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By A. C. FREEMAN.

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VOLUME 133.

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CASES

IN THE

SUPREME COURT

OF

ALABAMA.

DUMAS v. STATE.

[159 Ala. 42, 49 South. 224.]

HOMICIDE—Cause of Death.—The physical condition of the slain man when the wounds were inflicted, even though "at first trifling," does not justify or minimize the act of the slayer, if the causal connection between the wounds and the death is shown; the fact that the deceased suffered from a disease which contributed to the extreme result does not interrupt the order of causation. (p. 18.)

HOMICIDE.—Dying Declarations, Whether Tendered by Prosecution or Defense, are inadmissible unless preceded by the requisite predicate. (p. 18.)

APPEAL AND ERROR—Excluded Evidence—Curative Admission.—No prejudice has been sustained by a party on whose behalf evidence is at first rejected but subsequently admitted; the error, if any, is thereby cured. (p. 18.)

HOMICIDE—Evidence.—Expert opinion as to the relative attitude of the deceased and the instrument or person inflicting the wound is properly rejected; it relates to an inference of fact to be drawn by the jury. (p. 18.)

APPEAL AND ERROR—Homicide—Evidence of Threats by Deceased—Reply of Defendant.—Where evidence that threats by the deceased against defendant were communicated to him was admitted, it was not prejudicial to defendant also to admit that he said in reply thereto, "If he is going to kill me, I will go home." (p. 18.)

Miller & Miller, for the appellant.

Alexander M. Garber, attorney general, and Thomas W. Martin, assistant attorney general, for the state.

43 McCLELLAN, J. The defendant was convicted of murder in the second degree for the killing of John Goode. All the errors asserted relate to rulings on the admission and rejection of evidence. The deceased was shot in the side and arm, the weapon used being a pistol. He lived about three weeks after being shot. The physician attending deceased testified that the prime cause of his death was these wounds,

and that blood poison developed. The defendant sought to show the ⁴⁴ diseased condition of deceased. There was no prejudicial error in the disallowance of that testimony. Whatever may have been the physical condition of deceased at the time the wounds were received could not have benefited the defendant. Even though the wounds "were at first trifling," defendant could not justify or minimize his criminal act by the fact, if so, that the person of the victim was so diseased as to more readily become infected with blood poison. The causal connection between the wound and the death of deceased was clearly shown; and that the disease with which Goode suffered contributed, if so, to the extreme result, did not interrupt the order of causation.

No injury resulted to defendant from the exclusion of certain declarations said to have been made by alleged co-conspirators with the deceased in their assault on defendant. This testimony was later admitted, and error, if any, cured.

The inquiry of Dr. Semmes as to what the deceased said during his last sickness about the difficulty was not preceded by the requisite predicate to admit dying declarations. We know of no reason why the rule in this respect should be different when the statement of one deceased is attempted to be offered by the defendant or otherwise. The question indicated was properly disallowed on appropriate objection.

The question purporting to call for expert opinion as to the relative attitude of the deceased and the instrument or person inflicting the wound was correctly ruled out: *McKee v. State*, 82 Ala. 32, 2 South. 451. It related to an inference of fact, as capable of being drawn by the jury as by any other.

Dan Watson testified to threats by the deceased against defendant, and that he communicated them to defendant. The state then asked the witness what defendant ⁴⁵ said when so informed by witness. The defendant objected, and the court overruled it. The answer was that defendant said: "If he is going to kill me, I will go home." We cannot see any prejudice resulting to defendant from this ruling.

There is no harmful error to defendant in the record, and the judgment is affirmed.

Dowdell, C. J., and Anderson and Sayre, JJ., concur.

One Who Inflicted a Wound Which Caused Death is guilty of murder or manslaughter, as the case may be, although unskillful medical treatment may have aggravated the wound and the deceased might have recovered if greater care and skill had been employed in treating him: *State v. Landgraf*, 95 Mo. 97, 6 Am. St. Rep. 26; *Sharp v. State*, 51 Ark. 147, 14 Am. St. Rep. 27. See, also, *Rogers v. State*, 60 Ark. 76, 46 Am. St. Rep. 154.

The Admissibility in Evidence of Dying Declarations is the subject of a note to *State v. Meyer*, 86 Am. St. Rep. 637. For references on this subject, see *Craven v. State*, 49 Tex. Cr. 78, 122 Am. St.

Rep. 799; Jackson v. State, 55 Tex. Cr. 79, 131 Am. St. Rep. 792; Gambrel v. State, 92 Miss. 728, 131 Am. St. Rep. 549; Hunter v. State, 54 Tex. Cr. 224, 130 Am. St. Rep. 887; State v. Hood, 63 W. Va. 182, 129 Am. St. Rep. 964; State v. Thompson, 49 Or. 46, 124 Am. St. Rep. 1015; Jones v. State, 52 Tex. Cr. 303, 124 Am. St. Rep. 1097.

The Admissibility of Evidence of Threats in prosecutions for homicide is the subject of a note to State v. Nelson, 89 Am. St. Rep. 691. For recent cases on this subject, see Blocker v. State, 55 Tex. Cr. 30, 131 Am. St. Rep. 772; Huddleston v. State, 54 Tex. Cr. 93, 130 Am. St. Rep. 875; Hunter v. State, 54 Tex. Cr. 224, 130 Am. St. Rep. 887.

DIAL v. STATE.

[159 Ala. 66, 49 South. 230.]

INTOXICATING LIQUORS—Retailing Without License.—A mere agent purchasing for himself and others, with no interest in the sale beyond the joint acquisition of liquor, is not guilty of retailing the liquor without a license. (p. 19.)

INTOXICATING LIQUORS—Retailing Without License.—Where several persons pool money to buy whisky, and one of them buys it for the company and brings it to them, that one cannot be convicted of retailing the liquor without a license. (p. 19.)

TRIAL—Hypothetical Instruction.—A charge to the jury cannot be said to be abstract when there is evidence to support the facts therein hypothesized. (p. 19.)

Alexander M. Garber, attorney general, for the state.

No counsel for the appellants.

CS ANDERSON, J. There was evidence on the part of the state from which the jury could infer that defendant sold the liquor, notwithstanding his evidence showed that he was a mere purchasing agent and had no interest in the sale, and the trial court properly refused the general charge (1) requested by the defendant.

Under the facts hypothesized in charge 2, the defendant was not guilty of selling the liquor: Du Bois v. State, 87 Ala. 101, 6 South. 381, and cases there cited. Nor was the charge abstract, as the defendant testified to the facts therein hypothesized. The trial court erred in refusing charge 2 requested by the defendant.

Whether or not there was a local law prohibiting and punishing the procurement of the whisky, even if defendant did not sell it, we are unable to determine, as no such law covered the entire county of Marengo at the time of the alleged violation, and the proof does not locate the same in any particular part of the county.

The judgment of the circuit court is reversed, and the cause is remanded.

Dowdell, C. J., and McClellan and Sayre, JJ., concur.

Illegal Sale of Intoxicating Liquors.—One who procures a prescription on the ground of his own illness and uses it to procure whisky for others becomes a vender of intoxicating liquor and violates the local option law: *Hawkins v. State*, 55 Tex. Cr. 75, 131 Am. St. Rep. 790. For other recent decisions on what constitutes an illegal sale of intoxicating liquors, see *Tombeaugh v. State*, 50 Tex. Cr. 286, 123 Am. St. Rep. 841; *State v. Brown*, 83 Ark. 44, 119 Am. St. Rep. 109; *Anderson v. State*, 82 Ark. 405, 118 Am. St. Rep. 82.

MARKS v. STATE.

[159 Ala. 71, 48 South. 864.]

EVIDENCE—Judicial Knowledge of Liquors—Metheglin (Mead).—The courts do not judicially know that mead or metheglin is an alcoholic, spirituous, vinous, malt, or intoxicating liquor or beverage, or that, if it is drunk to excess, it will produce intoxication. (p. 23.)

INTOXICATING LIQUORS—Unnamed Beverage—Jury Question.—Where, under the "Carmichael bill," it was unlawful to sell certain named liquors and others unnamed, which latter, if drunk to excess, would produce intoxication, the fact that certain liquor, mead or metheglin, the subject matter of a charge, contained about two and one-half teaspoonfuls of alcohol to the pint does not of itself bring such liquor within the inhibition of the statute, and it is a question for the jury whether the liquor sold did so come within the statute; it was a question of fact, not law. (p. 24.)

INTOXICATING LIQUORS—Prohibition.—In section 1 of General Acts of 1907, known as the "Carmichael bill," which renders it unlawful to sell, etc., alcoholic, spirituous, vinous or malt liquors, intoxicating bitters or beverages, or other liquors or beverages by whatsoever name called, which if drunk to excess will produce intoxication, the words "which if drunk to excess will produce intoxication" apply only to the "other liquors or beverages by whatsoever name called." (p. 24.)

INTOXICATING LIQUORS—Statute—Construction.—When a prohibition statute names, designates or enumerates the kinds, classes or species of beverages or liquors against which its provisions are directed, there is no room for further inquiry into the scope of such statute. (p. 25.)

INTOXICATING LIQUORS.—The Power of the Legislature to Absolutely Prohibit the sale of intoxicating liquors is undoubted, to say what are intoxicating and what are prohibited, and to frame laws so as to effect the purpose of the legislation; and courts will not so construe the law as to render it void if dependent upon only one of these legislative powers, when it would be perfectly valid if referred to the other or both powers. (pp. 25, 26.)

INTOXICATING LIQUORS—Prohibition Statute—Construction.—When a statute uses merely general terms, such as alcoholic,

spirituous, etc., it is a question for the courts or juries to determine, in each case, whether a given liquor is within the inhibition of the statute. (p. 26.)

WORDS AND PHRASES.—Intoxicating Liquors—Prohibition Statute—Definitions.—"Spirituous liquor" is that which is in whole or in part composed of alcohol extracted by distillation, such as whisky, brandy or rum. (p. 26.)

"VINOUS LIQUOR" Means Liquor made from the juice of the grape or from other fruit or berries by a like process of fermentation when sugar and alcohol are added. (p. 26.)

"MALT LIQUORS" are the Product of a process by which grain is steeped in water to the point of germination, the starch of the grain being thus converted into saccharine matter, which is kiln-dried, then mixed with hops, and by a further process of brewing, made into a beverage, such as porter, ale or beer. (p. 26.)

"INTOXICATING LIQUORS" are those capable of being used as a beverage which contain alcohol in such per cent that they will produce intoxication when imbibed in such quantities as may practically be drunk. The phrase is not synonymous with "spirituous liquors." All spirituous liquors are intoxicating, but all intoxicating liquors are not spirituous. (p. 26.)

"INTOXICATING BITTERS" include those decoctions in which the distinctive character and effect of intoxicating liquors are present, so that they may be used as a beverage, notwithstanding the other ingredients they may contain. (p. 27.)

"ALCOHOL" is a Volatile Organic Body, a limpid, colorless fluid, hot and pungent to the taste, with a slight but not offensive scent. Its one source is fermentation, and it is extracted from its by-products by distillation. (p. 27.)

"WHISKY" is Alcohol diluted with water and mixed with other elements or ingredients. (p. 27.)

"LIQUOR" or "Liquors" commonly include all kinds of intoxicating decoctions, liquids or beverages, whether spirituous, vinous, malt or alcoholic. (p. 27.)

"ALCOHOLIC LIQUORS" do not Necessarily Include every article or compound which contains alcohol, but do include those containing alcohol or maltose which may be used as an intoxicating beverage. (p. 28.)

INTOXICATING Liquors — Statute — Construction.—The "Carmichael bill," which renders it unlawful to sell, etc., alcoholic, spirituous vinous, or malt liquors, intoxicating bitters or beverages, or other liquors or beverages by whatsoever name called, which if drunk to excess would produce intoxication, does not embrace every liquor or beverage which contains a trace of alcohol or maltose, or even that contains one or both in appreciable quantities, if capable of being used as an intoxicating beverage. (p. 28.)

STATUTES—Construction.—Where a statute has been construed, and is subsequently re-enacted, the previous construction becomes a part of the statute itself. (pp. 28, 29.)

INTOXICATING LIQUORS—Prohibition Statute.—The object of prohibition laws is to remedy the improper use of intoxicating liquors as a beverage, rather than as an ingredient of medicines and articles of toilet, or for culinary purposes, and this object must not be lost sight of in its interpretation. (p. 29.)

INDICTMENT—Omission of Date of Offense—Intoxicating Liquors.—It is a fatal objection to an indictment to omit the date of an offense when the statute creating such offense came into opera

tion only five months before filing the charge. In such case time is a material ingredient. (p. 31.)

John T. Glover and A. Leo Oberdorfer, for the appellant.

Alexander M. Garber, attorney general, and Thomas W. Martin, assistant attorney general, for the state.

74 MAYFIELD, J. This appeal involves questions which require a construction of the general prohibition laws of this state, not necessarily as to the constitutionality of such laws, but as to the meaning, interpretation and effect of certain provisions contained therein. The prosecution was commenced by, and was based solely upon, an affidavit containing three counts. The first attempted to charge that defendant aided, abetted or procured an unlawful sale, purchase or other unlawful disposition of spirituous, vinous or malt liquors, etc.; second, that defendant acted as agent or assisting friend of the seller or purchaser in procuring an unlawful sale or purchase of such liquors, etc.; third, that defendant sold spirituous, vinous or malt liquors, or mead, which, if drunk to excess, will produce intoxication. The defendant demurred to the affidavit of complaint, and assigned many grounds therefor, too numerous to mention.

The court overruled the demurrer, and trial was upon the general issue. The court, at the request of the state, gave the general affirmative charge for the state as to **75** the third count, refused a like charge to the defendant as to each count separately, and refused a great number of other charges requested by the defendant. The jury, after being out for an hour or more, returned to the court for further instruction. The foreman inquired of the court if the jury had to find that mead would intoxicate. The court replied that the giving of the general affirmative charge relieved them of that; that this charge meant that if the jury believed the evidence beyond a reasonable doubt, they must convict the defendant, which action of the court was excepted to by defendant.

Many questions are reserved as to rulings of the trial court touching the evidence. The trial resulted in a conviction under the third count only, and a fine of fifty dollars was imposed.

The first two counts each attempted to charge an offense under section 7363 of the Code of 1807, which section is codified from the act of March 12, 1907 (Acts 1907, p. 366). The third count evidently attempted to charge an offense under the general statutory prohibition law known as the "Carmichael bill," passed at the extraordinary session, and approved November 23, 1907 (Gen. Acts Sp. Sess. 1907, pp. 71-76).

The verdict and judgment eliminated all questions as to the first two counts, and render unnecessary a decision or

construction of section 7363 of the Code of 1907, but require a construction of section 1 of the act of November 23, 1907 (above referred to), reading as follows: "Section 1. Be it enacted by the legislature of Alabama, that it shall be unlawful for any person, firm, corporation or association, within this state to manufacture, sell, barter, exchange, give away to induce trade, furnish at public places or otherwise dispose of any alcoholic, spirituous, vinous or malt liquors, intoxicating bitters or beverages or other liquors or beverages by whatsoever ⁷⁶ name called, which if drunk to excess will produce intoxication, except as hereinafter provided." This section has never been codified, having been passed after the adoption of the code, and hence is not controlled by any code provisions or prior statutes, though some of the code provisions are applicable to prosecutions under it, and it may be construed in *pari materia* with other provisions of our laws.

It was admitted that defendant sold one bottle of a beverage known as "mead" (a beverage sometimes called "metheglin," made of water and honey), since the first day of January, 1908, when the prohibition law went into effect as to Jefferson county. This was the only disposition of any liquor or beverage by the defendant which was attempted to be proven. The state introduced in proof a chemical analysis of another bottle of the beverage known as "mead," and some evidence tending to show it was a malt and intoxicating liquor; while the defendant's evidence tended to show that it was not an intoxicating or malt liquor. It was conceded, however, that it contained maltose and alcohol; that it was contended by the defendant that it did not contain either in such quantities, or in such form, or under such conditions as to come within the meaning of the statute.

The trial court instructed the jury that if they believed the evidence beyond a reasonable doubt, they must find the defendant guilty under the third count. This charge can be supported or justified only upon the theory that mead is either an "alcoholic," "spirituous," "vinous," "malt," or "intoxicating" liquor or beverage, within the meaning of the statute. If the statute inhibits the sale of all liquor or beverage which contains any alcohol or malt, then the charge of the court was correct; otherwise, it was erroneous. Whether or not this beverage was an intoxicant was evidently considered immaterial ⁷⁷ by the trial court. Under no other theory can this action of the trial court be justified. In this we think the trial court was in error.

This court does not judicially know that mead or metheglin is an alcoholic, spirituous, vinous, malt or intoxicating liquor or beverage, or that, if it is drunk to excess, it will produce intoxication. Nor do we think that the fact that it contains one and forty-six hundredths per cent of alcohol by weight, and one and eighty-eight hundredths per cent by volume, and

one and twenty hundredths per cent maltose, making about two and one-half teaspoonfuls of alcohol to the pint, makes it as a matter of law within the inhibition of the statute. We are, therefore, clearly of the opinion that it was a question for the jury, under the evidence, to say whether or not mead was alcoholic, spirituous, vinous, malt, or intoxicating, or whether it was a liquor or beverage which, if drunk to excess, will produce intoxication. In other words, was the liquor or beverage sold within the inhibition of the statute? That was clearly a question of fact under the evidence, and not one of law.

If the statute had prohibited the sale of mead, or declared that it was an alcoholic, spirituous, vinous, malt or intoxicating liquor or beverage, or if the court judicially knew that it was within any one of these classes, then under the evidence in this case the court could probably have given the affirmative charge; but it clearly appears that, if mead is within the inhibition of the statute, it is clearly under the last clause of the first section of the statute, which inhibits the sale, etc., of "other liquors or beverages by whatsoever name called, which if drunk to excess will produce intoxication," and the evidence was in dispute as to whether or not it would produce intoxication, if drunk to excess. One witness, shown to be a highly educated physician, testified in substance that a man's stomach would not contain ⁷⁸ enough of the beverage to produce intoxication; that enough might be taken in the stomach to produce a thrill, but nothing more. Another witness testified that he had drunk a great deal of mead—as much as four bottles in an hour—and that it would not intoxicate. True, there was some evidence to show it would intoxicate if drunk to excess, and, while we can no more pass upon the weight or sufficiency of the evidence than could the trial court, yet we do say there was ample evidence to require the submission of this fact to the jury.

While we agree in part with counsel for appellant, we cannot concur with them in the contention (so forcefully and ably insisted upon) to the effect that the clause, "which if drunk to excess will produce intoxication," qualifies and relates to each and all of the liquors or beverages which precede it—that is, to alcoholic, spirituous, vinous or malt drinks. We are inclined to the opinion that this phrase qualifies or refers only to the clause, "or other liquors or beverages by whatsoever name called," which immediately precedes it, and which two phrases, taken together, constitute one of the six classes of liquor and beverage the sale of which is prohibited. We are led to this conclusion, not alone by the composition and grammatical construction of this section of the act, but also by a reference to the history of such legislation in this and other states, and the judicial construction put upon the terms "spirituous," "vinous," "malt,"

and "intoxicating" liquors and beverages by this and other courts. These terms each had a well-defined and accepted judicial construction by the courts, when used in such statutes; and it does not appear that there was any intention to change that well accepted judicial construction. They were severally treated as being well known and defined; but the phrase, "or other liquors or beverages by whatsoever name called," ⁷⁹ is clearly shown not to refer to every well-known or defined class, but is intended to include any and all other classes or kinds, not embraced in the foregoing five classes named, "which if drunk to excess will produce intoxication."

It is said by counsel that the punctuation of the section shows that this phrase refers to all the preceding classes. Punctuation may be looked to, for the purpose of aiding in ascertaining the meaning. It is intended to make the meaning apparent and more readily ascertainable than it would otherwise be; but it can never control or destroy a meaning which is otherwise apparent and certain. When a prohibition statute names, designates or enumerates the kinds, classes or species of beverages or liquors against which its provisions are directed, then there is no room for further inquiry into the scope of such statute. When it clearly appears that a given article, liquor or beverage comes within the scope of the forbidding enumeration, and is intoxicating, its properties become immaterial to courts and juries, because fixed by the law-making power of the state.

The courts have uniformly upheld the power of the legislature to declare certain drinks and beverages intoxicating when in truth and in fact they may not be so, though it is not conceded that this power is without limit. The legislature might go to such an extent that the courts would hold it to be an unreasonable exercise of the police power—far-reaching and comprehensive as it is. The courts would probably not uphold a statute which prohibited the use or sale of a necessary commodity, such as sugar or molasses, corn or barley, under the guise of a prohibition law, which denominated them intoxicants, because they were capable of being converted into alcohol or spirituous liquors. But as to this question we do not decide, nor do we hereby mean to intimate ⁸⁰ an opinion, but only refer to it to demonstrate the correctness of the construction which we place upon this section of the statute.

The legislature have the undoubted right to prohibit absolutely the sale of intoxicating beverages, and to say what are intoxicating, what are prohibited, and what are not—to designate them by general or special terms, and to so frame and word the law as to prevent evasion of its provisions (which is known to be often attempted); and courts will not put such construction on the law as would render it void if

dependent upon only one of these legislative powers, when it would be perfectly valid if referred to the other or both legislative powers or functions: *Black on Intoxicating Liquors*, sec. 43; *Fiebelman v. State*, 130 Ala. 122, 30 South. 384; *Wadsworth v. Dunn*, 98 Ala. 610, 13 South. 597. When, however, the statute uses merely general terms, such as "alcoholic," "spirituous," "vinous," "malt" and "intoxicating" liquors or beverages, then it is a question for the courts or juries to determine, according to the facts in each particular case, whether a given liquor, beverage or fluid is within the inhibition of the statute. Sometimes it is then a question of law for the court, and sometimes a question of fact for the jury.

Most of the terms used in this statute have been frequently construed by this court, and there is no conflict in the decisions on this subject as to those which have been construed. It is therefore only necessary to enumerate them, and cite the cases.

"Spirituous liquor" is that which is in whole or in part composed of alcohol extracted by distillation. Whisky, brandy and rum are examples. That these are spirituous or intoxicating is known to courts and juries, and proof thereof is not necessary: *Tinker v. State*, 90 Ala. 638, 8 South. 814; *Allred v. State*, 89 Ala. 112, 8 South. 56.

"⁸¹ Vinous liquor," *ex vi termini*, means liquor made from the juice of the grape; but it may include wines made from fruits or berries by a like process of fermentation, when sugar and alcohol are added: *Allred v. State*, 89 Ala. 112, 8 South. 56; *Adler v. State*, 55 Ala. 16; *Hinton v. State*, 132 Ala. 29, 31 South. 563.

"Malt liquors" are the product of a process by which grain is steeped in water to the point of germination, the starch of the grain being thus converted into saccharine matter, which is kiln-dried, then mixed with hops, and, by a further process of brewing, made into a beverage. The term embraces porter, ale, beer, and the like: *Allred v. State*, 89 Ala. 112, 8 South. 56; 1 *Mayfield's Digest*, 463; *Tinker v. State*, 90 Ala. 647, 8 South. 855.

"Intoxicating liquors" are any liquors intended for use as a beverage, or capable of being so used, which contain alcohol (no matter how obtained) in such per cent that they will produce intoxication when imbibed in such quantities as may practically be drunk. The term is not, however, synonymous with "spirituous liquors." All spirituous liquors are intoxicating, but all intoxicating liquors are not spirituous: *Black on Intoxicating Liquors*, sec. 2; *Allred v. State*, 89 Ala. 112, 8 South. 56.

"Intoxicating bitters." This term has been held to include those bitters, beverages, or decoctions in which the distinctive character and effect of intoxicating liquors are

present, so that it may be used as a beverage, notwithstanding the other ingredients it may contain. If, however, it can be so used as a beverage, though the other ingredients are medicinal and predominate, and alcohol is used to preserve these medicinal ingredients, and serve as a vehicle for them, then it may or may not be included, depending upon the evidence in each particular case. It is not within the power or province of any court to declare, as a matter of law, that any particular ⁸² bitters or beverage is or is not intoxicating, unless the statute or other law so declares, or it be one the effect of which everyone is presumed to know—if such there be: *Carl v. State*, 87 Ala. 17, 6 South. 118, 4 L. R. A. 380; 89 Ala. 93, 8 South. 156. See, also, 23 Cyc. 58, 266; *Black on Intoxicating Liquors*, sec. 9.

The foregoing terms used to designate the intoxicants inhibited by this statute are all well defined in this state; but the term “alcohol liquors” is comparatively a new term. If not new, it is not of such common use, and has not been judicially construed so often as those indicated above.

“Alcoholic,” *ex vi termini*, means “containing or pertaining to alcohol.” “Alcohol” has been frequently defined by courts, in construing prohibition and kindred statutes relating to intoxicating liquors. It is defined as a volatile organic body, a limpid, colorless liquid, hot and pungent to the taste, having a slight, but not offensive, scent. It has but one source, fermentation, and is extracted from its by-products by distillation, its purity and strength depending upon the degree of perfection or completeness of distillation. While it is the intoxicating principle, the basis of all intoxicating drinks—certainly so within the meaning of ordinary prohibition statutes—yet pure alcohol is rarely used as a beverage.

Whisky is alcohol diluted with water and mixed with other elements or ingredients: *Intoxicating Liquor Cases*, 25 Kan. 751, 37 Am. Rep. 284; *Commonwealth v. Morgan*, 149 Mass. 314, 21 N. E. 369; *State v. Giersch*, 98 N. C. 720, 4 N. C. 720, 4 S. E. 193.

The term “liquor” or “liquors” commonly includes all kinds of intoxicating decoctions, liquids or beverages, whether spirituous, vinous, malt or alcoholic: *People v. Crilley*, 20 Barb. 246; *State v. Brittain*, 89 N. C. 574.

⁸³ Whether pure alcohol comes within the phrases “spirituous” or “intoxicating” liquors is a question not well settled—some courts holding that it depends upon the language of the particular statute and the facts of each particular case, whether it was sold or purchased purely for medicinal or mechanical purposes, or to be used as an intoxicating beverage; but the weight of the authorities seems to be to the effect that, unless otherwise made by the language or provisions of the statute, it will be included in the terms “spirituous” and “intoxicating” liquors: *Snider v. State*, 81 Ga.

753, 12 Am. St. Rep. 350, 7 S. E. 631; *Rabe v. State*, 39 Ark. 204; *State v. Martin*, 34 Ark. 340; *Bennett v. People*, 30 Ill. 389; *Black on Intoxicating Liquors*, sec. 11.

The supreme court of Mississippi has held that wine is within the phrase "alcoholic or vinous liquors": *Reyfelt v. State*, 73 Miss. 415,, 18 South. 925. The court of appeals of Georgia has recently construed the Georgia prohibition law, of which our statute is in part a copy, and, while we have seen nothing except what purports to be a manuscript copy of the opinion, that court seems to have construed this term "alcoholic liquors" in accordance with the writer's view of the meaning of that phrase as it appears in our statute. The decoction sold or kept in that case was called "Green or Pale Beer." Samples of it were analyzed, and one found to contain four and two-tenths per cent, and another three and eight-tenths per cent, of alcohol. The trial court in that case held, as we presume it did in the case at bar, that the Georgia statute, which as to this question is nearly identical with our own, includes any liquor which has an appreciable quantity of alcohol therein. The court of appeals of Georgia reversed the case upon this question, and held that the statute included only those liquors or beverages which contain a sufficient ⁸⁴ quantity of alcohol to produce intoxication when drunk to excess. That the phrase "alcoholic or spirituous liquors" necessarily means intoxicating liquors is sustained in the case last referred to, by citation of two Georgia cases: *Bell v. State*, 91 Ga. 227, 18 S. E. 288, and *McDuffie v. State*, 87 Ga. 687, 13 S. E. 596.

After a careful study of the general prohibition law of this state, the one in question in this case, and comparing it with numerous others which have been construed by this and other courts, giving due weight to the fact that it was enacted with this known construction placed upon several or nearly all of the six classes or species of drinks or beverages named therein, we do not think that the statute embraces every liquor or beverage which contains a trace of alcohol or maltose, or even that contains one or both in appreciable quantities, if capable of being used as an intoxicating beverage. Such interpretation would be unreasonable, if not absurd. Where a statute has been construed, and is subsequently re-enacted, the previous construction becomes a part of the statute itself: *Southern Ry. Co. v. Moore*, 128 Ala. 434, 29 South. 659.

The statute under consideration is but the extension of kindred prohibition statutes to the entire state which were theretofore local. True, it contains provisions not heretofore embodied in local statutes, which new provisions must yet be construed. The objects and purposes of those statutes had been defined by the courts; and, being incorporated and re-enacted in the general law, they bring with them such

judicial constructions. The main object and purpose of all is the same. Some may be restricted, and some more extensive and exclusive than others; but the main object and purpose of all, as said by Justice Somerville, in *Carl v. State*, 87 Ala. 17, 6 South. 118, 4 L. R. A. 380, is "to promote temperance ⁸⁵ and prevent drunkenness. The mode adopted to accomplish this end is the prevention of the sale, the giving away, or other disposition of intoxicating liquors. The evil to be remedied is the use of intoxicating liquors as a beverage, rather than as an ingredient of medicines and articles of toilet, or for culinary purposes, and the object of the law in this particular must not be lost sight of in its interpretation."

However, if the article sold or disposed of is clearly within the inhibition of the statute, the fact that it was sold for medicine, etc., or that the dispenser did not know it contained ingredients which brought it within the statute, would be no defense, unless it was so expressly excepted or provided by the statute. This court in *Carson v. State*, 69 Ala. 235, which is quoted in *Carl v. State*, 87 Ala. 20, 21, 6 South. 118, 4 L. R. A. 380, says: "We are not to be supposed as intimating that physicians or druggists would be prohibited, under a statute such as the one in question, from the bona fide use of spirituous liquors in the necessary compounding of medicines manufactured, mixed or sold by them. This would not be within the evils intended to be remedied by such prohibitory enactment, nor within the strict letter of the statute." And in *Wall v. State*, 78 Ala. 417, which is also quoted in *Carl v. State*, it was said: "There may be cases, perhaps, where the bona fide use of a moderate quantity of spirituous liquors in a medical tonic would not alone bring a beverage (or decoction) within the statute."

The famous "Kansas prohibition law" (Laws 1881, p. 239, c. 128, sec. 10) prohibited "all liquors and mixtures by whatsoever name called that will produce intoxication." This law was construed by Justice Brewer, and has probably become the leading decision of the United States in construing such laws, and has been time and ⁸⁶ time again quoted by this court and others in construing prohibition laws, and by the text-book writers on the subject, as announcing the fundamental principles which should control in construing these laws. Nearly as much might be said of *Carl v. State*. Both of these cases announce and affirm the doctrine that "the mere presence of alcohol does not bring an article within the prohibition." The influence of the alcohol may be counteracted by other ingredients, and the compound be strictly and fairly only a medicine, or a toilet or culinary article, unfit for use as an intoxicating beverage, against which the statute or law is leveled; yet, if the intoxicant prohibited remains in the compound as a distinctive force, and the com-

pound is reasonably liable to be used as a beverage, it is then within the statute, though it may still be very beneficial as a medicine, or toilet, culinary, or mechanical article. That is to say, it was not the intention of the lawmakers to render a person guilty of violating a prohibition law who disposes of a medicine, or toilet or culinary article, because the purchaser misuses it and becomes intoxicated; but, on the other hand, they have so framed the laws, and they are so intended, that they cannot be evaded by selling articles or compounds as medicines, or toilet or culinary, or soft drinks or beverages, as nonintoxicating, which are, as a matter of fact and truth, intoxicating beverages. Selling wine or beer, called or labeled "vinegar," or "lemon syrup," would be as much within the statute as selling them by their real names. Yet selling Blue Lick or Stafford's Springs water would not be an offense, though labeled "Cream of Kentucky," "Three Feathers," "Whisky," etc. Nor is the sale of camphor, paragoric, or bay rum within the statute, though containing alcohol in large quantities; yet any compound which contains alcohol—the almost universal ⁸⁷ and sole intoxicating ingredient of all beverages—and is capable of being, or as a matter of fact is, used as an intoxicating beverage, may be within the statute, though not compounded as such beverage, and though used for other legitimate purposes.

As said before in this opinion, when the law names, enumerates or defines certain articles, compounds, decoctions, beverages or liquors as intoxicants, and prohibits their use, this may be conclusive upon the courts and juries; but when the law uses general terms only, such as "spirituous," "alcoholic," "vinous," or "malt" and intoxicating liquors and beverages, and fails to define these, then it is for the courts and juries to determine what articles are within and what are without the statute. When the article is one which everybody knows falls within one of the particular classes, such as whisky, brandy, wine, rum, ale, lager beer, etc., then the courts and the juries know this as well as the public, and no proof is required to show that it is within the statute; but if it is "hop jack," "synconic bitters," mead (metheglin), cider, nearbeer, pale beer, etc., then it requires proof to show that it is within one or the other of these general terms, unless the law itself enumerates or names it as being prohibited. The mere fact that one of these last articles named is a compound, and contains one or more ingredients which enter into or form a part of articles which are clearly prohibited, does not make such compound or article within the prohibited class; that is, every article that contains alcohol is not prohibited, because whisky contains alcohol and it is prohibited, or because it contains malt and lager beer contains malt, and is prohibited. But if it contains elements and ingredients in such proportion or in such form as to bring it within one

of the general clauses named in the law, then it is prohibited; otherwise not. In other words, ⁸⁸ the term "alcoholic liquors," as used in the law, does not necessarily include every article or compound which contains alcohol. On the other hand, it does embrace all articles which contain alcohol or malt in such proportions or form or state, which are or may be used as an intoxicating beverage, no matter what it is called, or what else it contains, or for what other purpose it was intended or is used, or for which it may be used, and although the vender or disposer did not know it contained such ingredients or could be so used as an intoxicating beverage, unless the law expressly so excepts such article or such disposition: *Carl v. State*, 87 Ala. 17, 6 South. 118, 4 L. R. A. 380; *Wall v. State*, 78 Ala. 417; *Carson v. State*, 69 Ala. 265; *Ryall v. State*, 78 Ala. 410; *Allred v. State*, 89 Ala. 112, 8 South. 56; *Adler v. State*, 55 Ala. 16; *Tinker v. State*, 90 Ala. 647, 8 South. 855; *Watson v. State*, 55 Ala. 158; *Knowles v. State*, 80 Ala. 9; *Compton v. State*, 95 Ala. 25, 11 South. 69; *Wadsworth v. Dunnam*, 98 Ala. 610, 13 South. 597; *Freiberg v. State*, 94 Ala. 91, 10 South. 703; *Hinton v. State*, 132 Ala. 29, 31 South. 563; *Feibelman v. State*, 130 Ala. 122, 30 South. 384; *Costello v. State*, 130 Ala. 143, 30 South. 376; *Intoxicating Liquor Cases*, 25 Kan. 751, 37 Am. Rep. 284; *Black on Intoxicating Liquors*, secs. 1-18; 23 Cyc. 57-63; 17 Am. & Eng. Ency. of Law, 2d ed., pp. 197-206.

The third count of the affidavit or complaint under which this conviction was had is bad, and the demurrer thereto should have been sustained. It is conceded that it attempted to charge, and could only charge, an offense under the prohibition law, which went into effect as to Jefferson county on the first day of January, 1908. The affidavit was made on the first day of May, 1908. It should have showed that the alleged offense was committed after the first day of January, 1908. This was necessary to charge an offense. If the sale had been prior ⁸⁹ to that date, and within a year, as alleged, it would have been necessary to allege that the sale was "without a license and contrary to law," to be sufficient under the law as it existed at that time. This much was necessary to show that any offense was committed. While the statute in this state dispenses with allegations as to a particular time, unless time is a material ingredient of the offense (Code 1907, see 7139), yet in the case at bar time is a material ingredient—that is, to the extent of showing that it was committed after January 1, 1908: *Bibb v. State*, 83 Ala. 84, 3 South. 711; *Dentler v. State*, 112 Ala. 70, 20 South. 592; *McIntyre v. State*, 55 Ala. 167; *Glenn v. State*, 158 Ala. 44, 48 South. 505.

As the case must be reversed, it is unnecessary to discuss or pass upon the other assignments of error, for the reason that they may not arise upon another trial; but we feel im-

pelled to say that many of them appear to be well taken. It is proper, however, to say here that we do not mean to imply that it shows any lack of consideration, fairness or capacity on the part of the trial court, but that the errors, if errors they be, were almost all as to questions which depended upon the construction of the statute, and the court was not without authority and reason for the construction he placed upon it, notwithstanding it was not the correct one.

The judgment must be reversed, and the cause remanded.

All the justices concur.

Judicial Knowledge of the Intoxicating Character of Beverages is discussed in the note to *Green v. Lineville Drug Co.*, 124 Am. St. Rep. 28. A "Manhattan cocktail" is generally and popularly known as an intoxicating liquor, and no proof of its intoxicating character is necessary in prosecutions under the prohibitory law: *State v. Pigg*, 78 Kan. 618, 130 Am. St. Rep. 387. But it has been held that the testimony of a witness that he bought from the accused a beverage called "lager beer" is not sufficient to sustain a conviction under the local option law; it must be shown that the beverage was of such alcoholic body as to produce intoxication if drunk in reasonable quantities: *Potts v. State*, 50 Tex. Cr. 368, 123 Am. St. Rep. 847.

The Right of the Legislature to Prohibit the Sale of Liquor, and to Declare Certain Liquors Intoxicating within the meaning of the law, irrespective of their intoxicating character as a matter of fact, has been held to be a legal exercise of the police power: *State v. Frederickson*, 101 Me. 37, 115 Am. St. Rep. 295. A local option law is not invalid on the ground that in defining the term "intoxicating liquors" it does not state how much water may be mingled with them and still leave them intoxicating liquors: *People v. McBride*, 234 Ill. 146, 123 Am. St. Rep. 82.

The Traffic in Intoxicating Liquors is a proper subject of police regulation, and may be controlled, restricted or even prohibited, without violating any constitutional right: *Beauvoir Club v. State*, 148 Ala. 643, 121 Am. St. Rep. 82; *State v. Herring*, 145 N. C. 418, 122 Am. St. Rep. 461; *People v. McBride*, 234 Ill. 146, 123 Am. St. Rep. 82.

ANNISTON ELECTRIC AND GAS COMPANY v. ROSEN.

[159 Ala. 195, 48 South. 798.]

STREET RAILROADS—Travelers—Use of Street.—The relative rights of travelers in public streets and street-cars operated therein have been defined as being equal, not exclusive, in favor of or against either. (p. 35.)

STREET RAILROADS—Duty of Car Operator.—It is the duty of the operator of a street-car to be diligent in keeping a lookout for persons on the street, and to use such care and prudence as the common right enjoyed by the traveler and the street-car suggest; but this duty is qualified to the extent that the car operator may assume that adults will leave the track in time to avoid injury,

though that assumption must not carry him beyond the point where prudence should dictate the stopping of the car. (p. 35.)

STREET RAILROADS—Duty of Ordinary Traveler.—On the traveler upon the street the duty rests to “always . . . look for an approaching car, and, if the street is obstructed, to listen, and in some instances to stop.” (p. 35.)

STREET RAILROADS—Injuries to Persons on Road—Elements of Liability.—Where the breach of duty consists of negligent misconduct resulting in injury after discovery of the peril of the injured party, knowledge of the peril with which the injured party is circumstanced before his injury must be proven, and cannot be inferred from a failure to look out for persons in peril whatever the place of injury, except the misconduct is wanton or willful. (pp. 35, 36.)

STREET RAILROADS—Injuries to Persons on Road—Proximate Cause.—Where a motorman, had he kept the lookout required, could have seen the peril of a traveler and his inability to extricate himself, and thus have averted the injury, the proximate cause of such injury must be ascribed not to the traveler's stated condition of peril but to the dereliction of duty of the motorman. (p. 36.)

STREET RAILROADS—Injuries to Persons on Road—Contributory Negligence.—Where injury is caused by the breach of the motorman's duty to keep a diligent lookout, the contributory negligence of the traveler in failing to observe the care due from him in placing himself in a position wherein injury to him might result from a breach by the motorman of his duty will defeat a recovery for such injuries, unless the motorman's default was willful or wanton. (p. 36.)

STREET RAILROADS.—The Relative Rights of Travelers and Street-cars in public streets necessarily negative any relation of either to the streets or to the other as trespassers; whether one is or is not a trespasser, the condition to the application of the principle of the negligent breach of duty after peril is discovered is the same. (pp. 36, 37.)

NEGLIGENCE—Street Railroads—Proximate Cause.—In natural consequence, the proximate cause of an injury to one known to have been in peril may be the product of simple negligence or of willful or wanton wrong; if the latter, then contributory negligence is in general no defense. (p. 37.)

PLEADING—Street Railroads—Injuries to Persons on Road. Actual knowledge by a motorman of a traveler's peril being essential to a recovery for failure to exercise reasonable care after the peril was discovered, a complaint alleging the alternative that the position of the traveler's peril was known, or by reasonable care could have been known, to the motorman is not the equivalent of an averment of the requisite knowledge. (p. 38.)

PLEADING—Street Railroads—Negligence—Inconsistency.—A count averring both simple negligence and wanton and willful wrong is bad for duplicity. (p. 38.)

PLEADING—Street Railroads—Simple Negligence.—A count setting forth plaintiff's rightful presence at a much frequented street crossing, and that it was defendant's duty so to operate his car that it might be brought to a full stop before striking a person on the track, but it was so negligently operated, after the motorman discovered plaintiff's peril, that it could not be brought to a stop before it injured plaintiff, is one charging simple negligence anterior to a breach of duty raised by discovery of peril. (pp. 39, 40.)

PLEADING — Street Railroads — Contributory Negligence.—A plea that defendant negligently drove on the track toward a street-car in lieu of other and less dangerous directions, that the car was in full view, and the plaintiff could have waited till the car passed, etc., is a good plea to a complaint charging simple anterior negligence, but is no answer to an allegation of want of due care after discovery of the peril. (p. 41.)

PLEADING—Street Railroads—Complaint—Sufficiency.—There is no necessity to aver the name of an alleged derelict servant of a railroad company through whose negligence the plaintiff suffered injury, nor to designate the amount claimed for each element of damage. (p. 41.)

TRIAL — Special Charges — Bulked.—Special charges, to be treated as separate instructions, should be written on separate sheets of paper; if bulked, the court may treat them as one. (p. 41.)

The second, third, fourth, fifth, sixth and seventh pleas were pleas of contributory negligence. The fifth, sixth and seventh are failure to stop, look and listen; the fourth, that plaintiff negligently drove his horse and buggy on said car track, and turned it up said car track toward the car, and that it was negligence on the part of plaintiff not to have driven across said track, and it was negligence to have driven on said track ahead of said car. The third avers the efforts to stop the car and the failure to do so after using all means, and that before driving over defendant's railway plaintiff failed to look for defendant's approaching car, and drove his said horse on the track ahead of said car. The second plea alleges that the street was wide enough where the collision occurred for plaintiff to have driven on either side of said track without injury, that the car was in plain view of plaintiff, that plaintiff could have stopped his horse and buggy until the car passed on, or that he could have turned the said horse and buggy up or down said street, with ample room to have avoided the collision, but that he did neither of these things, but negligently drove or allowed his horse to start across said track in front of defendant's car, and turned said horse and buggy toward said approaching car, which negligence proximately contributed to his injury.

Blackwell & Agee, for the appellant.

Tate & Walker, for the appellee.

202 McCLELLAN, J. The injury complained of was suffered by the plaintiff, in person and property, in consequence of the collision therewith of a street-car then in operation on a public thoroughfare in the city of Anniston. The original complaint contained two counts, to which defendant's (appellant's) demurrers were sustained. After amendment, the complaint consisted of counts 1 to 4, inclusive. All, save the fourth, would found the liability of the defendant upon the breach of duty by the servant of the defendant, arising

out of plaintiff's imperiled condition. The principle is familiar, and the sixteenth ground of the demurrer, addressed to these counts, takes the point that it is not averred that the servant in question knew of plaintiff's peril in time to have prevented the injury.

The relative rights of travelers in public streets and street-cars operated therein have been defined as being equal, not exclusive, in favor of or against either: *Schneider v. Mobile etc. R. R.*, 146 Ala. 344, 40 South. 761. The exercise of the common right, by each, must be such as not to unreasonably hinder or endanger either in the use of the street; and upon the operative of the street-car rests, as of course, the duty to be diligent in keeping a lookout for persons using the street, and to bring to the operation of the car, under such circumstances, such measure of care and prudence as the common right enjoyed by the traveler and the street-car suggest. This necessarily imposes upon the carrier the duty to operate its cars, in public streets, under such speed as that, if persons or property be upon or dangerously near the track of the street railway, the car ²⁰³ may be, with skilled application of stopping appliances, stopped, and injury thereto averted. But this duty is qualified to the extent that the operative of the car may assume that apparently adult persons, or property, such as horses and vehicles, in the control of persons apparently adult, will leave, in time to avert injury, the track or dangerous proximity to it; but the stated qualification is also qualified by the requirement that the operative is forbidden to rely upon the stated assumption beyond the point where prudence and care would suggest the stopping of the car, such prudence and care being suggested, to a reasonably prudent man, by the reasonable appearance of inability upon the part of the party imperiled to remove himself or property from danger, or from such circumstances as would indicate to the reasonably prudent operative that the party imperiled, or likely to become so, is unconscious thereof: *Schneider v. Mobile etc. R. R.*, 146 Ala. 344, 40 South. 761. On the traveler upon the street the duty rests to "always . . . look for an approaching car, and, if the street is obstructed, to listen, and in some instances to stop": *Birmingham R. L. & P. Co. v. Oldham*, 141 Ala. 195, 37 South. 452, 3 Ann. Cas. 333.

As stated before, all of the counts except the fourth would ascribe the negligent misconduct, resulting in the injury here involved, to a breach of duty after discovery of peril. The statement of the doctrine declaring the duty relied upon, in breach, for a recovery by this plaintiff, announces in terms the condition to the creation of the duty, viz., knowledge of the peril with which the party injured is circumstanced before his injury. This knowledge has been otherwise referred to in the descriptive term "aware," meaning "informed." The requisite knowledge is of the fact that the party injured was

in peril. Manifestly, this condition (knowledge) ²⁰⁴ to the duty (premitting wanton or willful misconduct, to be later considered) cannot arise out of a breach of duty to look out for persons, etc., in peril, whatever the place of injury. If the duty be to keep a diligent lookout, and the duty be merely negligently breached, the consequence is the opposite of knowledge, namely, want of knowledge, and that, on this phase of the subject, attributable only to the failure to observe that course of conduct which would have probably led to knowledge: *Southern Ry. v. Bush*, 122 Ala. 470, 26 South. 168. If a motorman, whose duty it is to keep a diligent lookout for travelers, etc., on public streets traversed by his car, forsake his duty and engage in a diverting conversation with a passenger on his car, and a traveler, whose peril and inability to extricate himself therefrom would have been discovered by the operative had he kept the lookout required, is injured, the proximate cause, aside from wanton or willful misconduct therefor, must be ascribed, not to the stated condition of peril in which the traveler was placed, but to the operative's dereliction in not keeping the lookout prescribed. He did not know the peril stated, because he violated his duty to look. Such a breach of a duty, unless raised by the circumstances to the character of wrong commonly called "willfulness" or "wantonness," may be defended and defeated as ground for a recovery by the contributory negligence of the traveler, if attending his conduct, in failing to observe the care due from him (traveler) in placing himself in a position wherein injury to him might result from a breach by the operative of the duty to keep a diligent lookout. This must be true, because the order of causation, put in motion by the negligence counted on, viz., failure to keep a diligent lookout, was not broken by the creation, by discovery of the peril by the operative, of a subsequent duty to employ all means ²⁰⁵ to avert injury to one whose peril is known to the derelict operative: *Louisville etc. R. R. Co. v. Young*, 153 Ala. 232, 45 South. 238, 16 L. R. A., N. S., 301. When the subsequent duty is raised, as stated, then the initial negligence of the injured party becomes a condition only, upon which the thereupon arising duty to avert the injury operated to afford the proximate cause of the injury, unless the imperiled party is, on his part, concurrently with or subsequently to the negligence of the operative of the car, after discovering the perilous situation of the injured party, contributorily negligent, which, if found, exempts the defendant from the consequences of the subsequent negligence of its employé: *Louisville etc. R. R. Co. v. Young*, 153 Ala. 232, 45 South. 238, 16 L. R. A., N. S., 301.

The relative rights of travelers and street-cars, in public streets, as we have restated them, necessarily negative any relation of either to the streets or to the other as trespassers.

The right to be thereon exists in each, and the duty each owes to the other in the premises is, in keeping with the common right of each, to avoid, by the exercise of due care and prudence, injury and embarrassment in the use of the street. But the fact that a traveler is not a trespasser in using the street cannot affect to alter the duty, for or against either the car operative or the traveler, where one's condition of peril is known to the operative. Whether one is or is not a trespasser, the condition to the application of the principle of the negligent breach of duty after peril is discovered is the same. The duty to avert injury to one imperiled is the same, whether his relation to the dangerous agency theretofore was wrongful or not, whether his situation of peril was the result of right or wrong conduct; provided, of course, the operative knew of the peril to which the injured party was subjected. Whenever the knowledge stated is brought to the operative, ²⁰⁶ his duty is to employ all means known to one skilled in his place to avert injury.

Coming to the more aggravated misconduct—willfulness or wantonness, as these terms are applied in cases of injury to person or property—with reference to the performance of the duty arising where the before stated peril is known to the operative, our decisions establish these conditions precedent to the ascription of the more aggravated wrong to the alleged derelict party: That the injury was the result of a direct intention to inflict it, or that the injury was the result of an act or omission to act as duty required; the action or failure to act being then taken or omitted with the consciousness that such act or omission would probably eventuate in injury. The standard for determination of the inquiry whether the act or omission to act was wanton or intentional must necessarily be the same, regardless of the reason for the creation of the duty in the premises. Given the duty to avert injury, the character of the act or omission to act coloring it as merely negligent, or as wanton or willful in negation of mere negligence, depends upon the presence, at the time the duty should have been performed, of the conditions we have restated for wantonness or willfulness vel non. In natural consequence, the proximate cause of an injury to one known to have been in peril may be the product of simple negligence or of willful or wanton wrong. If characterized by the elements essential to make a case of willful or wanton wrong, then contributory negligence of the imperiled party, such as negligent failure to conserve his own safety after he has become aware of his peril, is, as in cases generally, no defense. But if the duty to avert injury to one known to be in peril is unobserved, from inadvertence or mistake, and without the conscious indifference to probable consequences stated before, then ²⁰⁷ contributory negligence of the injured party—concurrent with or subsequent to that of the party charged, after

discovery of peril—such as the negligent failure to conserve his own safety after he has become aware of his peril, is a defense, and will defeat a recovery for such breach of duty predicated upon discovery of the injured party's peril. In Louisville etc. R. R. Co. v. Young, 153 Ala. 232, 45 South. 238, 16 L. R. A., N. S., 301, we noted many of our decisions declarative of the principles stated in respect of initial, subsequent and contributory negligence, and hence do not recite them.

Applying these principles to the complaint as amended, the sixteenth ground of demurrer should have been sustained to counts 1 and 3. Both of these counts allege that plaintiff's position of peril was known to the motorman, "or by the exercise of reasonable care" could have been known to him. The alternative averment is, of course, not the equivalent of an averment of the requisite knowledge. The pleader had for this alternative averment high authority in Birmingham R. L. & P. Co. v. Brantley, 141 Ala. 614, 37 South. 698. In that cause this court approved charge 3, requested for the plaintiff therein, which charge declared, in effect, among other things, that, since the duty to keep a diligent lookout was on the motorman, the "law charges the motorman with seeing the exposed condition of the wagon or of the plaintiff." Evidently these counts were drawn in the light of the Brantley case. We feel compelled, upon principle and authority, to condemn the proposition quoted from the approved charge. If the proposition be sound, then actual knowledge is not an essential condition to the creation of the duty to avert injury after discovery of peril. On the contrary, the condition is suppliable as a matter of presumptions arising from the mere existence of the duty to keep a lookout. This court, in Osborne v. Alabama S. & W. Co., ²⁰⁸ 135 Ala. 571, 33 South. 687, ruled that, in pleading, notice is not the equivalent of knowledge, thus in consequence, we think, refuting the proposition, less strong than that treated in the Osborne case, that from the mere existence of a duty the law will, in such cases as this, presume such actual knowledge of peril as the performance of the duty would have afforded. To attain such a result as the Brantley case (141 Ala. 614, 37 South. 698) approves, it must be presumed that the motorman performed his duty to keep a diligent lookout, and still further, and additionally, to presume that such lookout would have resulted, and did result, in his actual knowledge of the peril. Of course, to conclude actual knowledge from such bases is assumption not supported by fact.

Count 2 avers that the motorman knew of plaintiff's peril and that of his property, and "failed to exercise due care and diligence to avoid injuring plaintiff, when the exercise of such care and diligence would have avoided injuring him." After describing injuries received, both to person and prop-

erty, it is further averred in this count that "defendant's agent or servant in charge of and operating said car saw and knew of his peril, but notwithstanding this he wantonly and recklessly, or intentionally, ran said car against him, and that they did not use the means at hand to prevent said collision and injury when the use of said means would have prevented same." It is evident from a reading of the count that it is inconsistent and repugnant, as objected in the twenty-seventh ground of demurrer. In one phase it avers a negligent failure to take means to avert injury after discovery of peril, and latterly therein ascribes the injury to wanton and reckless or intentional driving of the car against plaintiff, and still later therein avers simply that means at hand were not used to avert injury, as could have been done by such use. The lines between ²⁰⁹ wanton and willful wrong and such wrong as results from simple negligence, of course, compel, in pleading, the observance of the distinctions between the two. The primary pleading should leave no doubt of the character of the wrong imputed—whether wanton or willful, or merely negligent. Duplicity in this respect is not tolerable: *Louisville etc. R. R. Co. v. Markee*, 103 Ala. 160, 49 Am. St. Rep. 21, 15 South. 511. The question whether a given count is in simple negligence, or for wantonness or willfulness, oftenest arises on the propriety of the plea of contributory negligence, permissible as a defense to the former, but not to the latter. So many of our cases have taken the course consequent upon a determination of the question stated, and accordingly allowed that species of plea. But where the count assumes to charge both, and the demurrer takes the point, the court cannot aid the inaccuracy of pleading by choosing when the pleader has not chosen.

Count 4, after setting forth the rightfulness of plaintiff's presence in and use of the public street, and which was a place—street crossing—where a great many people and turn-outs were accustomed to pass and repass, and were so doing where the injury occurred, avers, in substance, that it was the duty of defendant's servant or agent to so operate the car as that it might be under such control as that it might be brought to a full stop before striking a person or thing on the track; that this car was so negligently operated, in that it was run under such rapid and reckless rate of speed that the operative was unable to bring the car to a full stop before striking plaintiff and his property, after the operative had discovered the peril of plaintiff and his property on the track. This count cannot be held to charge willful or wanton injury, for the reason that it is not averred therein that the operative of the car knew of the conditions ²¹⁰ of accustomed frequent use of the street crossing in question, so as to impute to him knowledge of the probability of the presence there on that occasion, on the track or in dangerous proximity to it, of per-

sons or property liable to injury by his car: *Memphis etc. R. R. Co. v. Martin*, 117 Ala. 367, 23 South. 231, and its many successors in ruling on this point. The count, then, is in simple negligence; and we must determine whether the negligence imputed is initial or subsequent, as related to the presence of plaintiff on or dangerously near the track—whether, to be more concrete, the negligence ascribed was a breach of duty predicated upon the peril alleged to have been discovered, or, on the other hand, was anterior in order of committal to such discovery of peril. If the averments refer to initial negligence, as indicated, then, of course, negligence of the plaintiff, if present on the occasion in putting himself or his property in a position of peril, would be a pleadable defense. If, on the other hand, the negligence averred refers to a duty breached after discovery of peril, then such negligence of the plaintiff, if present, would not be pleadable for the reasons we have before stated.

The court below, in overruling the demurrer to the several pleas of contributory negligence to the fourth count, evidently construed the count as charging negligence anterior to a breach of duty raised by discovery of peril. We affirm the correctness of this construction of the count. Since a willful or wanton wrong is not therein imputed, to construe the count as charging subsequent negligence after peril discovery would be to ignore the unequivocal averment of duty, and its breach, in respect of the operation of the car prior to, and independent of, the discovery of plaintiff's peril. The idea sought to be stated in the count is, in short, that the operative was so negligent in the operation of the car ²¹¹ at or about the street crossing mentioned that when he discovered plaintiff's peril he was powerless to avert the impact by the use of all means at hand to stop the car. So interpreted the count was not subject to the demurrer assailing it, though we are not prepared to affirm, and do not consider the question, that the broad statement of the duty set forth in the count is sound—a matter not tested or raised by any ground of the demurrer interposed. Our recent cases of *Birmingham R. L. & P. Co. v. Brown*, 152 Ala. 115, 44 South. 572, and *Birmingham R. L. & P. Co. v. Jones*, 153 Ala. 157, 45 South. 177, are noted as bearing on these questions. The first of these decisions involved an injury not occurring on a track in a public highway; and the second dealt with an injury to an infant, not chargeable with contributory negligence, and hence the holding therein, in one phase of the case, that the negligent failure of the operative to keep a diligent lookout, if proximately causing the injury, rendered the defendant liable, regardless of whether the peril of the child had been discovered or not. These cases are, therefore, not in point in the determination of this appeal.

Turning to the pleas of contributory negligence, and applying the principles announced before, none of these pleas set up matter in defense of the subsequent negligence charged in counts 1 and 3. The eighth ground of plaintiff's demurrer took the objection indicated. However, such pleas were, as the court below ruled, answers to the fourth count of the complaint. These pleas, as matter of defense to the fourth count, were not, we think, subject to any of the objections to substance, suggested by the demurrer.

The court erred in overruling the defendant's demurrer to counts 1, 2 and 3, for the reasons stated, though we should add that those grounds of defendant's demurrer assailing the counts for failure to aver the name of the ²¹² alleged derelict servant and to designate the amount claimed for each element of damage were not well taken. Our system of averring, in such case as this, negligence in general terms has become fixed beyond hope of change, even if it were thought desirable. The elements of damage alleged to have been suffered by plaintiff and his property were definitely enumerated in the complaint; and we know of no ruling by this court, nor good reason, justifying a departure from the universal practice, in this state, of stating in the complaint, without apportioning, the total damage claimed for the injuries averred.

None of the assignments rests on the giving or refusal of special instructions for either litigant. There are assignments complaining of portions of the court's oral charge. Specific treatment of these assignments is unnecessary, in view of the conclusions stated before.

The last assignment is as follows: "In refusing the request of defendants' counsel to write 'Given' or 'Refused' on each of the several charges from 1 to 8, inclusive, and sign his name thereto separately." From the bill it appears these special charges were written on one sheet of paper. The court made one indorsement of "Refused" on this sheet; but counsel for defendant requested the court to enter the indorsement, stated in the quoted assignment, on or opposite each of said charges 1 to 8, inclusive. The court declined to do so, treating the request as single of all of said charges. This action was proper. Counsel not having separated these charges, the court was under no duty to do so. Special charges should, if intended by counsel requesting them to be separate requests, and not in bulk, always be presented to the court on separate sheets or pieces of paper.

²¹³ The errors indicated require the reversal of the judgment and the remandment of the cause.

Tyson, C. J., and Dowdell, Simpson and Anderson, JJ., concur.

DENSON, J. I concur in the reversal of the judgment; but in respect to count 2 I am of the opinion that the injury

complained of is ascribed solely to negligence on the part of the motorman; that the count cannot be construed as ascribing the injury to wantonness, recklessness or intentional misconduct; and that these averments might well be stricken from the count as surplusage.

Mayfield, J., concurs in the reversal, but is of the opinion that the Brantley case is not susceptible of the construction given it in the opinion. He is of the opinion that there is no conflict between the Brantley case and the opinion in this case.

The Right of a Railway Company in a Street is only an easement to use the highway in common with the public. It has no exclusive right to travel upon its track, although perhaps it has a superior right there from the fact that its cars cannot deviate therefrom, while ordinary vehicles can: *Rascher v. East Detroit Ry. Co.*, 90 Mich. 413, 30 Am. St. Rep. 447; *Thatcher v. Central Traction Co.*, 166 Pa. 66, 45 Am. St. Rep. 645; *Barto v. Beaver Valley Traction Co.*, 216 Pa. 328, 116 Am. St. Rep. 770; *Ford v. Paducah City Ry.*, 124 Ky. 488, 124 Am. St. Rep. 412; *North Chicago St. R. R. Co. v. Zeiger*, 182 Ill. 9, 74 Am. St. Rep. 157. In *Marden v. Portsmouth, K. & Y. St. Ry.*, 100 Me. 41, 109 Am. St. Rep. 476, it is said that the rights of street railway cars and other vehicles at crossings are equal; neither has a paramount right over the other. To the same effect is *O'Neil v. Dry Dock etc. R. R. Co.*, 129 N. Y. 125, 26 Am. St. Rep. 512.

The Duty of a Traveler Approaching a Street Railway Crossing is to exercise care to avoid a collision; the care must be that of an ordinarily prudent man in view of all the existing conditions: *Carrahar v. Boston etc. Ry. Co.*, 198 Mass. 549, 126 Am. St. Rep. 461, and cases cited in the cross-reference note thereto.

The Motorman of an Electric Car at a Street Crossing must anticipate that persons approaching from either side may drive or walk upon it, and must exercise all due care to have the car under such control as to be able to stop, if necessary, to avoid accident: *Marden v. Portsmouth etc. St. Ry.*, 100 Me. 41, 109 Am. St. Rep. 476. If it is apparent that a collision is likely to occur, it is his duty to be ready to use, and to use, if necessary, all practicable means to prevent it. Anything less is want of due care: *Butler v. Rockland etc. St. Ry. Co.*, 99 Me. 149, 105 Am. St. Rep. 267; *Marden v. Portsmouth etc. St. Ry.*, 100 Me. 41, 109 Am. St. Rep. 476. In a city a pedestrian has the right to rely on the motorman's using due care in managing his car, and due care means having it under such control as the occasion demands at a street intersection where people and vehicles are crossing: *Pilmer v. Boise Traction Co.*, 14 Idaho, 327, 125 Am. St. Rep. 161.

When the Motorman of a Car Sees a Team Which is Ahead being driven in a straight line "coming in toward" the track, so that if both keep on a collision will ensue, it is his duty to stop his car if he sees that the driver of the team is going on, even though the driver ought not to go on: *Carrahar v. Boston etc. Ry. Co.*, 198 Mass. 549, 126 Am. St. Rep. 461.

In Cities and Towns It is the Duty of Those Operating a Railroad to moderate the speed of trains, to give notice of their approach, to keep a lookout, and to take such other precautions as the occasion demands for the proper security of human life: *Louisville etc. R. R. Co. v. McNary*, 128 Ky. 408, 129 Am. St. Rep. 308.

CASES
IN THE
SUPREME COURT
OF
COLORADO.

**COLORADO AND SOUTHERN RAILWAY COMPANY v.
McGEORGE.**

[46 Colo. 15, 102 Pac. 747.]

COMMON CARRIERS—Passengers.—The **True Rule** governing the duty of passenger carriers is that for the safety of their passengers they are required to exercise the highest degree of care reasonably to be expected from human vigilance and foresight, in view of the mode and character of the conveyance adopted, and consistent with the practical prosecution of their business. (p. 45.)

APPEAL AND ERROR—Inconsistent Instructions.—Where one instruction is a sound exposition of the law which should guide the jury and another exaggerates a duty owed by one party to the other already referred to in the first instruction, the error is irreparable, and the judgment must be reversed. (pp. 46, 50.)

COMMON CARRIERS are not Insurers of the safety of passengers as they are of freight. (p. 46.)

COMMON CARRIERS—Passengers—Meaning of Highest Degree of Carefulness and Diligence.—The terms "highest degree of carefulness and diligence" do not mean all the care and diligence the human mind can conceive, but does require everything necessary to the security of the passenger, reasonably consistent with the business of the carrier and the means of conveyance employed. (pp. 47, 48.)

Dines, Whitted & Dines and J. G. McMurry, for the appellant.

S. H. Thompson, Jr., and Daniel Prescott, for the appellee.

15 BAILEY, J. Appellee here, plaintiff below, Percy McGeorge, sued the Colorado and Southern Railway Company, defendant below, appellant here, to recover damages for personal injuries said to have been sustained by him while a passenger for hire on one of the defendant's trains. The accident was occasioned by a slide of dirt from the mountain side to and upon the track of the company, into which the train was precipitated on rounding a curve. The sudden

shock to the train threw the plaintiff, who was then standing, across one of the car seats, and injury resulted to him, for which damage is here sought. Negligence on the part of the defendant is alleged as to maintenance of its roadbed, embankments thereto adjacent, its track, and the operation of its train. There seems, however, ¹⁶ no doubt that the landslide was the direct cause of the injury which plaintiff sustained. Issue was joined on all of the averments of the complaint, except formal matters. In addition to other separate defenses, the defendant specially pleaded unavoidable accident, alleging in substance that the approximate and efficient cause of the injury was the result of an act of God, unforeseeable and irresistible, and which no human foresight could guard against or prevent. Issue was joined on all affirmative defensive matter and a trial had, which resulted in a verdict and judgment for the plaintiff, to review which the defendant brings the cause here by appeal.

Since the judgment must be reversed, because of error in instructions given, other assignments will not be considered. The trial judge in defining the duty which a common carrier owes to a passenger for hire told the jury this in its instruction No. 2:

"The jury are instructed that carriers of passengers for hire are bound to exert the utmost skill and prudence in conveying their passengers, and are responsible for the slightest negligence or want of skill, either in themselves or their servants. They are bound to use such care and diligence as the most careful and vigilant man would observe in the exercise of the utmost prudence and foresight. The law, in tenderness to human life and limb, holds railroad companies liable for the slightest negligence, and compels them to repel by satisfactory proofs every imputation of such negligence. Carriers of passengers are bound to carry safely those whom they take into their carriages, as far as human foresight and care will go; they are bound to the most exact care and diligence, not only in the management of the train and cars, but also in the structure and care of the track, and in all subsidiary arrangements necessary to the safety of passengers. They are bound to ¹⁷ exercise all the care and skill which human foresight and diligence can suggest."

And again, by and in its instruction No. 3, the court said: "It is the duty of the railway company engaged in transporting passengers, to do all that human care, vigilance and foresight can reasonably do, consistent with the mode of conveyance and the practical operation of the road, in providing safe roadbed and track and embankment along the roadbed, and to use like care to keep the same in repair, and have like care in the conduct and management of its train, for the safety of its passengers. The utmost degree of care which the human mind is capable of inventing or producing is not

required, but the highest degree of care, vigilance and foresight that is reasonably practicable in the conduct and management of its road and business is required. Common carriers of passengers are held to the very highest degree of care and prudence that human care, vigilance and foresight could reasonably do, which is consistent with the practical operation of their road and the transaction of their business; yet they are not absolute insurers of the safety of their passengers; and if you find that the defendant exercised all reasonably practical care, diligence and skill in the location, construction, inspection and repairs of its roadbed, tracks and embankments, in the management and operation of the train at the time of the accident, alleged and shown to have occurred, and that the accident could not have been prevented by the use of the utmost practical care, diligence and skill consistent with the practical operation of its road, and the transaction of its business, then plaintiff cannot recover in this action."

The foregoing instructions undertake to state the rule which governs the liability to and duty of the common carrier to its passenger for hire. No argument ¹⁸ is needed to show that they are in hopeless and irreconcilable conflict. The first clearly states a higher and stricter rule as to the degree of care and diligence required. Both cannot be right. If the first is, then there was no prejudicial error in giving the latter, as it states a rule more favorable to the defendant than it was entitled to have. In that case, upon whichever one the jury may have based its finding, the defendant has no ground of complaint as to these instructions. On the other hand, if the first of said instructions incorrectly states the law, then the case must be reversed, because of the conflict between it and the true rule; for it is impossible to determine upon the doctrine of which instruction the jury acted, or by which it was governed, in reaching its verdict. We have examined practically all of the cases at hand, wherein this precise question has been considered, and reach the conclusion that the clear result of all of them is to the effect that: "For the safety of their passengers, common carriers are required to exercise the highest degree of care reasonably to be expected from human vigilance and foresight, in view of the mode and character of the conveyance adopted and consistent with the practical prosecution of their business": 1 Fetter on Passengers, sec. 8.

This is the rule expressly enunciated in some of the cases, and has the approval of nearly all of the courts of final resort in this country which have made any pronouncement upon the subject: *Wright v. Chicago etc. R. R. Co.*, 4 Colo. App. 102, 35 Pac. 196; *Denver Con. Electric Co. v. Simpson*, 21 Colo. 371, 41 Pac. 499, 31 L. R. A. 566; *Denver Con. Electric Co. v. Lawrence*, 31 Colo. 301, 73 Pac. 39; *Chicago & A. R. Co. v.*

Byrnum, 153 Ill. 131, 38 N. E. 578; Arkansas Mid. Ry. Co. v. Canman, 52 Ark. 517, 13 S. W. 280; Pershing v. Chicago B. & Q. R. R. Co., 71 Iowa, 561, 32 N. W. 488; St. Louis & S. Ry. Co. v. Sweet, 57 Ark. 287, 21 S. W. 587; Murray v. Lehigh Val. R. R. Co., 66 Conn. 512, 34 Atl. 506, 32 L. R. A. 539; Chicago ¹⁹ P. & St. L. Ry. Co. v. Lewis, 145 Ill. 67, 33 N. E. 960; Chicago & A. R. Co. v. Arnol, 144 Ill. 261, 33 N. E. 204, 19 L. R. A. 313; Meier v. Pennsylvania R. Co., 64 Pa. 225, 3 Am. Rep. 581; Pittsburgh etc. R. R. Co. v. Thompson, 56 Ill. 138; Southern K. Ry. Co. v. Walsh, 45 Kan. 653, 26 Pac. 45; Tuller v. Talbott, 23 Ill. 357, 76 Am. Dec. 695; Philadelphia W. & B. Ry. Co. v. Anderson, 72 Md. 519, 20 Am. St. Rep. 483, 20 Atl. 2, 8 L. R. A. 673; Kennon v. Gilmer, 5 Mont. 257, 51 Am. Rep. 45, 5 Pac. 847; Elliott v. Newport St. Ry. Co., 18 R. I. 707, 28 Atl. 338, 31 Atl. 694, 23 L. R. A. 308; Ford v. Railway Co., 2 Fost. & F. 730; Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 291, 23 L. ed. 898; Michigan Central Ry. Co. v. Coleman, 28 Mich. 440.

Tested by the foregoing rule the instruction first quoted is fundamentally wrong. By the use of the words, "They [common carriers of passengers] are bound to exercise all the care and skill which human foresight and diligence can suggest," contained in the last clause thereof, without condition or modification, the highest care and diligence which human foresight could suggest—that is, conceive or imagine—was here imposed upon the defendant by the court, without restriction or limitation. Thus, we think the rule too broadly stated, and the standard of care set too high. For all practical purposes it makes the carrier an insurer, and such is not the law. The carrier should be required to do all that human vigilance and foresight can reasonably accomplish for the passenger's safety, consistent with the mode of conveyance, and the practical operation of the road, not all that the human mind might apprehend as being likely to ward off any and every imaginable peril. Such rule, strictly enforced, would be well calculated to put us back to the stage-coach day, or possibly to even more primitive methods of transportation.

In *Wright v. Chicago etc. R. Co.*, 4 Colo. App. 102, 35 Pac. 196, that court, in an opinion by Mr. Justice Thomson, although the precise question was not there for consideration and determination, recognized and approved this rule in the following language: ²⁰ "While carriers are not insurers of the safety of passengers as they are of freight committed to them for shipment, still they are held to the utmost care, vigilance and precaution to guard against accident, consistent with the mode of conveyance and its practical operation."

This court, in *Denver Con. Electric Co. v. Simpson*, 21 Colo. 376, 41 Pac. 499, 31 L. R. A. 566, speaking through Mr. Justice Campbell, approving this doctrine, although in a case of a different character, yet involving, as we think, the like prin-

ciple, said: "Under the facts of this case, the law required of the defendant, conducting, as it did, a business so dangerous to the public, the highest degree of care which skill and foresight can attain, consistent with the practical conduct of its business under the known methods and present state of its particular art."

Again, in *Denver Con. Elec. Co. v. Lawrence*, 31 Colo. 301, 73 Pac. 39, this court, speaking through Mr. Justice Steele, and approving the rule laid down in the preceding case, which is in accord with what seems to us to be well settled respecting the degree of care and diligence due to their patrons from those engaged in a business fraught with danger and peril to the public, announced the following: "The company insists that it is not an insurer and that its obligation is that of using ordinary care. We are not prepared to say that it is an insurer, but the patrons of the company have the right to presume that they will not be injured in attempting to use that which the company sells, and that it will do all that human care, vigilance and foresight can reasonably do, consistent with the practical operation of its plant, to protect those who use its electric light."

In discussing this subject the supreme court of Arkansas, in *Arkansas M. Ry. Co. v. Canman*, 52 Ark. 517, 13 S. W. 280, thus announced the rule: ²¹ "Railroad companies 'are bound to the most exact care and diligence, not only in the management of trains and cars, but also, in the structure and care of the track, and in all the subsidiary arrangements necessary to the safety of the passengers.' While the law demands the utmost care for the safety of the passengers, it does not require railroad companies to exercise all the care, skill and diligence of which the human mind can conceive, nor such as will free the transportation of passengers from all possible peril. They are not required, for the purpose of making their roads perfectly safe, to incur such expense as would make their business wholly impracticable, and drive prudent men from it. They are, however, independently of their pecuniary ability to do so, required to provide all things necessary to the security of the passengers reasonably consistent with their business 'and appropriate to the means of conveyance employed by them,' and to adopt the highest degree of practicable care, diligence and skill that is consistent with the operating of their roads, and that will not render their use impracticable or inefficient for the intended purposes of the same."

In *Indianapolis etc. R. R. Co. v. Horst*, 93 U. S. 291, 23 L. ed. 898, the supreme court of the United States, having under consideration the meaning of the terms, the highest degree of carefulness and diligence, as used in connection with the duty which common carriers owe to passengers for hire, speaking through Mr. Justice Swayne, said: "The terms in

question do not mean all the care and diligence the human mind can conceive of, nor such as will render the transportation free from all possible peril, nor such as would drive the carrier from his business. It does not, for instance, require, in respect to either passenger or freight trains, steel rails, and iron or granite cross-ties, because such ties ²² are less liable to decay, and hence safer than those of wood, nor upon freight trains air-brakes, bell-pulls and a brakeman upon every car; but it does emphatically require everything necessary to the security of the passenger upon either, and reasonably consistent with the business of the carrier, and the means of conveyance employed."

In *Southern K. Ry. Co. v. Walsh*, 45 Kan. 653, 26 Pac. 45, where a suit was brought by a passenger for hire to recover for injuries sustained as the result of the derailment of the train upon which he was riding, the court, referring to the duty upon a carrier, under such circumstances, to a passenger, declared this to be the rule: "It is bound to exercise the highest degree of practicable care; not the utmost possible precaution that might be imagined, but the highest care and best precaution known to practical use, and which are consistent with the mode of transportation."

In *Chicago & A. R. Co. v. Arnol*, 144 Ill. 261, 33 N. E. 204, 19 L. R. A. 313, on the same subject, the supreme court of that state announced the following: "Ordinarily, carriers of passengers for hire, while not insurers of absolutely safe carriage, are held to the exercise of the highest degree of care, skill and diligence practically consistent with the efficient use and operation of the mode of transportation adopted. . . . The care and diligence exacted are not such as will exclude all possible peril, or required to be of that degree that will render use of the instrumentalities of transportation, known to be employed, impracticable."

Wharton, in his *Law of Negligence*, second edition, section 629, commenting upon this matter, says: "But the railroad company, as we will have occasion further to see, does not warrant the security of the carriage. It is liable for a failure to apply the degree of care, skill and diligence, which good business men of the class are accustomed, under similar ²³ circumstances, to apply. But perfect skill and care are not required; nor is the company compelled to exert an excessiveness of caution which would defeat the object for which the road was built."

In *Wood's Railway Law*, at section 301, this is said on the matter here under consideration: "The law does not require railway companies to use all the care and diligence the human mind can conceive, nor such as will render the transportation of passengers free from all possible peril."

Upon the question as to whether a railroad train had been properly managed by the operating company, having refer-

ence to its legal duty to a passenger, the supreme court of Michigan, speaking through Mr. Justice Campbell in the case of Michigan Central Ry. Co. v. Coleman, 28 Mich. 440, said: "The jury were told that carriers of passengers are 'legally bound to exert the utmost care and skill in conveying their passengers, and are responsible for the slightest negligence or want of skillfulness, either in themselves or in their servants.' 'That the law is, that common carriers of passengers are bound to the utmost care and skill in the performance of their duty. That the degree of responsibility to which carriers of passengers are subject is not ordinary care, which will make them liable for ordinary neglect, but extraordinary care, which renders them liable for slight neglect. It is the danger to the public which may proceed, even from slight faults, unskillfulness or negligence of passenger carriers or their servants, and the helplessness in which passengers by their conveyances are, which make this duty of extraordinary care a legal one.' The language used would fairly permit the jury to find anything to be negligence which could by any possibility be avoided. But negligence is neither more nor less than failure of duty. All railroad companies are ²⁴ held to the duty of being prudent railroad companies, and bound to conduct their business with such precautions as prudence has usually found necessary."

In a suit for damages for injury to a passenger on a railroad train, the trial court of Illinois instructed as to the duty of the company, employed in transporting passengers, among other things, as follows: "To do all that human care, vigilance and foresight can do, both in providing safe coaches, machinery, tracks and roadway, and to keep the same in repair."

Upon a review of the case the supreme court of that state—Pittsburgh etc. Ry. Co. v. Thompson, 56 Ill. 138—in reference to this direction of the court, to which objection had been made below and exception reserved, as imposing too high a degree of care and diligence, said: "The instruction, in its strict sense, was open to this objection, the true rule being, as said by this court in Tuller v. Talbott, 23 Ill. 357, 76 Am. Dec. 695, that the carrier shall do all that human care, vigilance and foresight can reasonably do, consistent with the mode of conveyance and the practical operation of the road. A company cannot be required, for the sake of making travel upon their road absolutely free from peril, to incur a degree of expense which would render the operation of the road impracticable."

These authorities, besides a host of others which adhere to a like view, seem to us to be precisely in point and to absolutely demand and force the conclusion to which we come. The instruction complained of is so strongly and distinctively

in conflict with what seems to be the settled rule of law on the subject, and also with sound reason and practical common sense, that it should not, on any plea, be permitted to stand.

²⁵ For the reasons here given the judgment is reversed and the cause remanded.

Chief Justice Steele and Mr. Justice White concur.

Common Carriers are not Insurers of the Safety of Their Passengers. They are held to reasonable care only, and that care means the highest care consistent with the proper transaction of their business: *Millmore v. Boston Elevated Ry. Co.*, 194 Mass. 323, 120 Am. St. Rep. 558. Other authorities somewhat to the same effect are *Oliver v. Ft. Smith Light etc. Co.*, 89 Ark. 222, 131 Am. St. Rep. 86; *Louisville etc. R. R. Co. v. Church*, 155 Ala. 329, 130 Am. St. Rep. 29; *McLean v. Atlantic Coast etc. R. R. Co.*, 81 S. C. 100, 128 Am. St. Rep. 892. The rule sometimes expressed is that the care required of railroad carriers of passengers is the highest practicable care which capable and faithful railroad men would exercise in similar circumstances: *St. Louis etc. Ry. Co. v. Stewart*, 68 Ark. 606, 82 Am. St. Rep. 311; *Louisville etc. R. R. Co. v. Minogue*, 90 Ky. 369, 29 Am. St. Rep. 378; *Furnish v. Missouri Pac. Ry. Co.*, 102 Mo. 438, 22 Am. St. Rep. 781; they are held to the highest degree of care, diligence and skill consistent with such mode of transportation under the circumstances of the case: *McKeon v. Chicago etc. Ry. Co.*, 94 Wis. 477, 59 Am. St. Rep. 910; *Connell v. Chesapeake etc. Ry. Co.*, 93 Va. 44, 57 Am. St. Rep. 786.

MILHEIM v. BAXTER.

[46 Colo. 155, 103 Pac. 376.]

LEASE—Implied Covenant.—Unless expressed to the contrary, a lease contains, of necessity, an implied covenant for the quiet enjoyment of the leased premises. (p. 51.)

LANDLORD AND TENANT—Voluntary Vacation Equal to Eviction, When.—A willful act of a landlord justifying a tenant's vacating the leased premises amounts to an eviction. (p. 51.)

LANDLORD AND TENANT—Justification for Vacation of Premises.—Where a tenant has leased premises for lawful purposes, and has been driven therefrom during his term by the conduct of persons occupying, under the same landlord, adjacent premises for immoral purposes known to and permitted by the landlord, such vacation is justifiable, and amounts to an eviction in respect of which the tenant is entitled to damages. (pp. 51, 52.)

LANDLORD AND TENANT—Summary Vacation by Tenant for Want of Quiet Possession.—Where a tenant discovers that her landlord has knowingly let the adjoining house for immoral purposes, no notice of her intention to quit and claim damages appears to be necessary. (p. 52.)

LANDLORD AND TENANT—Breach of Covenant for Quiet Possession—Measure of Damages.—A tenant cannot recover as damages for eviction anticipated profits on a business not established.

Except such special damage as she might be entitled to, she is entitled only to the difference between the actual rental value and the rent she agreed to pay, from the time she was evicted. (p. 53.)

E. T. Wells, T. J. Leftwich and Edwin H. Park, for the appellant.

John Hipp, for the appellee.

¹⁵⁶ GABBERT, J. Appellee, plaintiff below, brought suit against appellant to recover damages claimed to have been sustained as the result of having been evicted from premises which she had leased from the defendant. The trial of the case resulted in a verdict and judgment for the plaintiff, from which the defendant appeals.

The first point made on behalf of defendant is, that the complaint does not state a cause of action. In her complaint, plaintiff alleged, in substance, that she rented of defendant, for the term of one year, the premises known as 818 Twenty-second street, in the city of Denver, for a boarding and lodging house; that defendant was then the owner of the adjoining premises, No. 816; that these premises were then, and for a long time prior thereto had been, and thereafter were, used and occupied, with the knowledge and consent of defendant, as an assignation house, where immoral men and women were constantly meeting, for immoral purposes; that she was not aware of the character of such premises when she leased those adjoining, and that she was greatly annoyed by the vulgar and indecent conduct of the tenants in No. 816.

It is urged that these averments are insufficient, in that the lessee runs the risk of the condition of the premises unless there is an express agreement to the contrary, for the reason that, except in the case of furnished apartments, there is no implied covenant ¹⁵⁷ by the landlord that the leased premises are tenantable, or fit for the purpose for which they are let. Plaintiff is not complaining of the physical condition of the leased premises, but that defendant was guilty of acts which prevented her from the free use and enjoyment thereof. Unless expressed to the contrary, a lease contains, of necessity, an implied covenant for the quiet enjoyment of the leased premises: *Pickett v. Ferguson*, 45 Ark. 177, 55 Am. Rep. 545; *Field v. Herrick*, 10 Ill. App. 591; *Avery v. Dougherty*, 102 Ind. 443, 52 Am. Rep. 680, 2 N. E. 123.

Any act willfully done by a landlord which justifies the tenant vacating the leased premises, and he vacates them on this account, amounts to, and may be treated as, an eviction; and where the tenant has leased premises for a lawful purpose and has been driven therefrom before the expiration of his lease by the conduct of persons occupying adjacent premises for immoral purposes, which the landlord owns and controls, and which he knowingly permits to be occupied for such

purpose, a case is made within this rule: *Lay v. Bennett*, 4 Colo. App. 252, 35 Pac. 748; *Dyett v. Pendleton*, 8 Cow. 727.

The complaint, so far as considered, is sufficient.

It is next urged that there was no evidence of an eviction. In support of this claim, it is contended that there was no evidence tending to prove that the defendant had actual knowledge of any improper conduct on the part of the tenants of No. 816, or that plaintiff was injured or disturbed by such conduct, and that it appears that plaintiff, without any complaint or request to the landlord to suppress the illegal conduct of the occupants of No. 816, abandoned the premises she had leased. From the evidence submitted, there is no doubt regarding the character of the premises known as No. 816. The evidence discloses beyond all question that they were occupied for immoral purposes. It is also apparent ¹⁵⁸ from the testimony that the plaintiff was injured and disturbed by the conduct of the persons occupying such premises. It is probably true the evidence fails to disclose that plaintiff notified defendant of the character of the persons occupying No. 816, or requested the landlord to compel the persons occupying such premises to vacate or cease their unlawful conduct. We do not believe that plaintiff was required to take any such steps; at least, counsel for defendant have cited no authorities holding that she was required to do so. It appears, from the testimony, that No. 816 had long been occupied for immoral purposes under circumstances which would justify the jury in finding that defendant had full knowledge that they were so occupied. When the lessor, by an illegal act, materially disturbs the possession of his tenant which he should protect and defend, the latter may abandon the premises leased: *Lay v. Bennett*, 4 Colo. App. 252, 35 Pac. 748.

Over the objection of defendant, plaintiff was permitted to testify that she purposed occupying the premises rented as a rooming and boarding house; that the house contained ten rooms; that she only required two for her own use; that she could have rented eight at twelve dollars per month each, and could have accommodated from fifteen to twenty-five boarders; that the profit on each boarder would be about one dollar a week. At the time she vacated the premises, she had occupied them about two weeks. She further testified that the loss to her business was about sixteen hundred and thirty-eight dollars.

The court instructed the jury to the effect that if they found for plaintiff, she was entitled to recover damages in such sum as they might believe, from the evidence, she suffered by reason of the defendant failing to give her a quiet, peaceable and undisturbed possession of the leased premises for the ¹⁵⁹ term for which they were leased. The jury returned a verdict in the sum of eleven hundred and eighty

dollars. In the circumstances of this case, the evidence admitted and the instructions given were erroneous.

It appears that she had not established a business in the premises rented. The only roomers she had were guests. She says she never had any applications for roomers or boarders, but felt confident she would have secured all she could accommodate had it not been, as we infer, for the character of the premises next door. The business in which she intended to engage was a new one; hence, there was no basis upon which to estimate a loss of profits. They were remote, speculative and incapable of ascertainment. She might have secured all the boarders and roomers she could accommodate, and she might not. The profits she claimed to have lost were purely conjectural, and embraced too many elements of uncertainty to form a just basis upon which to measure damages on this account. The tenant cannot recover as damages for eviction anticipated profits on a business not established: 1 Sedgwick on Damages, sec. 185; Green v. Williams, 45 Ill. 206; Engstrom v. Merriam, 25 Wash. 73, 64 Pac. 914.

Except such special damages as plaintiff might have been entitled to recover, her recovery should have been limited to the actual rental value of the premises, over and above the rent she agreed to pay, from the time she was evicted: Sedgwick on Damages, sec. 185; Green v. Williams, 45 Ill. 206; 3 Sutherland on Damages, 149; Engstrom v. Merriam, 25 Wash. 73, 64 Pac. 914.

The judgment of the county court is reversed, and the cause remanded for a new trial.

Mr. Justice Campbell and Mr. Justice Hill concur.

An Actual or Physical Expulsion from the Premises is not essential to the eviction of a tenant. The landlord's failure to repair may constitute a constructive eviction: Rea v. Algren, 104 Minn. 316, 124 Am. St. Rep. 627; so may his creation of a nuisance which prevents a reasonable use of the premises: Sully v. Schmitt, 147 N. Y. 248, 49 Am. St. Rep. 659; or his obstruction of the street so as to interfere with access to the property; Edmison v. Lowry, 3 S. D. 77, 44 Am. St. Rep. 774. For other acts of the landlord, or uses to which he puts other portions of his property, which so interfere with the tenant's business as to constitute an eviction, see Brown v. Holyoke Water-power Co., 152 Mass. 463, 23 Am. St. Rep. 844; Coulter v. Norton, 100 Mich. 389, 43 Am. St. Rep. 458.

BROWN v. BELL.

[46 Colo. 163, 103 Pac. 380.]

STATUTE OF LIMITATIONS—Effect.—Where a Statute of Limitations prescribes the time within which actions upon judgments may be brought, and such time has elapsed, the statute does not extinguish the debt, but simply puts to repose the remedy for its enforcement. (p. 56.)

PLEADING.—The Statute of Limitations must always be specially pleaded, and if shown on the complaint, special demurrer is the proper remedy. (p. 56.)

JUDGMENT—Enforcement.—Two Distinct Remedies are open to a judgment creditor for the enforcement of his judgment—an execution and an action in some other court upon it. (p. 56.)

JUDGMENT—Enforcement.—An execution is a remedy afforded by law for the enforcement of a judgment; it is not an action, and no action is necessary to obtain it. (p. 57.)

JUDGMENT—Enforcement.—If a party has two remedies for the enforcement of a right, the one he chooses is not barred, because the other, if chosen, would have been. (p. 57.)

JUDGMENT—Enforcement.—An Execution, otherwise issuable as of right, may issue on a justice's judgment, and be of force after the six years statute of limitations has run against an action on the judgment. (p. 57.)

EXECUTION SALE—Redemption—Full Amount.—If a judgment creditor, desiring to redeem, pays to the officer the proper amount, and the officer errs in distributing the money, so that he holds insufficient to effect the redemption, but the creditor at once tenders him the deficiency, his rights are unaffected by the sheriff's mistake. (p. 60.)

S. S. Abbott, Rogers, Shafroth & Gregg and W. H. Malone, for the appellant.

No appearance for the appellee.

161 MUSSER, J. It appears from an agreed statement of facts that, on February 24, 1905, the sheriff of Teller county sold the Franklin lode claim for \$356.42 under an execution against the Franklin Gold Mining Company, and issued a certificate of purchase, which, by assignment, became the property of the appellant, Brown. Under the statute a deed might issue to the holder, if no redemption was made within nine months. On March 16, 1899, one Sherman obtained a judgment against the same company, before a justice of the peace. A transcript of this judgment was duly filed with the clerk of the district court, as provided by statute, on December 12, 1900, and, on November 23, 1905, more than six years after the rendition of the judgment by the justice of the peace, an execution was issued out of the district court on this judgment and placed in the hands of the appellee as sheriff of Teller county, together with \$500, for the purpose of redeeming the property, as provided by statute, from the

sheriff's sale aforesaid. This was more money than was necessary for that purpose. Several days later the sheriff returned to the redeeming creditor the balance of the \$500 left after deducting some sheriff's costs, and \$377.80 for the use of appellant, who held the certificate of purchase, and sent to the appellant the said sum of \$377.80. The appellant returned this amount to the sheriff. The amount necessary ¹⁶⁵ to redeem was \$383.15, or \$5.35 more than was sent by the sheriff to appellant. The sheriff was proceeding to sell the property under this second execution, when this action was brought to restrain the sale and to compel the sheriff to issue a deed to appellant, upon his certificate of purchase. On the same day that the appellant returned the money to the sheriff, the redeeming creditor tendered to appellant the sum of \$5.35.

The judgment was against the plaintiff, and he appeals. The appellant claims that, though the judgment obtained before the justice of the peace had been taken on transcript to the district court, it was still a judgment of the justice of the peace, and that the execution issued thereon out of the district court, by means of which the redemption was attempted, was void, because issued more than six years after the rendition of the judgment by the justice of the peace.

Our statute provides that, when a transcript from a justice of the peace is filed and recorded in the office of the clerk of the district court, the judgment "shall thenceforward have all the effect of a judgment of the said district court, and execution shall issue thereon out of that court as in other cases." The appellant asserts that, notwithstanding the language of our statute, the judgment remains a judgment of the justice of the peace, and cites numerous authorities tending to sustain that position. Without deciding, it will be assumed, for the purposes of this case, that the appellant is right, and that the judgment was still a judgment of the justice of the peace, and not of the district court, when the execution issued. Appellant says that section 2900 of Mills' Annotated Statutes provides expressly for a limitation of six years on any judgment rendered in any court, not a court of record, and that, therefore, the ¹⁶⁶ execution, under which the redemption was attempted to be made, was null and void, and there was no redemption. Appellant cites no authorities to support this position, but assumes it. Section 2900 (Rev. Stats. 1908, sec. 4061), so far as pertinent, is as follows: "The following actions shall be commenced within six years, next after the cause of action shall accrue, and not afterward: Second. All actions upon judgments rendered in any court not being a court of record." Appellant seeks to annul the execution indirectly, through section 2900, and raises no other question as to the life of the judgment or the issuance of the execution. The question thus presented is, Does this

section limit the time within which an execution, otherwise issuable as of right, may issue on a justice's judgment? If it does, it must do so upon the theory that this statute of limitation extinguishes the judgment, wipes it out and leaves nothing upon which an execution may rest. Especially must this be true in this case, for it must be remembered that appellant is not the judgment debtor. He is a stranger to the judgment and the execution. If he has the right to question the execution as he does, as to which right no opinion is expressed, it must be upon the theory that the running of the statute against an action on the judgment made it nothing in the sight of all men. Statutes of limitation have given rise to much discussion, and there is some contrariety of opinion about them, but the authorities are quite generally agreed, and it is the declared law of this state, that a statute like section 2900 acts upon the remedy only, and not upon the debt. It does not extinguish a debt, but simply puts to repose the remedy for its enforcement: *Holmquist v. Gilbert*, 41 Colo. 113, 92 Pac. 232, 14 L. R. A., N. S., 479; *Foot v. Burr*, 41 Colo. 192, 92 Pac. 236, 13 L. R. A., N. S., 1210.

In order to get the benefit of the statute as a ¹⁶⁷ defense, a debtor must plead it specially in his answer, or if it appears on the face of the complaint that the statute has run, he may plead it in bar of the action, by way of special demurrer. If he fails to plead the statute specially, one way or the other, the defense is not available, for it is deemed waived, and the plaintiff may recover as in other cases, notwithstanding the statute has run: *Hexter v. Clifford*, 5 Colo. 168; *Hunt v. Hayt*, 10 Colo. 278, 15 Pac. 410; *Adams v. Tucker*, 6 Colo. App. 393, 40 Pac. 783.

A debt—and a judgment is a debt—is as much a moral obligation after the bar of the statute has fallen as before. The statute may be employed as a defense by the debtor, if he chooses to do so. It is a personal privilege granted to him: *Foot v. Burr*, 41 Colo. 192, 92 Pac. 236, 13 L. R. A., N. S., 1210. All these decisions of our courts are directly at variance with the idea that a judgment is extinguished when the statute has run.

Under section 3755, Revised Statutes of 1908, a party obtaining a judgment before a justice of the peace is of right entitled to the remedy by execution immediately after rendition of judgment. No action or proceeding of any kind before the court, after judgment, is necessary to obtain an execution. This fact should be borne in mind, for, in some states, whose decisions will hereafter be referred to, executions are issued upon motion or some proceeding before the court. An execution is plainly a remedy afforded by law for the enforcement of the judgment. A party has another remedy looking toward the enforcement of his judgment. He may bring an action thereon in some other court. This is fre-

quently done. He must bring this action, however, within six years after the rendition of the judgment, else there is great probability that his adversary may plead the statute of limitations (section 2900, *supra*), and thus this remedy by action will be lost. ¹⁶⁸ Thus has our legislature left the matter, and we will have to accept it as it was left. If a party has two remedies for the enforcement of a right, the one he chooses is not barred, because the other, if chosen, would have been: *Foot v. Burr*, 41 Colo. 192, 92 Pac. 263, 13 L. R. A., N. S., 1210.

Having seen that a judgment, otherwise alive, is not extinguished because the statute of limitations has run against an action thereon, how can a statute which only limits the time within which an action can be brought on a judgment, limit the time within which an execution may issue on it? It is difficult to comprehend how the issuance of an execution as of right, without an appeal to and an order of court, can be an "action" such as is meant in section 2900. From the foregoing observations, it appears, from our statutes and former decisions of this court, that there is no escape from the conclusion that an execution, otherwise issuable as of right, may issue on a justice's judgment and be of force, after the six years statute of limitations has run against an action on the judgment.

It is pleasing to note that this conclusion has support in the decisions of other states.

Waltermire v. Westover, 14 N. Y. 16, speaks of a statute providing, in substance, that all actions upon justice's judgments "shall be commenced within six years next after the cause of such action accrued." It is true that, in that case, the execution issued a short time before, and the sale took place about a year after, the six years had expired. The reasoning of the court is as applicable as though the execution issued later. After saying that the statute operated on the remedy, not the debt, the court, on pages 21 and 22, said: "If statutes of limitation do not discharge the debt, but act exclusively upon the remedy, upon what principle of interpretation is it to be held that ¹⁶⁹ this statute, which is in terms confined to the remedy by action, operates to annihilate the remedy by execution? The statute is in derogation of a clear common-law right. It does not operate according to the recent cases, by producing any presumption of payment, but is a mere statutory bar, founded in principles of public policy. It would be contrary, therefore, to all just rules of construction to extend its operation beyond the fair and reasonable interpretation of its language. The reasoning which has so fully established that statutes of this sort act upon the remedy only and not upon the debt equally proves that the operation of the statute in question here is confined to the particular remedy by action. Indeed, the statute could only be held to

reach and subvert the remedy by execution, by holding that the debt itself is discharged, or by interpolating language not expressly or by any fair implication contained in the statute."

To the same effect is *Kineaid v. Richardson*, 25 Hun, 237. In *Williams v. Mullis*, 87 N. C. 159, it is said that there is a general concurrence of opinion that the statute of limitations does not annihilate the judgment; that it acts upon the remedy and not the debt, and that, if the judgment is kept alive by issuing execution every three years, execution may issue though the statute has run. In that case, it is pointed out that, under the statute of that state, if the judgment creditor allows three years to elapse without issuing execution, he would have to apply to the clerk of the court for leave to issue, and that the application for leave being in the nature of a *scire facias*, the defendant may oppose the motion by pleading the statute, but as long as the execution issued as of right, the statute could not be interposed.

It might be said that the following decisions ¹⁷⁰ cited by an eminent writer induce the belief that this view is at variance with the general current of authority, but it seems to us, upon examination, that the said decisions, save one, are not opposed to that view.

Jerome v. Williams, 13 Mich. 521, was a proceeding before a court to renew an execution. The court said it was a substitute for a *scire facias*, and did not differ from a formal action, and that, where the delay in issuing execution rendered it necessary to apply for leave, it cannot be granted if the statute had run. This is far from saying that an execution as of right might not issue.

In *Parsons v. Wayne Circuit Judge*, 37 Mich. 287, it was pointed out that, at a certain time, the statute in force did not limit the time within which a suit might be brought on a judgment, but provided that the judgment should "be presumed to be paid and satisfied at the expiration of ten years" after it was entered. Another section of the statute provided for the issue of execution without any limitation of time and for alias executions. It would seem that, if ever a judgment is extinguished by a limitation statute, it would be by one that said the judgment should be deemed paid and satisfied: yet as eminent a lawyer as Chief Justice Cooley said that, under such statutes, there is reason for saying that an execution might be taken out notwithstanding the lapse of the ten years' period, and that the court would not be justified in setting the execution aside without proof of actual payment. It is not intended to be understood, by mentioning this, that this court would go so far as to hold that a judgment would or would not be extinguished under such a statute. It is not necessary to do so under the statute which we are now considering. The case is mentioned to show ¹⁷¹ that the de-

cisions in Michigan are not opposed to the view that we have taken.

McDonald v. Dickson, 85 N. C. 248, was a proceeding before a court for leave to issue an execution, and the defendant set up the statute as a defense. The proceeding was held to be in the nature of an action. The later case of Williams v. Mullis, 87 N. C. 159, in the same court, points out this difference in McDonald v. Dickson.

Peters v. Vawter, 10 Mont. 201, 25 Pac. 438, was upon statutes so essentially different from ours that it cannot be considered in point here, and besides the case was a motion for leave to issue an execution. Thomson v. Beverage, 3 Mackey, 170, was upon a statute which did not bar an action, but which declared that a judgment was not good and pleadable or admissible in evidence after twelve years. The court held that this reduced a judgment to a nullity and destroyed the cause of action entirely, and distinguished it from a statute that barred an action.

In Ludeman v. Hirth, 96 Mich. 17, 35 Am. St. Rep. 588, 55 N. W. 449, it appears that judgment was rendered on April 2, 1878, and execution issued the same day. On March 29, 1888, nearly ten years thereafter, the land was advertised for sale and was sold on May 16, 1888. The court held the sale good, notwithstanding the expiration of the ten years period of limitation before the sale, because the execution had been issued and the sale advertised before the period had expired. This is not in point. True, the court says that executions cannot be issued and levied after the statute has run, but this dictum is no doubt intended to be taken in the light of the Michigan statute, and is supported by the citation of Jerome v. Williams, 13 Mich. 521, and Parsons v. Circuit Judge, 37 Mich. 287, mentioned above, which logically sustain our view, under the Colorado statute.

Merchants' Nat. Bank v. Braithwaite, 7 N. D. 358, 66 Am. St. Rep. 653, 75 N. W. 244. ¹⁷² is not opposed to our view. It seems therefrom that, under the laws of that state, no action on a judgment can be brought, and no execution can be issued after ten years, and that the judgment ceases to be a lien at the expiration of that period. The court thought that all these statutes showed the legislative purpose to destroy the judgment after ten years. It would seem that this is true, for the action, execution and lien being barred, it is difficult to see what would remain. The court mentioned the New York cases cited above, and said: "It is apparent that, in New York, the statute was leveled at only a particular remedy, and therefore the court rightly held that all other remedies remain unimpaired."

McGrew v. Reasons, 3 Lea, 485, seems to hold that the running of the statute of limitations against an action on a judgment likewise barred the remedy by execution, so that

an execution on a justice's judgment might be quashed in the circuit court upon petition for certiorari and supersedeas. The age of the judgment, nearly twenty years, no doubt appealed to the court in that case. No authorities are cited by the court. The conclusion in that case is not supported by the former reasoning of our own court on the statute of limitations, and to follow it now would be subversive of former decisions in this state.

The appellant also says that there was no redemption in this case, because there was not enough paid to effect the redemption. Our statute (Rev. Stats. 1908, sec. 3653) provides that, after the expiration of six months and at any time before the expiration of nine months from the sale, a judgment creditor may redeem by placing an execution on his judgment in the hands of the proper officer to execute, and paying to the officer the amount of money for which the premises were sold, with ten per cent ¹⁷³ per annum interest thereon from the date of the sale. This the redeeming creditor did. Before, and for several days after the period of redemption expired, the sheriff had sufficient money in his hands to effect the redemption, paid to him by the redeeming creditor for that purpose. If the sheriff made a mistake in distributing this money, it was a matter between appellant and the sheriff. True, the sheriff returned money to the redeeming creditor, but the latter did not ratify the mistake of the sheriff, for he tendered \$5.35 seasonably to appellant.

As it appears from the foregoing that appellant is wrong in his contentions, the judgment is affirmed.

Chief Justice Steele and Mr. Justice Campbell concur.

THE EFFECT OF THE STATUTE OF LIMITATIONS ON JUDGMENTS AND WRITS OF EXECUTION AND PROCEEDINGS FOR THEIR ENFORCEMENT.

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I. Historical Suggestions.

The judgment creditor may well be puzzled as to the means of extracting benefit from a stale judgment. Research is necessary to that full understanding of the subject, by the aid of which luminous works have been written and judgments rendered, and without which foreknowledge the student is dazzled by the cross-lights of the conclusions set down—often carelessly—often on the assumption that the reader is as well acquainted with the premises as the author or judge is presumed to be.

In olden time, after a judgment had been rendered and the successful party had allowed the debtor a time of grace, exceeding a year and a day, and the exigency arose that he should reap the benefit of his unsatisfied judgment, he found himself at a bifurcation of the legal road to enforcement of his judgment, whether by action or execution. The common-law rule, up to the passing of the statute of Westminster, 13 Edward I, chapter 45, was that all writs of execution must be sued out within a year and a day after the judgment was entered; otherwise the court concluded, *prima facie*, that the judgment was satisfied and extinct. But the statute referred to allowed the court to grant a writ of *scire facias* to the defendant to show cause why the judgment should not be revived and execution had against him, to which the defendant might plead such matter as he had to allege in order to show why process of execution should not be issued; or the plaintiff might still bring his action of debt, founded on this dormant judgment, which was the only method of revival allowed by the common law: Blackstone, bk. 3, p. 421. The right of the judgment creditor, therefore, to this double remedy dates from the passing of that statute of Westminster, although in Foster on *Scire Facias*, 2, it is said that *scire facias* after a year and a day lay at common law in real actions and on writs of annuity; but in personal actions, if the judgment creditor did not sue out his execution within that year and a day, he was put to a new action on his judgment. The Westminster statute extended this remedy to personal actions, and its provisions have been re-enacted in the United States, though the later acts have extended the time within which execution may issue without revival by *scire facias*. It is to be noted that the judgment in default of execution did not become dead, but merely dormant. It still subsisted as a debt, and could still be the foundation of a new action of debt or, at the election of the plaintiff, be revived by *scire facias*, so as to become again a debt upon which execution might issue: Davis v. Davis, 174 Fed. 786. And the writ of *scire facias* to revive a judgment was not a new action, but a continuation of the old one: Eldred v. Hazlett's Admr., 38 Pa. 16.

"In many of the states," says Mr. Freeman, "the remedy by scire facias is no longer employed; but after the lapse of a time designated in the statute, an execution can issue only upon order of the court, granted on motion, on proof that the judgment remains unsatisfied. These statutes are, many of them, limitations upon the time within which execution may issue. If the plaintiff does not bring himself within their provisions, his right to execution is irrevocably lost": Freeman on Executions, sec. 27a.

In addition to this wholesome relegation of the remedy by scire facias, distinctions have crept in as to the species of judgment on which the present remedies are available, and to add to the difficulty, so multifarious are the decisions on the statutes of limitations, the varying periods of currency, the commencing date of the currency, the period of finality of judgment, that to describe generally their effect on judgments and consequential executions, it is necessary to analyze the variant decisions of divers learned judges and to deduce from them some general principle which may act as a guide for the inquirer.

It is a certain matter both of wonder and regret that, knowing that for centuries England has had the double remedy in use, local legislatures in their appropriate time and thirst for improvement have not adopted one uniform method of awakening sleeping judgments. Yet, and it is really an illustration of legislative atavism, with the opportunity ripe for an orderly adjustment of an important branch of the law, we find that in California the Code of Civil Procedure practically divides judgments into two great classes—(1) those the object or result of which is the recovery of money; and (2) those the object or result of which is to recover something other than money—while in the other states in which the right to issue execution after a certain time is granted by statute, it generally depends not upon the character of the judgment, but upon the fact of its remaining unsatisfied: Freeman on Execution, sec. 27a.

Yet one more excerpt from the same authority: "Sometimes there is an apparent conflict between different parts of a state statute relating to this subject, one part giving the right to issue execution without imposing any limit of time, and another part limiting the time within which an action could be brought on a judgment, and thereby implying that after such time it is *functus officio*. In New York it is said that the limitation of the remedy by action does not imply any limitation of the remedy by execution, and, therefore, that an execution may properly issue to enforce a judgment on all actions which are barred by the statute of limitations. This position seems logically sound. Nevertheless, we believe it at variance with the general current of authority. The majority of the cases treat the statute of limitations as a practical extinguishment of the judgment, and in one case it has been held that the issuing of an execution after the statute of limitations had become operative could not be sustained, even by showing that the defendant had made a new promise under which an action on the judgment could be successfully prosecuted": Freeman on Executions, sec. 27a. The case referred to by Mr. Freeman is *Cannon v. Laman*, 7 Lea, 513.

References to the difficulties to be met are numberless, but the following from an opinion of Mr. Justice Ruffin in *McDonald v. Dickson*, 85 N. C. 248, is to the point: "Very much of the difficulty which

surrounds the question comes from an effort to construe the provisions of our code by the light of decisions made by the courts of other states, with reference to their codes or statutes on the subject, when in fact their provisions are variant, and oftentimes incompatible with ours. Compare our code, for instance, with that of the state of New York, and it is hardly possible to conceive of greater differences than exist between the two, with reference to this very matter of the effect of the lapse of time upon a judgment and its lien upon lands. That code, after declaring that a judgment docketed shall be a lien on the lands of the defendant for ten years, expressly provides that after that period the lien shall cease only as against encumbrances and bona fide purchasers. Again, it provides that after the expiration of ten years, the lands of the judgment debtor, or of anyone claiming under him as heir, may be levied upon by virtue of an execution under the judgment and sold, and the time fixed when an action on a judgment shall be barred is twenty years. We have referred to the code of that state because it has been said that ours was mainly taken from it, and might, therefore, be supposed more nearly to resemble it than any other, and yet so marked are the discrepancies as to make it plain that we can derive but little aid from the decisions of the courts there, in regard to the point in hand, and indeed, so far as we have been able to investigate, ours is the only code which fixes the current period of ten years as that which terminates the lien of a judgment and operates as a bar to a new action upon it."

Having thus briefly introduced the past history of the foundation we come to the contemplation of the legal edifice reared on the decisions to date, with an obvious comment on the composite style of the architecture.

In this utilitarian age, is it presumptuous to suggest that a time and brain labor-saving alteration of the law limiting the period within which judgments may be enforced should be adopted by the states? The present condition contains its own suggestions, that (1) a uniform period be named after any final judgment, decree or order, after which the right to issue execution, revive it, or bring action upon it shall be barred; (2) a uniform definition of when judgments, decrees or orders become final; (3) a uniform set of disability exceptions, such as infancy, lunacy, absence from the state or other like contingency, so that the judgment creditor shall not be prejudiced by matters over which it is legally presumed he has no control; (4) a uniform period of life for liens arising on the docketing of judgments, transcripts of judgments, to run from the date of the original judgment; (5) a uniform waiver of the necessity to issue or reissue execution to keep judgment alive, and therefore making its existence independent of the issue of the writ of execution.

We have advocated, and shall continue to advocate, a course, the adoption of which will ultimately render the consideration of the opinions of the learned judges of the states a marked help to the construction of the statutes, by the definiteness of the point of vantage from which the difficulties are attacked, instead of as at present increasing the difficulty in the endeavor to pay that respect to judicial utterances which their diametrically opposite conclusions only too often endanger.

II. Time Limit on Enforcing Domestic Judgments.

By the light of what we have already written, we propose to read in the decisions to date in the various states wherein the subject has been before the courts.

a. In Alabama, the code, sections 1920, 1922, authorizes the registration of judgments and the issuance of execution within ten years. During that period the judgment is kept alive, so that the creditor may proceed by execution without regard to whether one has been previously issued within the year and a day or not: *Howard v. Corey*, 126 Ala. 283, 28 South. 682.

b. In Arkansas, in *Brearily v. Norris*, 23 Ark. 169, Gould's Digest, chapter 106, section 15, was the section limiting actions on judgments and decrees to ten years, and the language of the statute was held to be comprehensive and embracing all judgments and decrees without discrimination or exception. It provided that actions on judgments and decrees should be commenced within ten years after the cause of action should accrue, and not afterward.

The two sections of Gannett's Digest, dealing with the subject, viz., section 3791, limiting the time in which execution may be issued on judgments of justices of the peace, and section 4128, which enacts that "actions on all judgments and decrees shall be commenced within ten years after the cause of action shall accrue, and not afterward," treat of entirely different subjects, and a sharp distinction is to be drawn between the issue of the execution on a judgment and an action on the same judgment. The statute which bars the one remedy has not the effect of preventing the other: *Hicks v. Brown*, 38 Ark. 469.

c. In California, the Code of Civil Procedure, section 336, subdivision 1, provides that actions upon judgments must be commenced within five years, and although the provisions of the code are so plain that they hardly needed judicial confirmation, a case was presented in which a judgment eight years old was sought to be enforced by action, and although the defense of the statute of limitations had not been raised on the pleadings, the court, taking into account that the defendant was the personal representative of one deceased, could not allow either waiver or laches to interfere with the defense which exposed the plaintiff's case to the influence of the limitation: *Reay v. Hazelton*, 128 Cal. 335, 60 Pac. 977. A similar ruling is to be found in *Mason v. Cronise*, 20 Cal. 211.

d. In Colorado, the old-time principle obtains that a statute of limitations acts upon the remedy only, and not upon the debt. It does not extinguish the debt, but simply puts to repose the remedy for its enforcement: *Brown v. Bell*, 46 Colo. 163, ante, p. 54, 103 Pac. 380, 23 L. R. A., N. S., 1096.

e. In Indiana, it has been held that the words in the statute of limitations, "a specialty, or any agreement, contract or promise in writing," did not include an action on a judgment: *Kimball v. Whitney*, 15 Ind. 280; and this ruling was followed in *Niblack v. Goodman*, 67 Ind. 174. In the last-mentioned case *Howk, C. J.*, said (p. 181): "We are aware that the decisions of the different courts of last resort, in the different states of the United States, are not in harmony on the question as to whether a judgment is or is not a contract or in the nature of a contract."

The code of 1852, section 211, subdivision 5, declared that an action upon a judgment of a court of record must be commenced within twenty years after the cause of action accrued, and section 225 provides that every judgment and decree of a court of record of the United States or of this or any other state shall be deemed satisfied after the expiration of twenty years. These sections are not in conflict, nor has the one any bearing upon the construction to be given to the other, and the fact that an execution was issued upon a judgment and returned unsatisfied does not avoid a plea under the statute of limitations: *King v. Manville*, 29 Ind. 134.

f. In Iowa, actions on judgments must be brought within five years, and this period has been fixed by the interpretation of code, sections 3439 and 3447, the former of which provides that no action shall be brought on any judgment of a court of record within fifteen years after its rendition without leave of the court, but that the time during which an action on a judgment is prohibited by such section shall not be excluded in computing the statutory period of limitation for an action thereon; while the latter requires actions on judgments of courts of record to be brought within twenty years. The result is that the period within which an action on a judgment may be maintained is only five years, or the time between the end of the fifteen years and of twenty years after its rendition: *Wooster v. Bateman*, 126 Iowa, 552, 102 N. W. 521.

g. In Kansas, the death of the owner does not render the judgment dormant, and his executor more than a year after the death, but within a year after the judgment became dormant, is not under Code of Civil Procedure, section 440, barred from bringing his action upon it. That section merely provides that a judgment can only be sued on within one year after it becomes dormant, not within one year from its rendition: *Beall v. City of Leavenworth*, 34 Fed. 113. In *Burnes v. Simpson*, 9 Kan. 658, it is implied that section 18, subdivision 6 of the code would fix the period of limitation, which would have been five years from the time the right of action accrued, i. e., from the date of the judgment, but in the later decisions of the supreme court of Kansas it has been decided that the statute referred to does not fix the time within which a judgment creditor may bring his action. The date of the judgment is immaterial, but the date of its becoming dormant is all-material: *Kothmann v. Skaggs*, 29 Kan. 5; *Baker v. Hummer*, 31 Kan. 325, 2 Pac. 808.

h. In Kentucky, the act of May 31, 1865, provides that no execution shall issue after the lapse of fifteen years from the judgment, and therefore left any right of action that the plaintiff might have on the judgment to be governed by the rules applicable to other causes of action. It does not operate as a bar to an action on the judgment where the defendant obstructed the prosecution of the action by departing from the state: *Lockhart v. Yeiser*, 2 Bush, 231; *Davidson v. Simmons*, 11 Bush, 330. And the lapse of that period—fifteen years—will bar any further proceedings on the judgment: *McArthur v. Goddin*, 12 Bush, 274. But where a provision exists as in the Civil Code Practice, section 439, allowing equitable actions for the discovery of the debtor's property after a return of nulla bona to an execution, the fact that the period of fifteen years had elapsed pending such a suit did not defeat the creditor's remedy, he

having begun the suit before the time limit had expired: *Thierman v. Wolff*, 31 Ky. Law Rep. 376, 102 S. W. 843. Where there was a judgment against two defendants, after the death of one of them, an execution issued against both is void as to the decedent, and consequently does not stop the running of the statute so far as his estate is affected: *People's Bank of Kentucky's Assignee v. Barbour*, 30 Ky. Law Rep. 712, 99 S. W. 608.

i. In Louisiana, whenever it became necessary to enforce a judgment by an action separate and distinct from the one in which judgment was rendered, the prescription of ten years was applicable under article 3508 of the Civil Code. To avoid this prescription, the creditor must have been in a condition to enforce the collection of his judgment without the aid of an original suit: *Kemp v. Cornelius'* Heirs, 14 La. Ann. 301; *Succession of Beckham*, 16 La. Ann. 352.

The passage of the act of the legislature approved April 30, 1853, regulated ten years as the term of prescription in the law applicable to domestic judgments, but such term did not commence earlier than the promulgation of the act: *Succession of Rice*, 15 La. Ann. 649.

j. In Michigan, although the statute of limitations (How. Ann. Stats., sec. 8713) requires actions of assumpsit to be brought within six years after the cause of action accrues, section 8736 fixes ten years after its entry as the period for bringing "every action on a judgment or decree": *Snyder v. Hitchcock*, 94 Mich. 313, 54 N. W. 43. Executions cannot be issued and levies made after the right of action is barred by the statute of limitations. The manifest reason on which this principle is founded is, that when the judgment is dead, no action can be taken to revive it: *Jerome v. Williams*, 13 Mich. 521; *Parsons v. Circuit Judge*, 37 Mich. 287; *Ludeman v. Hirth*, 96 Mich. 17, 35 Am. St. Rep. 588, 55 N. W. 449.

k. In Minnesota, under sections 4071, 4075, and 4082 of the Revised Laws of 1905, an action upon any judgment, whether domestic or foreign, must be brought within ten years from the rendition thereof, without reference to the residence of the judgment debtor during that time: *Gaines v. Grunewald*, 102 Minn. 245, 113 N. W. 450.

l. In Missouri, the time covered by the pending of a suit has been held not to be taken into account either to create a bar by limitation under Revised Statutes of 1899, section 3722, limiting the time for issuing executions to ten years, or to raise a presumption of payment: *St. Francis Mill Co. v. Sugg*, 169 Mo. 130, 69 S. W. 359. In an action on a judgment to which the statute of limitations was pleaded, the fact that such statute had been repealed was immaterial to the defense, the court holding that as the judgment was rendered in 1884, the statute contained in Revised Statutes of 1899 had no application, as the case was governed by the statute in force at the date of the judgment: *Gaar, Scott & Co. v. Black*, 120 Mo. App. 181, 96 S. W. 683. This was followed in *Bick v. Robbins*, 131 Mo. App. 670, 111 S. W. 612, and in the opinion delivered by Mr. Justice Norton, the reason is explicitly announced: "While it is entirely competent for the legislature to curtail the limitation within which suits may be instituted for the enforcement of an accrued right, it is not permissible to extinguish existing rights of action thereby. When the limitation period is thus reduced by the legislature, it is essential, in order to give entire validity to the act in respect of ex

isting causes of action, to provide a reasonable period after its passage for the enforcement of such rights as had theretofore accrued. It is the rule, when such reasonable time has not been provided, that rights theretofore accrued will be governed by the prior statute of limitations, or, in proper circumstances, the period under the present or amended statute will commence to run as of the date the amended statute became effective."

m. In Nebraska, the statute provides that on a "specialty or any agreement, contract, or promise in writing, or foreign judgment," actions must be commenced within four years. A domestic judgment does not come within this category: *David v. Porter*, 51 Iowa, 254, 1 N. W. 528.

n. In New York, the code of 1848 regulated the limitations of actions on judgments recovered subsequently to the time when it came into operation, the period of limitation being twenty years: *Delavan v. Florence*, 9 Abb. Pr. 277, note. An interesting and instructive opinion both on the construction and effect of the New York Code of Civil Procedure is contained in *Gray v. Seeber*, 53 Hun. 611, 17 Civ. Proc. R. 327, 6 N. Y. Supp. 802, 917. Section 376 provides that a judgment for a sum of money rendered in a court of record is presumed to be paid and satisfied after the expiration of twenty years. Section 378 provides that a party may avail himself of the provisions of section 376 by alleging that the action was not commenced within the time limited. Section 388 provides that an action, the limitation of which is not specifically prescribed, must be commenced within ten years from the accrual of the cause of action. The question presented was whether section 376 was to be regarded as a statute of limitation specially applicable to actions on such judgments within section 388. The chapter in which the sections were contained was headed "Limitation of the time of enforcing a civil remedy." In the opinion Mr. Justice Martin delivered is to be found the following epitome of the law: "When this whole statute is examined, and its language and purpose considered, it becomes quite manifest that the legislature regarded section 376 as prescribing a special limitation in actions upon such judgments. It is said there is a clear distinction between a presumption of payment and a statute of limitation. As an abstract proposition, that statement may be correct. It is doubtless true that there may be presumptions of payment which are not statutes of limitation, but it does not follow that a presumption of payment created by statute may not constitute a statutory limitation of the time within which an action may be maintained. That a statute like the one under consideration which creates an artificial and conclusive presumption of the payment and satisfaction of a debt is in effect a statute of limitation cannot, we think, be successfully denied. A statute which declares that a judgment shall be conclusively presumed to be paid and satisfied after the expiration of twenty years as effectually bars the remedy to enforce it, and as absolutely limits the time within which a recovery may be had thereon, as would a statute which provided that no action would be maintained thereon unless brought within that time."

As the statute of limitations against actions on judgments contained in the code affects the remedy and not the debt, the remedy must be pursued under existing statutes, and therefore the present code applies to judgments entered before it took effect: *In re War-*

ner, 39 App. Div. 91, 56 N. Y. Supp. 585. Supplementary proceedings are not an action on a judgment within Code of Civil Procedure, section 382, subdivision 7: *Green v. Hauser*, 18 Civ. Proc. R. 354, 9 N. Y. Supp. 660.

The Code of Civil Procedure, section 1252, provides for the enforcement of a judgment against a debtor's lands after ten years on filing a notice with the clerk as a *lis pendens*, to which the debtor or his heir or devisee is a party, and the rights of creditors proceeding under this section are unaffected by sections 1379-1381, limiting the time within which executions may be issued: *Atlas Refining Co. v. Smith*, 52 App. Div. 109, 64 N. Y. Supp. 1044, 31 Civ. Proc. R. 12. An action brought under section 1937, Code of Civil Procedure, to charge property of a judgment debtor sued originally eighteen years previously, jointly with another, but not served with process, is barred by section 388 of the same code, which gives a ten years' limit for actions not specially provided for, within which category this action fell: *Hofferberth v. Nash*, 191 N. Y. 446, 84 N. E. 400.

o. In North Carolina, the statutory time against actions founded on justice's judgments is seven years, and the statute was held to apply to an action brought against a surety on the judgment. It appears that after a judgment was rendered against the defendant, an application to stay execution was made by the defendant, and the words "stayed by," signed by the surety, were added at the foot of the judgment and attested by the justice. Such suretyship was said to be tantamount to a judgment, and the contention of the surety, when action was brought on his undertaking, that it was an action on his contract was not sustained: *Barringer v. Allison*, 78 N. C. 79. A useful authority for the dictum that "such suretyship" is tantamount to a judgment, because execution may issue upon it against the surety, is to be found in *Humphreys v. Buie*, 12 N. C. 378. A judgment rendered in 1870, though upon a debt contracted before 1868, is subject to the provisions of the code as to the time of commencing action, whenever such judgment becomes itself a *causa litis*: *McDonald v. Dickson*, 85 N. C. 248. An example of where an action on such a judgment was held to be a new *causa litis* is given in *Dickson v. Crawley*, 112 N. C. 629, 17 S. E. 158. A judgment was obtained against an administrator of a decedent and his surety prior to the adoption of the code, and the judgment as to the surety was final; an action upon it was held to be a new *causa litis*, and was subject to the limitations prescribed by the code.

p. In North Dakota, the Revised Code of 1899, section 5500, provides that a judgment may be enforced by execution at any time within ten years after entry; but a judgment cannot be properly enforced by execution issued after such time, although the judgment debtor has been continuously absent from the state during such period, and the judgment remains in force for that reason: *Weisbocker v. Cahn*, 14 N. D. 390, 104 N. W. 513. Under the same section time runs from the date of the judgment in the justice's court and not from the date of the transcript lodged in the district court: *Holton v. Sehmarback*, 15 N. D. 38, 106 N. W. 36; *Acme Harvester Co. v. McGill*, 15 N. D. 116, 106 N. W. 563.

q. In Ohio, the act of February 18, 1831, provided "that all actions hereinafter mentioned shall be commenced within the several times hereinafter limited after the cause of such action shall have

accrued," and the statute enumerates the various kinds of actions, the time to sue upon which it was intended to limit. Judgments or debts of record are not specified among the listed causes of action, and could only be catalogued under the heading of "actions upon the case, covenant and debt, founded upon a specialty." While the court held that a foreign judgment might be included under the head of specialty, it said a domestic judgment could not be so classified. A domestic judgment is much more—it is a lien upon lands; and upon it can be exercised all the executory remedies given by the law to procure full satisfaction, and therefore an action on a personal judgment, which was procured more than fifteen years before commencement of the action, and which had not been revived, might be maintained just as at common law: *Tyler's Exrs. v. Winslow*, 15 Ohio St. 364, followed in *Graham v. Simon*, 76 Ohio St. 77, 81 N. E. 170, which laid down further that an action to recover upon a judgment may be brought at any time within twenty-one years, which is the limitation expressly imposed by section 5368 of the Revised Statutes of 1892 upon an action to revive a judgment.

r. In *Oklahoma*, Mansfield's Digest, section 4103, limits the time to five years within which executions may issue in commissioners' courts; but such section is no limitation to an action on the judgment: *Reaves v. Turner*, 20 Okl. 492, 94 Pac. 543.

s. In *Pennsylvania*, the act of May 19, 1887, provides that execution may issue within twenty years after judgment, and that a scire facias shall be issued at the same time to revive the judgment. The act of June, 1887, provides that all judgments shall continue a lien for five years after entry, unless revived by agreement or scire facias. The construction of these sections is that they destroy the lien of a judgment which has not been revived, but that the life of the judgment itself is twenty years and not five, and that at any time in the twenty years scire facias may be had to revive the judgment: *Davis v. Davis*, 174 Fed. 786.

t. In *South Dakota*, under Justice Code, section 81, and the Code of Civil Procedure, sections 325, 329, limiting the time of issuance of execution to five years, time runs from the date of the judgment and not from the date of filing a transcript in the circuit court: *Phillips v. Norton*, 18 S. D. 530, 101 N. W. 727. In delivering this opinion the court cited *Freeman on Executions*, section 14: "This does not transform the original judgment into a judgment of the higher court except for the purpose of issuing and controlling execution. . . . The filing of the transcript does not prolong the life of the original judgment. The time at which the right to execution will expire must be computed from the rendition of the judgment and not from the filing of the transcript."

u. In *Virginia*, prior to the code of 1860, the law was that where execution issued and no return was made thereon, the party in whose favor the same was issued might obtain other executions for ten years from the date of the judgment and not after. No limitation was placed on an action of debt upon the judgment, and a party was not barred from maintaining such an action after the ten years had expired: *Herrington v. Harkins' Admrs.*, 1 Rob. 591.

Under the code of 1860, chapter 186, sections 12 and 13, a judgment is barred after ten years from the return day of an execution on which there is no return, but, where there is a return, the limita-

tion is twenty years. A return which stated that it was by order of the attorney for the execution plaintiff was sufficient to bring it within the twenty years limit: *Rowe's Admr. v. Hardy's Admr.*, 97 Va. 674, 75 Am. St. Rep. 811, 34 S. E. 625. In the computation of time, that period between the order directing collection of part of the moneys claimed until further order and such further order is properly deducted from the statutory period of limitation: *Davis v. Roller*, 106 Va. 46, 117 Am. St. Rep. 977, 55 S. E. 4.

v. In Washington, Ballinger's Annotated Codes and Statutes, section 5149, provides that no suit or action shall ever be had on any judgment rendered in that state, whereby the lien or duration of the judgment shall be continued in force for longer than six years from the entry of the original judgment. Section 4798 permits actions on judgments within six years. These sections have been held not to prohibit actions on domestic judgments, their construction being that the lien shall not be extended longer than the six years: *Lilly-Brackett Co. v. Sonnemann*, 50 Wash. 487, 97 Pac. 505

w. In West Virginia, the statute of limitations on an action on a judgment is not prevented from operating by the fact that the defendant, having departed from the state after the accrual of the original cause of action and before the judgment, could not successfully plead the statute against the suit thereon. That cause merged in the judgment, and cannot be regarded as being the subject matter of a suit on such judgment: *Fisher's Exrs. v. Hartley*, 48 W. Va. 339, 86 Am. St. Rep. 39, 37 S. E. 578, 54 L. R. A. 215.

x. In Wisconsin, the Revised Statutes, section 2968, provides that in no case shall an execution be issued upon a judgment after twenty years from the rendition thereof, and section 2900, dealing with transcripts, provides that no execution be issued on such transcript judgment after the expiration of the period of the lien thereof on real estate, viz., ten years from its rendition. These two sections were held to be not inconsistent, the former being negative and prohibiting rights on the original judgment after twenty years; the latter a qualified right on the transcribed judgment only: *McCormick v. Ryan*, 106 Wis. 209, 82 N. W. 137.

III. Effect on the Right to Issue Execution.

Having shown the effect of the statutes of limitation on judgments, more particularly with regard to actions upon them, we come now to consider what effect, if any, they have on the right of the judgment creditor to pursue his remedy on the original judgment by issuing execution. In this consideration the common-law rule of issuance within a year and a day is excluded. Nor need we here discuss the necessity of applying for the writ of *scire facias*. We address ourselves rather to the question suggested by Mr. Freeman when he says: "Independently of any express limitation upon the time within which execution may be issued, the question must occasionally be presented whether there is not an implied limitation arising from the operation against the judgment of the statute of limitations."

The opinions of the courts of the several states differ, but in some it is held that where the statute contains different sections, one limiting the time within which an action could be brought on the judgment and one the limit within which an execution might issue, there is no necessary relation between the two sections, and where the action on the judgment was limited to ten years and the right to

issue an execution to five years, and the action on the judgment was brought after five years, the plea of the five years limitation on execution was unavailing. An important factor in the problem is that a payment or part satisfaction would remove the bar of the statute of limitations, but would not extend the time for issuing execution: *Hicks v. Brown*, 38 Ark. 469; *Atlas Refining Co. v. Smith*, 52 App. Div. 109, 64 N. Y. Supp. 1044, 31 Civ. Proc. R. 12. One of the latest opinions on the point is to be found in *Reaves v. Turner*, 20 Okl. 492, 94 Pac. 543, to the effect that under *Mansfield's Digest*, section 4103 (*Ind. Ter. Ann. Stats.*, sec. 2783), limiting the time to five years within which execution may issue in commissioners' courts, that term is no limitation to an action on the judgment.

While there does not appear any decided case wherein the converse set of facts is contained, it is a fair corollary to the last-named case to suggest that if in that case the action on the judgment had been limited to five years and the right to issue execution to ten years, and the judgment creditor had issued execution in the sixth year, he could not have been restrained. According to Mr. Justice Harrison, in the case last quoted, the section limiting the action on the judgment is not required to be construed in *pari materia* with the one fixing the period within which execution may issue. This is practically the conclusion reached in *Davidson v. Simmons*, 11 Bush, 330, where, after stating the existence of two such sections, one limiting execution and the other actions on judgments, the court said that the statute did not provide that a judgment should be barred by the lapse of fifteen years without an execution having issued thereon. It only provided that no execution should issue, and left any right of action the plaintiff may have had undisturbed.

In other states, again, the opposite view has been taken that execution cannot be issued, and levies made after the right of action is barred. This conclusion rests on the reason that when the judgment is dead, no action can be taken to revive it: *Jerome v. Williams*, 13 Mich. 521; *Parsons v. Circuit Judge*, 37 Mich. 287; *Ludeman v. Hirth*, 96 Mich. 17, 35 Am. St. Rep. 588, 55 N. W. 449.

The weight of authority seems to be that the border line of the extreme limits of time may be crossed if a proceeding is begun before the last day and continued over and beyond it—that an execution issued and levied before, may be completed by sale after, the expiring of the limitation period. Mr. Justice Evant, in the opinion in *Ludeman v. Hirth*, 96 Mich. 17, 35 Am. St. Rep. 588, 55 N. W. 449, says: "We think that when any proceedings authorized by law to enforce the lien are instituted before the right of action upon the judgment is barred, they are valid, and the sale in pursuance thereof legal. . . . In the present case proceedings for sale were commenced before the right to bring suit upon the judgment had expired by limitation, but the sale took place after it had expired."

The effect of these and other varying decisions appears, however, to be that when the time within which executions may issue is determined by the statute, that time governs irrespective of any other provision relating to the renewal of the judgment, either for purposes of enforcing a lien or otherwise, and we are left very much in the condition described in the excerpt by Mr. Freeman (*ante*, p. 62), viz., that while the limitation of the remedy by action does not imply the limitation of the remedy by execution is a logically

sound position, and that executions may issue to enforce judgments barred by the statute, there is nevertheless a persuasive weight of cases deciding that the statute extinguishes the judgment. What better argument could be adduced to support action for a uniform construction of provisions important in themselves by reason of their universal adoption and necessity. Furthermore, when the statutory period after which an action cannot be commenced and maintained to recover property adversely held has elapsed, prescriptive title has been created, or rather title has passed from the former owner to the adverse possessor, and this being the case, it does not seem reasonable to assume that it may become revested in the former owner merely by taking out execution under a judgment rendered so long before the issuing of the executions as to give time to create title by prescription. Nevertheless, section 685, Code of Civil Procedure of California, by providing that "in all cases, the judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of the court, upon motion, or judgment for that purpose founded upon supplemental pleadings; but nothing in this section shall be construed to revive a judgment for the recovery of money which shall have been barred by limitation at the time of the passage of this act," seems to imply that a court may in its discretion enforce any judgment other than for the recovery of money rendered before the date of such amendment, viz., 1872, and if rendered after that date may enforce judgments by execution, irrespective of their character.

IV. From When Time Runs.

The accrual of the cause of action seems now to have been ascertained by the best decisions with some degree of certainty. The question, "When does the statute of limitations barring actions upon judgments commence to run—from the date of the entry of the judgment or from the date when the judgment has become a final determination of the controverted matters between the parties litigant?" has found exhaustive answer in *Feeney v. Hineckley*, 134 Cal. 467, 86 Am. St. Rep. 290, 66 Pac. 580, and as it reversed the judgment in 64 Pac. 408, and in the opinion considered the latest and best reasoning on the subject, the answer it afforded the question above may be taken as the latest and safest interpretation of the law thereon. Assuming that in the majority of the states, as it in fact does, legislation exists marking the period of limitation of actions on judgments, the terminology, as so often happens, furnishes the solution to most of the difficulties.

A judgment becomes a finality when the rights of the parties are fixed by it; when it is admissible in evidence for or against either of them—when, in short, a cause of action has accrued upon it and it has become the final determination of the parties in an action or proceeding.

In the case referred to it was presented to the court in the guise of an action brought to recover an unpaid balance due upon a judgment. It was commenced more than five years and less than six years after the entry of the judgment. The Code of Civil Procedure of California, section 336, provides that an action must be brought upon a judgment within five years, and at the time of the entry of the judgment the law permitted one year during which the losing party might prosecute his appeal. Section 1049 declares an action

to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied. In *Gilmore v. American Cent. Ins. Co.*, 65 Cal. 63, 2 Pac. 882, it is said: "Until litigation on the merits is ended, there is no finality to the judgment in the sense of a final determination of the rights of the parties, although it may have become final for the purpose of an appeal from it"; and in the same case it is said that judgments become final only, in the sense of the stipulation, when the time to move for a new trial and to appeal therefrom has elapsed, and no motion is made and no appeal taken. The case of *Harris v. Barnhart*, 97 Cal. 546, 32 Pac. 589, lays it down that until the time for appeal has expired, if the judgment has not been sooner satisfied, the action is, under section 1049 of the code, to be deemed as pending. To the same effect are *Naftzger v. Gregg*, 99 Cal. 83, 37 Am. St. Rep. 23, 33 Pac. 757, and *In re Blythe*, 99 Cal. 472, 34 Pac. 108.

"Until final judgment is reached, the proceedings are subject to change and modification, are imperfect and inchoate, and can avail nothing as a bar, or as evidence, until the judgment with its verity as a record settles finally and conclusively the questions at issue"; and "whenever it fails to fix and determine the ultimate rights of the parties; whenever it leaves room for a final decision yet to be made, it is not admissible in another action, for the plain reason that it has finally decided and settled nothing. Until the judgment comes, no man can know what the ultimate decision will be": *Webb v. Buckelew*, 82 N. Y. 555.

The same reasoning will be found in *Story v. Story & Isham C. Co.*, 100 Cal. 41, 34 Pac. 675, in *Brown v. Campbell*, 100 Cal. 635, 38 Am. St. Rep. 314, 35 Pac. 433, *Cook v. Rice*, 91 Cal. 664, 27 Pac. 1081, and *Harrier v. Bassford*, 145 Cal. 529, 78 Pac. 1038.

In *Trenouth v. Farrington*, 54 Cal. 273, and *Herrlich v. McDonald*, 104 Cal. 551, 38 Pac. 360, the decisions were not directed to this particular point. Those cases dealt with the question, When is a judgment a judgment? that is, whether at time of entry or of pronouncement. Incidentally it was decided that it is the entry of the judgment that gives it life.

The statute, therefore, begins to run only when the right of action has accrued—that is to say, after final determination on appeal, in the event that an appeal has been taken, or after the passage of the time in which an appeal might be taken in the event that none has been: *Feeney v. Hinckley*, 134 Cal. 467, 86 Am. St. Rep. 290, 66 Pac. 580. The time within which an execution may issue is counted in the time necessary to bar an action on the judgment: *McConnico v. Stallworth*, 43 Ala. 389; and in the case of a judgment by default it runs from the entry of the judgment and not from the entry of the default: *Edwards v. Hellings*, 103 Cal. 204, 37 Pac. 218.

In Illinois, where there is no saving clause in the statute, a judgment was rendered in the circuit court on May 17, 1856, and the court adjourned for the term June 4, 1856. An appeal bond was filed June 28, 1856, and on the ground that until that date the judgment was final and of full force and effect, it was held that the statute commenced to run, and once having begun, nothing could interrupt it until it became a complete bar, and it therefore dated from the last day of term, and not from the result of the appeal: *Peoria County v. Gordon*, 82 Ill. 435.

In Iowa, the interpretation of sections 2521, 2541 of the code has led to a unique result. The former section provides that no action shall be brought on any judgment within fifteen years after its rendition, without leave of the court, for good cause shown, unless the record thereof is lost or destroyed, and the latter section declares that when the commencement of an action shall be stayed by statute, the time of such stay shall not be a part of the time limited for the commencement of the action. The court construed these sections as meaning that as an action could not be commenced until fifteen years after judgment, the statute of limitations did not begin to run until the time the action could be brought, viz., fifteen years from the date of the judgment: *Weiser v. McDowell*, 93 Iowa, 772, 61 N. W. 1094.

In Louisiana, where the law requires a separate action to be brought in the case of a domestic judgment where the debtor has died after judgment, the statute begins to run not from the date of the judgment, but from the death of the debtor: *Succession of Beckham*, 16 La. Ann. 352.

In Pennsylvania, where the judgment is for a sum "to be ascertained by the prothonotary," the statute has been held to run from the date of the prothonotary fixing the amount: *Wills v. Gibson*, 7 Pa. 154. In the District of Columbia the act of limitation is the old Maryland statute of 1715, chapter 23, section 6, and expressly limits actions on judgments "above twelve years' standing." Time was there held to run from the signing of judgment, or from the time when process of execution could have legally issued on the judgment: *Galt v. Todd*, 5 App. D. C. 350.

In Nebraska the statute was held to run against the assignee of a judgment in favor of the state from the time of the assignment: *Predohl v. O'Sullivan*, 59 Neb. 311, 80 N. W. 903.

In North Carolina, where a judgment in foreclosure was final as to the amount awarded but was "retained for further directions," time was held to run from the date of the original order, irrespective of when the further directions were given: *McCaskill v. McKinnon*, 121 N. C. 192, 61 Am. St. Rep. 659, 28 S. E. 265, and this was followed in *Williams v. McFadyen's Admr.*, 145 N. C. 156, 59 S. E. 1005.

In Texas the statute of limitation of ten years applies to actions upon judgments, and such actions are not barred until the lapse of that time period after the issue of the last execution thereon: *Stevens v. Stone*, 94 Tex. 415, 86 Am. St. Rep. 861, 60 S. W. 959.

In Vermont a levy upon personal property operates as a satisfaction of the judgment for the time being and suspends the right of action. Hence, in computing the time in which an action may be maintained upon a judgment, the period while the right of action was suspended by the levy of an execution must be excluded. But an action upon a judgment is not suspended while an execution thereon remains undisposed of: *Thatcher v. Lyons*, 70 Vt. 438, 67 Am. St. Rep. 677, 41 Atl. 428.

In Washington the limitation of actions upon judgments is six years, and it was held that a deficiency judgment in a foreclosure suit being within the six years, though the original order for foreclosure was without, was outside of the limitation, and could be successfully pursued: *Bignold v. Carr*, 24 Wash. 413, 64 Pac. 519. The statute commences to run on a domestic judgment as soon as

it is rendered and not after the expiration of the time during which execution might issue: *Citizens' National Bank v. Lucas*, 26 Wash. 417, 90 Am. St. Rep. 748, 67 Pac. 252, 56 L. R. A. 812.

In the United States courts, in the case of *Borer v. Chapman*, 119 U. S. 587, 7 Sup. Ct. Rep. 342, 30 L. ed. 532, the time when the statute runs on a *nunc pro tunc* judgment was very fully discussed and settled to be from the rendition of the judgment and not from some anterior date to which it related. A judgment in revivor in *scire facias* shifts the date of the statute running from the original judgment to the one in revivor: *Walsh v. Bosse*, 16 Mo. App. 231; and this view is upheld in several decisions, the only contrary one being *Meek v. Meek*, 45 Iowa, 294.

V. Docketing Justices' Judgments.

As the principle underlying the law of *scire facias*, revivor and renewal of judgments is that the diligence of the judgment creditor should rebut the presumption of payment, it has been used to support the proposition that filing a transcript of the judgment obtained in a justice's court should be accounted such an act of financial industry as to warrant the reward of recognition of his rights from the date of such act, and that the statute should commence to run against him only from that date. In our opinion, subdivision I, page 63, we have indicated that such should not be the law, notwithstanding the proceeding evinces at least as earnest a desire to keep the judgment alive as the issuance of an execution; and our advocacy of uniformity could hardly find a more staunch support than the weighty arguments for and against the proposition.

In Arkansas, in *Burr v. Engles*, 24 Ark. 283, where the precise point was raised, Mr. Justice Clendinen said: "The filing of the transcript, we have no doubt, was intended by the legislature to be in the nature of a judgment of a circuit court, and took effect from the day of its filing; and was governed by the same limitation that judgments of the circuit court would be governed by"; and the court accordingly ruled the statute began to run from the date the transcribed judgment was filed. In support of this opinion is *Spencer v. Wait*, 9 Civ. Proc. R. (N. Y.) 93, wherein Mr. Justice Boardman says: "The judgment, when docketed in the county clerk's office, became a judgment of the county court—a court of record. . . . The action was not, therefore, barred by the statute of limitation applicable to judgments in justices' courts"; and almost the same language is employed in *Sullivan v. Mills*, 117 Wis. 576, 94 N. W. 298; and this has been followed also in *Lewis Co. v. Adamski*, 131 Wis. 311, 111 N. W. 495, with this qualification, that though the judgment became that of the court of record, the right to issue execution upon it expired when the lien created by its rendition in the lower court expired—a named period of ten years from the date of the original judgment. It has also been followed in *Miller v. Rosebrook*, 136 Iowa, 153, 113 N. W. 771; and the same point was taken in *Brown v. Bell*, 46 Colo. 163, ante, p. 54, 103 Pac. 380, 23 L. R. A., N. S., 1096, and Mr. Justice Musser said: "Without deciding, it will be assumed, for the purposes of this case, that the appellant is right, and that the judgment was still a judgment of the justice of the peace, and not of the district court, when the execution issued."

But in *Michigan*, in *Wilcox v. Lantz*, 107 Mich. 1, 64 N. W. 735, followed in *Cole v. Potter*, 135 Mich. 326, 106 Am. St. Rep. 398, 97 N. W. 744. McGrath, C. J., on the same point says: "The statute does not contemplate the rendition of a judgment by the clerk. It simply clothes the judgment so recorded with the force and effect of a judgment rendered in the circuit. It is by virtue of the filing of the transcript and the entry and docket or record that the judgment is given certain effect. . . . The statute operates upon a pre-existing adjudication, and does not contemplate a new rendition." In *Weimeister v. Singer*, 44 Mich. 406, 6 N. W. 858, it is said: "It would be an abuse of terms to call it a judgment rendered in the circuit court."

And the array of authorities in favor of the docketing of the transcript transforming it into a new judgment includes the luminous opinion of Mr. Justice Earl in *Dieffenbach v. Roch*, 112 N. Y. 621, 20 N. E. 560, 2 L. R. A. 829, that such a transcribed judgment is a statutory judgment of the court of record, but one not rendered there so as to avoid the effect of such statute of limitations as was applicable to judgments in justices' courts.

To the same effect are *In re Warner*, 30 App. Div. 91, 56 N. Y. Supp. 585, *Daniel v. Laughlin*, 87 N. C. 433, and *Adams v. Guy* (N. C.), 10 S. E. 1102, notwithstanding the North Carolina statute providing for such transcripts being docketed says that thereafter the transcribed judgment "shall be a judgment of the superior court in all respects."

VI. Circumstances Tolling the Statute.

The efficacy of pleading the statute is often challenged by showing its want of application to the proceeding under review, by reason either of the nature of the action or the occurrence of some event which prevents the adoption of its provisions. For instance, while the cause of action on a contract may be revived by a written admission that the debt is unpaid, it was unsuccessfully contended that a domestic judgment in an action founded on contract was also revived on such an admission. It was properly held otherwise, and that the court would not look beyond the judgment to ascertain on what it was founded: *Niblack v. Goodman*, 67 Ind. 174; *Favrot v. Bates*, *McGloin* (La.), 130; *Berkson v. Cox*, 73 Miss. 339, 55 Am. St. Rep. 539, 18 South. 934; *Taylor v. Spivey*, 33 N. C. 427; *McAleer v. Clay County*, 38 Fed. 707. Execution issued and returned unsatisfied within the statutory period is no answer to the plea of the statute of limitations where the statute expressly limits the period to a given number of years from the date of the judgment: *King v. Manville*, 29 Ind. 134. The opposite view held in *Butts v. Patton*, 33 N. C. 262, and *Fessenden v. Barrett*, 9 Tex. 475, and *Graves v. Hall*, 13 Tex. 379, is explained by the fact that at that time there was no express limitation in the statutes of those states. Where it is expressly provided in the statute that a lien shall continue for a given number of years if the plaintiff issues execution within twelve months of the judgment, and the plaintiff issued his execution and followed it with alias writs at longer intervals than a year, the plea of the statute was successfully met, and he was entitled to enforce the vendor's lien given him by the statute without reissuing his execution every twelve months: *Wilcox v. First Nat. Bank*, 93 Tex. 322, 55 S. W. 317.

Where the code section provided that in computing the ten years under the statute relating to judgments the "time during which the right to sue out execution on the judgment is suspended by the terms thereof, or by legal process, shall be omitted," the filing of a bill praying that the land of the debtor should be subjected to the payment of the judgment debt, which bill was simply dismissed, did not suspend the right to sue out execution referred to in the statute: *Dabney v. Shelton*, 82 Va. 349, 4 S. E. 605. Nor is the commencement of an action upon the judgment stayed within the meaning of section 5215, Revised Codes, during the time the judgment creditor is required to obtain leave of the court in order to bring suit thereon: *Osburne v. Lindstrom*, 9 N. D. 1, 81 Am. St. Rep. 516, 81 N. W. 72, 46 L. R. A. 715.

An action on a judgment is a cumulative mode of securing satisfaction of it, and does not suspend the right to have succession execution issued upon it, nor does it prevent the statute of limitations from running: *Swafford v. Howard*, 20 Ky. Law Rep. 1793, 50 S. W. 43. And issuance of a writ of garnishment does not interfere with the statute's currency: *Shields v. Stark* (Tex. Civ. App.), 51 S. W. 540.

LEONARD v. REED.

[46 Colo. 307, 104 Pac. 410.]

CONSTITUTIONAL LAW—Interstate Commerce—Taxation.—

Congress has the sole power to regulate commerce among the several states, and therefore interstate commerce cannot be taxed by a state. (p. 79.)

CONSTITUTIONAL LAW.—The Itinerant Venders' Act,

which imposes a license fee for conducting business upon anyone except commercial travelers who temporarily sell merchandise, and does not impose any fee upon the permanent seller thereof, is such a tax upon nonresidents bringing goods into the state as renders it invalid. (p. 79.)

CONSTITUTIONAL LAW—Taxation.—Classification Which is Natural and Reasonable is valid; that which is arbitrary and capricious is not. (p. 80.)

CONSTITUTIONAL LAW — Taxation — Citizens of Other States.—The federal constitution, article 41, section 2, does not permit a state statute which charges a license fee for conducting temporary business on the citizen of another state, while it allows those of its own state in permanent business to go free, and such a statute is invalid for attempting to confer privileges and immunities on its own residents which it denies to those of other states. (p. 80.)

CONSTITUTIONAL LAW—State License Fee—Uniformity.—

A state may require a license to engage in business, but such license must be uniform and not discriminate in favor of one class and against another. (p. 81.)

CONSTITUTIONAL LAW—Double Taxation.—The revenue act of 1903 has the effect of imposing double taxation once on the merchandise itself and again if part of it is moved into another county, and is therefore void. (p. 81.)

CONSTITUTIONAL LAW.—Uniformity in Taxing Implies Equality in the burden of taxation, and all taxes must be uniform on the same class of property within the jurisdiction of the authority levying them. (p. 83.)

CONSTITUTIONAL LAW—Uniformity.—A law which imposes a tax upon goods brought into a county for temporary lodgment and sale, but relieves those which are not for sale, is void for discrimination violating the Colorado state constitution, article 10, section 3. (p. 83.)

CONSTITUTIONAL LAW—Uniformity.—A law which imposes a tax upon goods sold from a storeroom but relieves those which are not, like horses and cattle, is void as violating the Colorado state constitution, article 10, section 3. (p. 83.)

TAX MONEY PAID UNDER PROTEST.—When a Tax has been paid under protest, and such tax is illegal, the taxpayer may recover it by action. (p. 83.)

R. L. Chambers, for the plaintiff in error.

R. L. Holland, for the defendant in error.

308 GABBERT, J. The sole question presented for our determination is the constitutionality of the itinerant vendors' act. Session Laws of 1905, page 274, and an act entitled "Revenue," chapter 157, acts of 1903, 408.

Leonard paid the license fee exacted by the itinerant vendors' act, and also the tax levied upon his property under the provisions of chapter 157 of the acts of 1903. Thereafter an agreed case was submitted to the district court, the purpose of which was to determine whether he was entitled to recover the fee and tax so paid. From the facts agreed upon in the trial court, so far as necessary to consider in determining the constitutionality of the acts in question, it appears that, in the summer of 1905, Leonard was a citizen of the United States, a nonresident of the state of Colorado, and that his place of residence was Pasadena, California; that he was then engaged in selling manufactured goods, wares and merchandise in a storeroom rented by him for that purpose in the city of Colorado Springs; that the occupation of such room was temporary, and without intention to engage in permanent trade therein; that his stock of merchandise consisted of articles brought into this state; and that Reed, county clerk and recorder of El Paso county, demanded of him, as a license for the privilege of conducting his business, the sum of two hundred and fifty dollars, which was paid to Reed under protest. It further appears that Leonard brought his stock of merchandise into El Paso county and state of Colorado subsequent to May 1, 1905; that, pursuant to the revenue act involved, a tax in the sum of forty-one dollars and nine cents was assessed against this stock, which sum he paid to the county treasurer of El Paso county under protest. September 30, 1905, judgment was rendered in

309 favor of the defendants, Reed et al., from which the plaintiff appealed.

We have no jurisdiction to entertain the appeal (Civil Code, sec. 388), but, by virtue of the provisions of section 388a, Civil Code, we have directed the clerk to enter the action as pending on writ of error. Were it not for the fact that appellees have entered an appearance, we would be compelled, on the authority of *Brady v. People*, 45 Colo. 364, 101 Pac. 340, to dismiss the appeal, and refuse to consider it on error.

The term, "itinerant vender," as defined by the itinerant venders' act, includes any person who engages in either a temporary or transient business in this state, in one locality or by traveling from place to place selling merchandise, and also "those who, for the purpose of carrying on their temporary or transient business, hire, lease or occupy a building, structure, tent, car, boat, vehicle, storeroom or place of any kind for the exhibition and sale of any manufactured goods, wares or merchandise." The succeeding section declares that the act shall not apply to commercial travelers or agents selling to merchants in the usual course of business. This act was under consideration in *Smith v. Farr*, 46 Colo. 364, 104 Pac. 401, wherein we held that the constitution of the United States confers upon Congress the sole power to regulate commerce among the several states, and, therefore, interstate commerce cannot be taxed by a state. We also held that, as applied to the facts of that case, the law was invalid, for the reason that it was nothing more or less than the imposition of a tax upon nonresidents bringing merchandise into the state for the privilege of selling to the consumer. Such is the effect of the law in the case at bar. Plaintiff in error is required to pay the license fee exacted for the privilege of disposing of his merchandise **310** at a storeroom because he temporarily occupies it without the intention of engaging in permanent trade at that place. His temporary occupation results from the fact that he is a non-resident, bringing with him from a sister state articles of merchandise which he seeks to dispose of to those purchasing for their own use. A resident merchant, permanently engaged in selling the same class of merchandise at a storeroom in Colorado Springs, is exempted from the payment of such license. This imposes a burden upon the nonresident coming to the state for the purpose of engaging in commerce by requiring him to pay for the privilege of selling articles of merchandise brought with or sent to him from the outside, from which the resident, permanently engaged in business, is exempted. That it is not a tax imposed upon the merchandise of plaintiff because it had become a part of the general mass of the property of the state is manifest from

the fact that, in addition to the license fee exacted, the act of 1903, *supra*, provides for the levy of a tax, and under which a tax was, in fact, levied in addition to the license fee exacted, the validity of which we shall consider later. The existence of this provision serves to strengthen our conclusion in *Smith v. Farr*, 46 Colo. 364, 104 Pac. 401, wherein it was stated, as applied to the facts of that case: "The license exacted is nothing more or less than a tax imposed upon outside manufacturers for the privilege of selling their products in this state direct to the consumer, for the reason that manufacturers within the state are relieved from that burden."

The fourteenth amendment to the federal constitution provides: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ³¹¹ nor deny to any person within its jurisdiction the equal protection of the laws." The act exempts from its operation commercial travelers or agents selling to merchants in the usual course of business. This is a discrimination without any reason. An itinerant vender, as defined by the act, could maintain a temporary place of business next door to plaintiff, and engage in selling the same character of merchandise to merchants, without paying a license fee. A burden is thus imposed upon one itinerant vender from which another is exempt. We can see no reason why one temporarily occupying a storeroom and selling to merchants may do so without paying a license fee, while another, who sells the same article, from his temporary place of business, to the consumer, must pay that fee. Classification which is natural and reasonable is valid; that which is arbitrary and capricious is not. In short, as we held in *Smith v. Farr*, 46 Colo. 364, 104 Pac. 401, under the statute one may enjoy a right which is denied another, within the same jurisdiction in like circumstances, and for that reason the statute is obnoxious to the fourteenth amendment to the federal constitution.

The federal constitution further provides: "The citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several states": Sec. 2, art. 4. The statute under consideration clearly violates this provision. When analyzed for results, we find that the citizen of another state who comes to Colorado to temporarily engage in the sale of merchandise in a storeroom temporarily occupied, without the intention of engaging in permanent trade in such place, is required to pay a license fee, while a resident merchant next door, occupying his place of business permanently ³¹² and engaged in selling the same character of merchandise, is not required to pay that fee. So that it is manifest the statute attempts to confer privileges and immunities upon its own residents which it denies to those of other states.

A state may require a license to engage in business, but such license must be uniform and not discriminate in favor of one class and against another, nor in favor of its own citizens as against those of other states, or require a license which will constitute a regulation of interstate commerce, and a statute not uniform in its operation, but in favor of one and against another, although each is engaged in the same business and vending the same character of articles in a similar way, is unconstitutional: *Ames v. People*, 25 Colo. 508, 55 Pac. 725. On the authority of that case, and *Smith v. Farr*, 46 Colo. 364, 104 Pac. 401, plaintiff was entitled to judgment for the license fee paid.

The revenue act of 1903 is entitled: "An act to subject stocks of goods, wares or merchandise entering any county subsequent to the first day of May, in any year, for temporary lodgment and sale to the taxes imposed upon permanent stocks of the same character and providing methods of collecting the same." Section 1 is as follows: "Whenever any person, firm or corporation shall, subsequent to the first day of May of any year, bring or send into any county any stock of goods or merchandise to be sold or disposed of in a place of business temporarily occupied for their sale without the intention of engaging in permanent trade in such place, the owner, consignee or person in charge of said goods or merchandise, shall immediately notify the county assessor, and thereupon the assessor shall at once proceed to value the said stock of goods and merchandise at its true value, and upon such valuation the said ³¹³ owner, consignee or person in charge shall pay to the collector of taxes a tax at the rate assessed for state, county and local purposes in the district in the year then current."

From a literal reading of the statute it imposes double taxation. This the law does not authorize nor permit: *People v. Ohio & M. R. Ry. Co.*, 96 Ill. 411; *County Commrs. v. Wilson*, 15 Colo. 90, 24 Pac. 563. The act, however, if enforced, would result in double taxation. Its purpose, as deduced by its title, is to subject a stock of merchandise brought into any county subsequent to the first day of May in any year, for temporary lodgment and sale, to the tax imposed upon permanent stocks of the same character. The statute provides for carrying out this purpose. Let us consider the results which would follow the enforcement of the statute. A merchant doing business in the city of Denver has returned, for the purpose of assessment, the average value of his stock of merchandise, for the year preceding April 1st, as required by our general revenue act. Upon such valuation the taxing authorities of the city and county of Denver will levy a tax which the owner will be required to pay. If, subsequent to the date of making his return, and after the first day of May of the year such return was made, he removes the stock he

had on hand April 1st, or a part thereof, to the city of Colorado Springs, he would be required to pay another tax for state, county and local purposes equal to that assessed upon similar stocks of like value in that city. Or, take the case of a merchant engaged in business in the city of Denver, who concludes to temporarily enlarge his business by renting a store next door, without any intention of engaging in permanent trade at that place, and for the purpose of furnishing a stock for ³¹⁴ such store brings in from outside the state, subsequent to May 1st, a new stock of goods, and places them in the temporary store for sale. Under our general revenue act he would be required to include this new stock in determining the average value of his merchandise for the year, would be assessed thereon, and required to pay taxes accordingly; and yet, in addition to this taxation, according to the statute, he would be compelled, as a condition precedent to offering his stock for sale in his temporary store, to pay a tax on its full cash value, equal to that assessed for state, county and local purposes upon similar merchandise of like value. In each instance, the enforcement of the statute would result in double taxation.

If the legislature has the power to impose any such tax, in the circumstances considered, then it might require the resident of San Miguel county, who should go to the county of Montrose and purchase a horse after the first day of May from the owner who had returned it in his tax schedule, and who would be required to pay a tax thereon, and brought it into the county of San Miguel for his own use, to pay a tax as a condition precedent to enjoying that privilege; or, a teamster engaged in the business of teaming in the city of Denver, if he should temporarily engage in teaming in the county of Jefferson, could be required to pay a tax upon his outfit because taken into the latter county after a certain date, although he was regularly assessed for such property in the county of his residence. True, these are extreme cases, and it is not likely that we will ever be called upon to consider the validity of an act imposing taxes in such circumstances, but they serve to illustrate the extent to which the legislature might go if the act under consideration could be enforced as it reads literally.

³¹⁵ Counsel for the defendants say that no question of double taxation is presented, in view of the fact that the property was brought into the state subsequent to the first day of May, 1905, and hence, that the tax levied is not upon goods taxed in some other county. He contends that the object of this act is to secure equality in the tax laws by providing that stocks of goods brought into the state after the first day of May in any year and temporarily placed on the market in competition with goods bearing the burden of taxation,

shall also bear their proportionate share thereof. Conceding, for the sake of the argument, that the law is susceptible of this construction, and that the General Assembly has the power to provide by law for the levy and collection of a tax on merchandise brought into the state and temporarily placed on sale, let us see if the law under consideration is valid. Section 3, article 10 of our constitution provides that: "All taxes shall be uniform upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under the general laws, which shall prescribe such regulations as will secure a just valuation for taxation of all property, real and personal." Uniformity in taxing implies equality in the burden of taxation, and all taxes must be uniform on the same class of property within the jurisdiction of the authority levying them: *Catron v. County Commrs.*, 18 Colo. 553, 33 Pac. 513; *People v. Lathrop*, 3 Colo. 428; *Sleight v. People*, 74 Ill. 47.

Tested by our constitution and the principles deducible therefrom, we find the law wanting in validity. It imposes a tax upon goods and merchandise brought into any county subsequent to the first day of May in any year for temporary lodgment and ³¹⁶ sale, and by necessary implication relieves goods of a similar character brought into the same county at the same time from the burden of such tax if they be not placed upon the market. This discrimination robs the law of the indispensable requisite that taxes shall be uniform upon property within the jurisdiction of the body imposing them. If a certain character of property brought into a county for a particular purpose after the first day of May in any one year may be subjected to a tax, then all other property within the same jurisdiction of a similar character must be subjected to the same tax in order to satisfy the provision of our constitution on the subject of uniformity of taxation: *Graham v. Commrs. of Chautauqua Co.*, 31 Kan. 473, 2 Pac. 549; *County Commrs. v. Wilson*, 15 Colo. 90, 24 Pac. 563.

It may be that the act only covers that class of goods or merchandise usually sold from a storeroom. We do not deem it necessary to pass upon this question, but call attention to the fact that if it was so construed, then it would be obnoxious to the provision of our constitution relating to uniformity of taxation, for the reason that all chattels not usually sold from a storeroom, like horses or cattle, although brought into the county after the first day of May in any year and placed upon the market, would not be subject to the tax provided by the statute.

The judgment of the district court is reversed and the cause remanded, with directions to enter judgment in favor of plaintiff in accordance with the views expressed in this opinion.

Decision in bank.

Constitutional Limitations on the Right to Impose License Taxes are discussed in the recent note to *Hager v. Walker*, 129 Am. St. Rep. 249.

The Right to Recover Back License Taxes which have been illegally exacted is discussed in the note to *New Orleans etc. Co. v. Louisiana etc. Co.*, 94 Am. St. Rep. 437.

PEOPLE v. JEFFERSON DISTRICT COURT.

[46 Colo. 386, 104 Pac. 484.]

JUDGMENTS—Enforcement.—Every Court has the Inherent Power and authority, and upon it rests the duty, of enforcing its own judgments and decrees by proper orders and directions to ministerial officers to that end. If it fails, the exercise of its duty will be compelled by a writ of mandamus, which will specify the exact mode of performance. (pp. 85, 86.)

MANDAMUS—Jurisdiction—Peremptory Writ.—Where suit is brought in condemnation against the owners for possession of property, and results in such possession being expressly ordered on payment of damages and costs, which are duly paid, and the owners refuse possession on the ground that the purpose for which their lands were taken is not yet ripe, and are upheld in their recalcitrance by the court's refusal to order such possession to be given, a peremptory mandamus should issue to such court ordering it to the performance of its duty. (pp. 87, 88.)

Milton Smith and Charles R. Brock, for the relators.

J. W. Barnes and Goudy & Twitchell, for the respondents.

386 BAILEY, J. The relator, the Farmers' Reservoir and Irrigation Company, on June 15, 1907, in the district court of Jefferson county, had judgment in condemnation for title to and possession of, for reservoir purposes, the real property in controversy, having paid to the various owners thereof for such title and possession thirty-three thousand two hundred and sixty dollars, as damages, and the further sum of two hundred and thirty-nine dollars and sixty-three cents costs of the proceedings, or an aggregate **387** of thirty-three thousand four hundred and ninety-nine dollars and sixty-three cents. This money was accepted by the property owners, and the judgment in condemnation acquiesced in as final, no appeal having been taken therefrom, and no steps whatsoever proposed to dispute, question, deny, review or qualify it. No one in interest complains of or desires a review of that judgment. The relator promptly paid every cent assessed against it, and in every respect complied with the terms of the decree. Nothing remains to make of the condemnation proceedings, and of this application, a closed incident, except the surrender of the possession of the property, according to the terms of the award. However, the owners did not va-

cate said premises, but remained in possession of portions thereof, and decline to surrender same, and, despite the condemnation judgment, stoutly maintain that they have a legal right to such occupancy and possession.

On March 27, 1909, the district court of Jefferson county, Hon. Charles McCall, Judge, one of the respondents here, on application of the relator for an order directed to the sheriff of said county commanding him to put it into possession of the land so condemned and paid for, denied such relief, and these original proceedings in mandamus followed, wherein a writ is prayed from this court to the district court and the judge and clerk thereof, directing the issuance of an order from the court below to the Jefferson county sheriff, as originally moved.

The proposition here is, whether it was and is the plain and unquestioned duty of the court below, and of its presiding judge, to enter the order required by this alternative writ.

The right of the relator to have immediate and exclusive possession of this property is so clear that it may not for an instant be doubted. To have that question settled was the very gist of the condemnation ³⁸⁸ proceedings. The matter was determined favorably to the relator, and for such possession it has paid the price, and which price those who now seek to retain the property have safely in their pockets. The situation is simply an exemplification of the old story of one trying to keep his cake and eat it, too. This is impossible as a physical fact, and so is the thing attempted here equally impossible and inconsistent as a legal proposition. The former owners frankly admit that the relator is entitled to possession under the decree. But they, in effect, say: "While it is true you have paid for the possession, still we are of opinion that you really are not in need of it just now, and therefore we propose to continue to occupy and possess the land ourselves." Such is the contention that the court below apparently upheld. Instead of issuing a proper writ for the prompt and efficient enforcement of its clear and unequivocal decree, without jurisdiction or authority, as it seems, it attempts by its order, upon the relator's application for such writ, to modify the force and effect of that solemn and binding judgment, in which all parties acquiesced. The duty of the court to grant an order for the writ prayed was and is clear, and the right of the relator to have it equally plain. Its issuance involves the exercise of no judicial discretion; it was and is an order to which the relators were and are entitled as a matter of right. It is a mockery of justice to give one a judgment and then deny him the means of its enforcement. Every court has the inherent power and authority, and upon it rests the duty, of enforcing its own judgments and decrees by proper orders and directions to ministerial

officers to that end. Were it otherwise, judgments and decrees of courts would be empty and meaningless things, just as this judgment and decree in condemnation is, if incapable of enforcement. The relators ³⁸⁹ have no other plain, speedy or adequate remedy, and the court below has no discretion whatever, except to issue the writ prayed for by the relator, and to which prayer that court turns an unheeding ear. With equal propriety the clerk might refuse to a judgment creditor an execution on a money judgment, and the court, upon application for an order to the clerk for its issuance, might deny such relief, on the theory that the judgment creditor was not in need of the money, being in affluent financial circumstances, and the judgment debtor sore pressed and in financial straits. The relator is as well entitled to an order of court for the prompt and efficient enforcement of this decree, as the judgment creditor would be to have an execution in the case illustrated. The right to the relief sought is clear and indubitable. The duty upon the court to enforce its own judgment, which is now being openly defied, and thus prevent a miscarriage of justice, is equally certain. Unless such relief be given the result is an absolute denial of justice.

The question of the character and quality of title is not involved. The right of possession is the sole question here for consideration. The question of necessity for present possession was determined in the condemnation proceedings, and that judgment is conclusive upon this court, as it is upon the court below. Should the relator, after having secured possession of the premises, fail within a reasonable time to make use thereof for the purposes for which they were condemned, then doubtless a direct action to have the character and quality of the title determined would lie. But no such question may be heard or determined in these proceedings at this time, or in the manner attempted by the court below.

Merrill on Mandamus, section 186, says: "The writ of mandamus has been used most extensively ³⁹⁰ to control and correct the action of inferior courts. It is used not only to restrain their excesses, but also to quicken their negligence and obviate their denial of justice. When a duty is imposed by law upon a court, a mandamus from a higher court is the proper means to compel the discharge of such duty. When such duty is so plain in point of law and so clear in matter of fact that no element of discretion is left as to the precise mode of its performance, such duty is ministerial, and a writ of mandamus to compel the performance of such duty will specify the exact mode of performance."

The above and foregoing pronouncement so completely and perfectly covers the situation disclosed by the pleadings here that it should set at rest all doubt as to the propriety of the issuance of the writ in the case at bar.

Where one has a clear and definite judgment, which needs no construction, it is an absurdity and a denial of justice to hold that it may not be enforced, or that the court may rightfully refuse proper writs or orders to secure such result. If such action be permissible, it is apparent that the judgment holder is helpless and without a remedy. It is equally absurd to hold that he must resort to the procurement of another judgment of no higher or more helpful character, the enforcement of which might on demand, with equal propriety, be denied him. It must be clear, in view of the order already made by the court below, that no merely executive or ministerial officer will or should now act contrary to that order; hence relief can only properly be had by direction to that court and to the judge thereof.

This court has never held, and never will hold, as we now view the matter, that the writ of mandamus may not go in original proceedings, even in purely private matters, where failure to award it leaves a ³⁹¹ litigant without remedy and results in a denial of justice. It was to afford relief in just such cases that the authority to supervise the action of inferior courts was by the constitution vested in this court. Whether the writ is proper in original proceedings here must depend upon the peculiar facts in each particular case. We are clearly of the opinion that the petition here presents a proper showing for the application of the rule. The announcements of this court are to the effect that the writ should not go in private matters, except in cases presenting some special or peculiar exigency: *Wheeler v. Northern Colorado Irr. Co.*, 9 Colo. 248, 11 Pac. 103; *Keady v. Owers*, 30 Colo. 1, 69 Pac. 509.

In *Wheeler v. Northern Colorado Irr. Co.*, 9 Colo. 248, 11 Pac. 103, at page 255, the court said: "As above suggested, rare instances may occur when, owing to some peculiar emergency or exigency, although the sovereign power, prerogatives or franchises of the state are only indirectly drawn in question, a refusal here to take original jurisdiction would practically amount to a denial of justice. In such cases this court will sometimes issue its original process. Whether a sufficient emergency exists will depend upon the circumstances attending each particular case, and will be determined in connection with each application for original relief, as presented. But in general the view above announced will be strictly adhered to, and unless a cause directly presents as the subject matter of the proceeding one of the grounds named, its inception will be consigned to the jurisdiction of subordinate tribunals."

How can a more peculiar, special or extraordinary situation be imagined, in a legal controversy, than is disclosed by the record here? The relator company brings suit in condemnation against the owners for possession of the property in

controversy, ³⁹² and at the end of the litigation is awarded, definitely and unequivocally, possession of the same for the purposes for which that possession is sought; it is mulcted in damages and costs in the aggregate of thirty-three thousand four hundred and ninety-nine dollars and sixty-three cents, promptly pays over that sum, which is received and retained by the owners of the property, who accept the judgment as final and conclusive, and who thereupon declare that the company shall not have the thing they have sold and which it bought and paid for, and which the decree so specifically gives it; and the very court which rendered the judgment declares that it may not now be enforced. The proposition is so sharply in conflict with every consideration of common justice and fair dealing that it ought not to be judicially approved. The alternative writ should be made peremptory, and it is accordingly so ordered.

Peremptory writ granted.

Decision in bank.

Mr. Justice Gabbert not participating.

Mr. Justice Musser and Mr. Justice Campbell Dissented on the ground that the form of the order in the court below precluded the interference by mandamus, and notwithstanding the right to possession of the land, no reason existed why the supreme court should give possession more speedily than the ordinary process of the lower court permitted.

When Mandamus is the Proper Remedy Against Public Officers is the subject of a note to *State v. Gardner*, 98 Am. St. Rep. 863. Mandamus is not regarded as a writ of right, but applications therefor are addressed to the sound discretion of the court: *Moore v. State*, 71 Neb. 522, 115 Am. St. Rep. 605; *People v. City of Rock Island*, 215 Ill. 488, 106 Am. St. Rep. 179. That mandamus may issue in a proper case to compel the entry of a judgment upon a verdict which settles title to land, see *Texas Tram etc. Co. v. Hightower*, 100 Tex. 126, 123 Am. St. Rep. 794.

CASES
IN THE
SUPREME COURT
OF
IDAHO.

SCHMELZEL v. BOARD OF COUNTY COMMISSIONERS.

[16 Idaho, 32, 100 Pac. 106.]

COSTS, When may be Allowed.—The allowance of costs is a matter dependent wholly on the statute, and where there is no statute authorizing it no costs can be allowed. (p. 90.)

JURY, Expenses of for Which County is Liable.—Under sections 7900 and 7901, Revised Codes, it is provided that the county commissioners shall provide a room with suitable furniture, fuel, lights and stationery for the use of the jury upon their retirement for deliberation, and that when the jury are kept together, they must also be provided, at the county's expense, with suitable and sufficient food and lodging. (p. 90.)

JURY, Expenses of Shaving and Cutting Hair of.—Sections 7900 and 7901 are not sufficiently broad and comprehensive to include or authorize the payment by the county of a bill for shaving and hair-cutting for jurors while kept together, either in the progress of the trial or during their retirement for deliberation. (p. 92.)

COURTS OF JUSTICE, Inherent Authority of Respecting Expenses.—Courts of justice have the inherent power and authority to incur and order paid all such expenses as are necessary for the holding of court and the discharge of the duties thereof in the administration of justice. (p. 91.)

JURY, EXPENSES OF—Barbers' Work.—An expense incurred by order of the court for shaving jurors and hair-cutting while the jury was kept together in the progress of the trial is not such a necessary expense incident to and necessary in the administration of justice as to become a county charge. The necessity for a juror shaving and having his hair cut does not arise out of or depend upon his services on a jury, and is no more necessary while serving on a jury than at any other time. (p. 92.)

(Syllabi by the court.)

Charles F. Koelsch, prosecuting attorney Ada county, and
O. M. Van Duyn, for the appellant.

Cavanah & Blake, for the respondents.

34 AILSHIE, J. This is an appeal from a judgment of the district court reversing an order of the board of county commissioners of Ada county. The respondents, a firm of

barbers, doing business in Boise City, presented to the board of commissioners of Ada county a bill for the sum of eighty-one dollars and sixty-five cents, charged by them for services in shaving jurors and cutting their hair while serving as jurors in the cases of *State v. Heywood* and *State v. Pettibone*, theretofore tried in the district court in and for Ada county. The board of commissioners rejected the bill and refused to allow the same on the ground that the charge is not authorized by law. The claimants appealed to the district court, and the order of the board of commissioners was reversed and they were directed to audit and allow the bill. The board of commissioners have appealed from the judgment.

The only provisions to be found in the statutes of this state relative to the compensation of jurors and their care are to be found in the following sections: Sections 6136 and 6137 of the Revised Codes provide for per diem compensation of jurors and the mileage to be paid them. Sections 7900 and 7901, Revised Codes, are as follows:

"Sec. 7900. A room must be provided by the commissioners of each county for the use of the jury upon their retirement for deliberation, with suitable furniture, fuel, lights and stationery. If the commissioners neglect, the court may order the sheriff to do so, and the expenses incurred by him in carrying the order into effect, when certified by the court, are a county charge."

"Sec. 7901. While the jury are kept together, either during the progress of the trial or after their retirement for deliberation, they must be provided by the sheriff, at the expense of the county, with suitable and sufficient food and lodging."

It will be seen at once that none of the provisions of the foregoing sections apply to the particular charge involved ³⁵ in this action. It must also be conceded that the allowance of costs is a matter dependent wholly upon the statute, and where there is no statute authorizing it, no costs can be allowed: 11 Cyc. 24, 493, and cases cited. It seems to be admitted by respondents in this case that the bill ordered paid cannot be sustained or justified as items of costs, but that if sustained it will, at most, rest upon the "inherent power of the court to authorize the performance of the services which were performed by respondents," so as to thereby become a legal charge against the county. It is contended that under the provisions of section 13, article 5 of the constitution, providing that "The legislature shall have no power to deprive the judicial department of any power or jurisdiction which rightly pertains to it as a co-ordinate department of the government," etc., it would be an interference with the inherent power of the courts, as the constituted tribunals for the administration of justice, if the legislature could, by

a failure to enact a statute, cut off the necessary and incidental expenses that must inevitably attend the administration of the judicial functions of the court. We think, upon the outset, that, without discussion or controversy, it must be admitted that the courts have the inherent power and authority to incur and order paid all such expenses as are necessary for the holding of court and the administration of the duties of courts of justice: *State v. Davis*, 26 Nev. 373, 68 Pac. 689; *Board of Commrs. v. Stout*, 136 Ind. 53, 35 N. E. 683, 22 L. R. A. 398; *In re Janitor of Supreme Court*, 35 Wis. 410; *Stowell v. Jackson Co. Supervisors*, 57 Mich. 31, 23 N. W. 557; *Bates v. Independence Co.*, 23 Ark. 722; *Fernekes v. Milwaukee Co. Supervisors*, 43 Wis. 303; *State v. Armstrong*, 19 Ohio, 116; *White v. Polk Co.*, 17 Iowa, 413.

We conclude, without further discussion or citation of authorities, that if the expense incurred for which this claim was presented was a necessary incident in the administration of justice, then it should have been allowed, and the judgment of the trial court is correct. But if, on the other hand, it was not a necessary expense in order to administer justice in the court in which it was incurred, then it is unauthorized,³⁶ and cannot be recovered against the county. It is claimed that this was an extraordinary case, and that in one of the state cases in which the jurors were shaved by respondents the jurors were kept together continuously for about two months, and in the other case they were kept together continuously for about one month. It is insisted by respondents that it was necessary from a sanitary point of view, as well as for the comfort of the jurors, that they should be shaved and have their hair cut. It is also argued that they could not go to the barber-shop themselves and secure this service, for the reason that they were kept together and under the guard of court bailiffs, and that it was therefore necessary to have the barbers go to the jury-room and there perform this service. Conceding these things as true, the barber could have as easily gone to the jury-room and shaved the jurors and cut their hair at the expense of the individual jurors as he could at the expense of the county. The dangers of their being tampered with or subjected to undue influence by the process would have been no greater if the individual jurors were paying the bill than if the county were becoming liable for it. The necessity for this was not entailed or brought about by reason of the men serving on the jury. Their whiskers and hair would grow just the same at home or at their offices or places of business as they would while serving on the jury. There is nothing peculiar or special about jury service that will cause whiskers and hair to grow. If the jurors had been at home or elsewhere about their business in their usual avocations, it would have been just as necessary for them to have shaved themselves or to have gone to a barber for this service

as it was for them to have the service while serving on these juries. The demands and necessities for this service would be no greater than the necessity might be under some circumstances for having a jurymen's laundering done by the county while he is serving on the jury. We apprehend that no one would seriously contend that the county can be held liable for clothing and laundering for jurors while kept together, and still the same reasons may be urged with equal force in support of such a charge ³⁷ as for the charge claimed in this case. Sanitary and humanitarian considerations, as well as the comfort and convenience of jurors, might as urgently demand these comforts as they would demand a haircut and a shave. The answer is that such requirements are not the result of jury service, and are not covered or contemplated by statute. The statute directs that jurors shall be paid certain per diem compensation and mileage, and that, in addition thereto, when kept together, either during the progress of the trial or after their retirement for deliberation, the county shall furnish them with suitable room, furniture, fuel, lights and stationery, and sufficient food and lodging. These things are furnished the jurors in addition to their mileage and per diem compensation. If the legislature had intended that the county should furnish anything else, they would have included it in the statute. The legislature has a right to fix the compensation, and they could have added a charge of the character involved in this action if they had seen fit to do so. Until it is so provided by statute it is clearly unauthorized. If the courts go beyond the statute for one thing that is not inherently necessary for the administration of justice, they may do so for another item, and there will be no limit to such expenses. There is no merit in the argument that the jurors deserved to have this paid by the county. Everyone may admit that. The compensation they receive for such services is very meager, and but few would be willing to discharge the duties in consideration alone of the compensation allowed. It is, however, the duty of every good citizen to serve his state as a juror when called upon. That is a part of his duties as a citizen, and in the absence of a statute authorizing compensation, he would be obliged to do so without compensation. It has been so held in many states: *Justices v. State*, 24 Ga. 82; *White v. Panola Co.*, 12 Tex. 173; *Person v. Ozark Co.*, 82 Mo. 491; *Bright v. Pike Co.*, 69 Mo. 519; *Van Epps v. Mobile Commrs. Court*, 25 Ala. 460. In the absence of a statute authorizing the county to pay the bill, it has been held that the juror would have to pay for his food, as such an item is not required and made necessary ³⁸ simply by reason of his service on the jury: See cases above cited.

We conclude that the order of the board of commissioners in disallowing this claim was correct, and that the district

court erred in reversing that order and directing the payment of the same. The judgment is reversed and the cause is remanded, with directions to take such further action as may be necessary in harmony with the views herein expressed. Costs awarded in favor of appellant.

Sullivan, C. J., concurs.

Judge Stewart Dissented, claiming that as the law was mandatory that the jury, on a trial for murder, should be kept together in charge of a proper officer, and was thereby deprived of their freedom, liberty and opportunity for caring for their personal wants, and were, in effect, prisoners confined in the custody of the law, unable to communicate with anyone or receive any communication except by an order of court; that therefore they could not visit the barber-shop, nor could the barber visit them; that the failure to properly care for a jury and leave their personal appearance for thirty days or more without any attention might materially affect the due administration of justice; that when a jury are treated as human beings and given the care and comfort to which they are entitled, their services are better in administering the laws of the state. He relied upon *Lycoming Co. Commrs. v. Hall*, 7 Watts, 290, *Fernekes v. Supervisors*, 43 Wis. 303, and *Stowall v. Jackson Co. Supervisors*, 57 Mich. 31, 23 N. W. 557, as sustaining the general conclusion that the court was not controlled by statutes specially authorizing expenditures for the jury, if its authority extended to authorizing such expenditures as were necessary in the due administration of the law, citing *Bates v. Independence Co.*, 23 Ark. 722, and *State v. Armstrong*, 19 Ohio, 116, and announced his final conclusion as follows: "If the court has the inherent power in one instance, it has it in the other; and the mere failure to vest such power by statute is of no consequence and cannot take away from the trial court such power. These things, in my judgment, are necessary incidents in the administration of the law, and when the trial judge determines that such matters are necessary, they become county charges in the absence of a showing that the expense was not necessary or the services not rendered. For these reasons I dissent from the majority opinion."

The Right to Recover Costs is generally regarded as purely statutory: *Estate of Donges*, 103 Wis. 497, 74 Am. St. Rep. 885; *Buckley v. Williams*, 84 Ark. 187, 120 Am. St. Rep. 24. Costs are a statutory allowance to a party for his expenses incurred in the action: *Bennett v. Kroth*, 37 Kan. 235, 1 Am. St. Rep. 248.

UTTER v. MOSELEY.

[16 Idaho, 274, 100 Pac. 1058.]

CONSTITUTIONAL LAW—Contradictory Amendments to the Constitution Adopted at the Same Time, Effect of.—Where a section of the constitution is amended at the same time by two different amendments and the amendments adopted are directly in conflict, and it is impossible to determine which should stand as a part of the constitution or to reconcile the same, then they must both fail. (p. 96.)

CONSTITUTIONAL LAW—Contradictory Amendments to the Constitution, One of Which is not Properly Submitted or Adopted.—If, however, one of such proposed amendments is not submitted in accordance with the provisions of the constitution and is not adopted or made a part of the constitution, and the other amendment is regularly submitted in accordance with the provisions of the constitution and adopted, then there can be no conflict between two amendments, and the latter will not fail because of conflict. (p. 97.)

CONSTITUTIONAL LAW—Contradictory Amendments, Rule Respecting, on What Founded.—The rule of law, that where two conflicting amendments are adopted at the same time, they both must fail, is based upon the assumption that both amendments are regularly submitted and adopted in accordance with the provisions of the constitution and are amendments to the constitution. (p. 96.)

CONSTITUTIONAL LAW—Amendments, When Do not Become Effective.—A question submitted as a constitutional amendment does not become a constitutional amendment unless submitted and adopted in accordance with the provisions of the constitution. (p. 96.)

(Syllabi by the court.)

Cavanah & Blake, for the plaintiff.

D. C. McDougall, attorney general, John F. MacLane, J. H. Peterson and C. P. McCarthy, county attorney, for the defendants.

276 STEWART, J. This is an original application addressed to this court praying for a writ of mandate to compel the board of county commissioners of Ada county to hear evidence to be offered by plaintiff for the purpose of determining the necessity for deputies and clerical assistance in the office of plaintiff, assessor and ex-officio tax collector for said Ada county. An answer was filed by defendants and the facts are stipulated.

The question presented is, Was the amendment submitted to the electors of this state at the regular November election, 1908, under House Joint Resolution No. 10, and designated as the assessor amendment, adopted by the electors of the state, and has the same become a part of the constitution of this state?

The state board of canvassers, upon canvassing the returns of election upon said amendment, declared said amendment carried, and the conclusion of such board is not called in question in this proceeding.

The contention of the defendant is that at the same election there was submitted to the electors a proposed amendment to the same section of the constitution under House Joint Resolution No. 3 and designated as the judicial amendment; and that the vote on such amendment was canvassed by the state board of canvassers and such amendment declared carried; that the judicial amendment above referred to is in conflict with and contradictory to the assessor amendment, and both amendments having been submitted and voted upon at the same time, it is impossible to determine which of said amendments was adopted by the electors of the state, and because of such conflict, under the rule announced by this court in the case of *McBee v. Brady*, 15 Idaho, 761, 100 Pac. 97, both must fail. The judicial amendment submitted under House Joint Resolution No. 3 was under consideration in the case of *McBee v. Brady*, 15 Idaho, 761, 100 Pac. 97, and in discussing the conflict between the judicial amendment and the assessor amendment, this court said: "It is next urged by counsel for defendant that section 6, article 18, included as a part of said proposed amendment, is ²⁷⁷ in conflict with the same section and article covered by a proposed amendment thereto by joint resolution No. 10 passed by the legislature at the same session, and submitted and voted upon by the electors of the state at the same election and by them adopted: Sess. Laws 1907, p. 585. Section 6 as amended by the amendment submitted by joint resolution 3 changed such section by omitting therefrom the words 'probate judge.' The amendment submitted under joint resolution No. 10 amended said section by adding therein the word 'assessor' among the names of the officers who were empowered to appoint deputies and clerical assistants by the board of county commissioners. Resolution No. 3 submitted section 6, amended by the omission of the words 'probate judge,' as the amendment; while resolution No. 10 submitted section 6 with the words 'probate judge' therein, and also the word 'assessor' added as the amendment. Thus the first amendment contains the section with the words 'probate judge' out and the word 'assessor' out, while the second amendment contains the section with the words 'probate judge' in, and the word 'assessor' in. Both of these amendments were submitted and voted upon at the same election, and both adopted. Thus, we have section 6, article 18, amended by omitting the words 'probate judge' therefrom, and no mention made of the office of assessor as an officer who should have deputy or clerical assistance; and also by retaining the words 'probate judge,' and also inserting the word 'assessor' as an officer who might be authorized to appoint deputies."

The conflict in the two amendments was one of the questions urged in that case why the judicial amendment submitted by House Joint Resolution No. 3 should fail; and it

was in this connection that the court in that case discussed the question of conflict, and announced the rule: "The provisions of the section thus amended are directly in conflict, and, taking the section as a whole as the amended section, it is impossible to determine which of these two amended sections should stand as a part of the constitution of this state. It is impossible to reconcile the two amendments, and under the rule announced by the supreme court of Nebraska in the case ²⁷⁸ of *In re Senate File 31*, 25 Neb. 864, 41 N. W. 981, both must fail."

The statement of law thus made, we again reaffirm; and where a section of the constitution is amended at the same time by two different amendments, and the amendments adopted are directly in conflict, and it is impossible to determine which should stand as a part of the constitution or to reconcile the same, then they must both fail. This principle of law, however, necessarily assumes that the conflict arises out of amendments regularly adopted and made a part of the constitution. It was upon this assumption that the court dealt with this question in the case of *McBee v. Brady*, 15 Idaho, 761, 100 Pac. 97. In that case, however, this court held that the judicial amendment was not submitted to a vote of the electors of the state in accordance with the provisions of the constitution, and by reason of such noncompliance with the provisions of the constitution, such proposed amendment was not adopted, and did not become a part of the constitution of the state. The failure of the legislature to follow the requirements of the constitution, in submitting the proposed judicial amendment, denied to the electors of the state an opportunity to express their will with reference to such proposed change; and the vote thereon was of no force or effect. The change was not a proposed amendment upon which the electors could vote, and did not become an amendment by reason of their vote.

Under the constitution of this state certain necessary steps are provided for in order to submit a proposed amendment to the electors of the state for their approval or disapproval; and unless these steps are followed, as held in the case of *McBee v. Brady*, 15 Idaho, 761, 100 Pac. 97, the vote of the electors of the state becomes of no consequence, and cannot vitalize the question voted upon into an amendment to the constitution. Before, therefore, the amendment now under consideration and known as the assessor amendment should be held void and unconstitutional by reason of a conflict, it is necessary to find some amendment in which the conflict exists; and inasmuch as this court has held that the subject matter submitted under House ²⁷⁹ Joint Resolution No. 3 was not submitted in the manner required by the constitution, it did not become an amendment to the constitution, and if not an amendment to the constitution, it would not be an

amendment which could or would conflict with the amendment known as the assessor's amendment, regularly submitted under House Joint Resolution No. 10 and conceded to have been adopted by the vote of the electors of this state.

To illustrate: Suppose the Secretary of State places upon the ballot what purports to be a proposed amendment to the constitution of the state, without such amendment having been adopted or submitted by the legislature; and at the same time the Secretary of State places upon the ballot a proposed amendment regularly adopted and submitted by the legislature in accordance with the provisions of the constitution; and both are adopted by the necessary vote of the electors of this state, and the provisions of the latter conflict with the former; it would seem to require no argument to show that the latter amendment should not be embarrassed or its constitutionality called in question by reason of the vote upon the former proposition. The voluntary acts of the Secretary of State in placing the proposition not submitted by the legislature upon the ballot could not give such proposition any force or vitality as a proposed amendment; and an affirmative vote thereon by the electors of the state would also fail to give such matter any force or vitality as an amendment to the constitution of the state. If one of the questions voted upon did not become an amendment, it could not be argued that it was an amendment which conflicted with an amendment regularly adopted; and the case would not fall under the rule announced by this court in the case of *McBee v. Brady*, 15 Idaho, 761, 100 Pac. 97.

If, therefore, two amendments are proposed to the same section of the constitution and are regularly submitted to the electors of the state at the same time, and the vote is in favor of both proposed amendments, and they are directly in conflict, then both fail. If, however, one of such proposed amendments is not submitted in accordance with the provisions ²⁸⁰ of the constitution and is not adopted or made a part of the constitution, and the other amendment is regularly proposed in accordance with the provisions of the constitution, then there can be no conflict between two different amendments, within the rule announced in the case of *McBee v. Brady*, 15 Idaho, 761, 100 Pac. 97, for the reason that the former does not become an amendment, while the latter does.

Applying this rule, then, to the case under consideration, and it being conceded that the amendment proposed by House Joint Resolution No. 10, known as the assessor amendment, was regularly submitted and adopted by the electors of the state in accordance with the provisions of the constitution, such amendment thereby became a part of the constitution of this state, and can in no way be affected or controlled by the

provisions of the proposed amendment covered by House Joint Resolution No. 3 known as the judicial amendment.

From what has been said, it therefore follows that the writ of mandate must issue as prayed for. No costs awarded.

Sullivan, C. J., and Ailshie, J., concur.

An Amendment to a Constitution can be made only in the manner provided by the instrument itself: *State v. Tufley*, 19 Nev. 391, 3 Am. St. Rep. 895. But unless satisfied beyond a reasonable doubt that the constitution has been violated in the submission of an amendment, courts must uphold it: *People v. Sours*, 31 Colo. 369, 102 Am. St. Rep. 34. A constitutional amendment cannot be held void because of its conflict with pre-existing provisions of the same instrument: *State v. Chicago etc. R. R. Co.*, 195 Mo. 228, 113 Am. St. Rep. 661.

The Repeal of Statutes by Implication is the subject of a note to *Howard v. Hulbert*, 88 Am. St. Rep. 271.

DITTEMORE v. CABLE MILLING COMPANY.

[16 Idaho, 298, 101 Pac. 593.]

PLEADING—General Demurrer, Defects Which are not Reached by.—In an action by a trustee in bankruptcy, the general allegations of the filing of an involuntary petition in bankruptcy, the adjudication thereon, and that the plaintiff is the duly appointed, qualified and acting trustee of the estate of the bankrupt are sufficient as against a general demurrer. (By the editor.) (p. 100.)

PLEADING—Demurrer, Special, When Should be Resorted to. If the litigants do not understand the meaning of the allegations of the complaint and feel that they may be deceived or misled by them, or that they are ambiguous or uncertain, their remedy is by special demurrer to reach such ambiguities and uncertainties, and thereby require the pleader to be more specific and certain. (By the editor.) (p. 100.)

PARTIES—Sheriff Who Made Levy and Sale, When Need not be Joined as a Defendant.—It is not necessary to join a sheriff who made a levy and sale in an action of assumpsit against a judgment creditor to recover the sum actually received by him on the sale of the property. (By the editor.) (pp. 100, 101.)

PLEADING DENIALS on Information and Belief, When Permissible.—Where a plaintiff alleges in general terms that he is "the duly appointed, qualified and acting trustee" of the estate of a bankrupt, and in like general terms alleges the filing of the petition in bankruptcy and the adjudication in bankruptcy, denials by one in no way a party to that proceeding of such allegations for want of information on the subject are sufficient, and should not be stricken out. (p. 101.)

PLEADING DENIALS on Information and Belief Though the Defendant Might have Informed Himself.—The rule prohibiting denials on information of matters of record should not be extended to the length of requiring a defendant to inform himself as to the files and records of referees in bankruptcy in the federal courts and bankruptcy courts generally, wherein the proceedings are chiefly

had before a referee, to which proceeding the defendant was not a party, nor should it be extended to the records and files of boards and departments of government in matters to which the pleader has not been a party in any respect. (pp. 101, 102.)

BANKRUPTCY, Trustee's Right of to Waive Tort and Sue in Assumpsit.—Where a trustee in bankruptcy sues for the value of property belonging to the bankrupt estate that has been wrongfully converted, he may waive the tort and sue in assumpsit. In such case the trustee is the legal representative of the bankrupt and of his estate, and a waiver of the tort by the trustee is a waiver on the part of the estate, and effectually protects the tort-feasor from a subsequent action for the tort. (pp. 103, 104.)

BANKRUPTCY PROCEEDINGS, Notice of—Liability of Person Interfering With Property to be Sued in Tort or Assumpsit.—The filing of a petition in bankruptcy is notice to the world of the pendency of the proceedings, and operates as an attachment of the bankrupt's property and also as an injunction restraining all persons from intermeddling therewith. One who subsequently seizes the property on attachment or execution is liable in tort or assumpsit for the goods or value thereof. (pp. 104, 105.)

(Syllabi by the court except where stated to be by the editor.)

Action by a trustee in bankruptcy to recover the proceeds of a sale of a bankrupt's property under execution. Judgment for the plaintiff; the defendant appealed.

Edwin McBee, for the appellant.

John M. Flynn, for the respondent.

300 AILSHIE, J. This action was commenced by the plaintiff as trustee of the estate of one J. H. Danner, a bankrupt. The action was brought for the purpose of recovering a judgment against the defendant for the sum received for certain merchandise sold under writ of execution. It is alleged that the defendant procured two judgments in the justice's court against Danner, and filed abstracts of such judgments with the clerk of the district court on June 13, 1906, and caused writs of execution to issue out of the district court on both judgments. Under and by virtue of these executions, the sheriff levied on certain merchandise belonging to Danner, and on June 20th sold the same at execution sale. The amount realized from the sales was four hundred and twenty-one dollars and sixty-four cents. The trustee sued the defendant and appellant herein for money had and received in the amount received by it upon these execution sales. The plaintiff recovered judgment and defendant has appealed.

The first question presented for consideration is as to the sufficiency of the complaint. Paragraphs 2, 3 and 4 of the complaint are as follows:

"2. That plaintiff is the duly appointed, qualified and acting trustee of the estate of J. H. Danner, a bankrupt.

"3. That said J. H. Danner filed his voluntary petition in bankruptcy in the United States district court of the district

of Idaho, northern division, on the eleventh day of June, 1906.

"4. That thereafter and on the twenty-sixth day of June, 1906, said J. H. Danner was duly adjudicated a bankrupt by said court."

The foregoing is the only mention contained in the complaint of the adjudication in bankruptcy, and of the appointment ³⁰¹ or authority of the plaintiff to maintain this action as the legal representative of the alleged bankrupt. The defendant demurred to the complaint on the ground that it does not state facts sufficient to show a cause of action. It is alleged that paragraphs 2, 3 and 4 of the complaint as above set out are not sufficient to show the authority of the trustee to maintain the action. It must be conceded that the allegations are very general and meager, and consist principally in conclusions of law. We think, however, they were not properly reached by general demurrer. They are sufficient to support a judgment: *West v. Johnson*, 15 Idaho, 681, 99 Pac. 709; *Aulbach v. Dahler*, 4 Idaho, 654, 43 Pac. 322; *Hollister v. State*, 9 Idaho, 651, 77 Pac. 339.

It is further argued that the complaint is insufficient, in that it alleges the amount received by the sheriff under each execution, but does not show the amount deducted by the officer as his fees and the net sum received by the defendant. The complaint does allege the specific amount received by the officer from the sale on each execution, and that allegation is immediately followed by a paragraph in this language: "That the proceeds of said sale were paid by said sheriff to said defendant." The "proceeds" must necessarily mean all that was received from the sale; otherwise it would have said "net proceeds," or some other and similar expression. The word "proceeds" is the synonym for product, income, yield, receipts, returns. We think only one conclusion can reasonably be drawn from this allegation, and that is that the defendant herein received the entire sum for which the goods sold, amounting in all, from both sales, to the sum of four hundred and twenty-one dollars and sixty-four cents. It is not out of place to observe here that if litigants do not understand the meaning of such allegations, and feel that they may be deceived or misled by them, or that they are ambiguous or uncertain, they are given ample remedy by the statute, through special demurrers, to reach such uncertainties and ambiguities and thereby require the pleader to be more specific, definite and certain.

The defendant further demurred to the complaint on the ground of a misjoinder of parties defendant, in that the sheriff of the county who made the levy and sale had not been ³⁰² made a party defendant. That was not necessary. The action was not one for conversion, but was an action in as-

sumpsit. The plaintiff waived the tort and sued as if upon contract. The action was not instituted for the reasonable or market value of property sold, but for the sum actually received by the defendant. The defendant was treated by this complaint as one who has received a certain specific amount of money for the use and benefit of the plaintiff. In such case the sheriff was not a necessary party defendant. After defendant's demurrer was overruled, it answered, and alleged that it had no knowledge or information as to whether or not Danner had ever filed a petition in bankruptcy or had ever been adjudged a bankrupt, and that it had no knowledge or information as to whether the plaintiff had ever been appointed, elected or qualified as trustee of the bankrupt estate. It admitted obtaining the judgments against Danner, and the issuance of the executions and sale of the property as alleged in the complaint, but denied any indebtedness. Defendant further pleaded that it had no knowledge or information at the time of the issuance of the execution and sale of the property that Danner had been adjudged a bankrupt, and alleged that the proceedings were had in good faith and without any purpose of obtaining any preference, etc.

The plaintiff moved to strike out the answer to paragraphs 2, 3 and 4 on the ground that they were made on information and belief, and that denials of matters of record could not be made in that manner. Plaintiff also moved for judgment on the pleadings. The court granted the motions and entered judgment in favor of the plaintiff as prayed for in the complaint.

The question presented here is whether a denial on information and belief is sufficient denial of such allegations as 2, 3 and 4 above set forth. We are convinced that there are two reasons why this answer should have been allowed to stand. First, the allegations of the complaint were general and merely conclusions of law, and did not pretend to point out when or where the plaintiff was elected or appointed trustee, nor did it designate where the petition in bankruptcy³⁰³ and the order of adjudication might be found, whether they were in fact on file with the clerk of the United States district court or with a referee in bankruptcy. If with the latter, there is no specification or designation as to the particular referee in bankruptcy or where his office might be found. In the second place, we do not think that the rule prohibiting denials on information should be extended to the length of requiring a defendant in a state court to inform himself as to the files and records in federal courts in cases to which he was not a party, and especially in matters heard and passed upon chiefly, if not wholly, by a referee, where the records and files are usually in custody of the referee: Loveland on Bankruptcy, 3d ed., sec. 29. The rule origi-

nated on the theory that a litigant is bound to know the record and proceedings had in a case to which he was a party, and that he is bound to take notice of the records of a recording office within his county that is designated by law as the depository of the public records of his county. This rule, however, should not be carried to the extent of placing the burden upon a defendant to chase all over the country hunting up the records and files of referees, boards and departments of government in matters to which he has not been personally a party.

In *People v. Curtis*, 1 Idaho, 753, the territorial court held that a party should not be presumed to know the contents of the records of the proceedings of a board of county commissioners. It was held in *Mower v. Stiekney*, 5 Minn. 397 (Gil. 321), and *Zivi v. Einstein*, 21 N. Y. Supp. 583, that a person not a party to the action might deny any knowledge or information concerning the same or any judgment entered therein.

It was also held in *Wittmann v. Watry*, 37 Wis. 238, that a party might deny the grant of letters of administration on information and belief. Respondent relies solely upon three Idaho cases: *First Nat. Bank v. Martin*, 6 Idaho, 204, 55 Pac. 302; *Simpson v. Remington*, 6 Idaho, 681, 59 Pac. 360; *First Nat. Bank v. Watt*, 7 Idaho, 510, 64 Pac. 223. These cases all hold that matters of public record cannot be ³⁰⁴ denied on information and belief, but none of them go to the extent claimed here. In *First Nat. Bank v. Martin*, 6 Idaho, 204, 55 Pac. 302, the court held that "an answer which contains denials on information and belief of matters which are entirely made up of the files and records in a case in which the defendant was a principal party is properly stricken out as sham and frivolous." There, it will be observed, the party undertook to deny matters of record to which he had been a party.

Simpson v. Remington, 6 Idaho, 681, 59 Pac. 360, was an action supplemental to execution, and the court held that the defendant would not be allowed to deny on information and belief an allegation that the execution had been returned nulla bona. This execution had issued from a district court, and was a matter of record in the action to which the proceedings were supplementary.

In *First Nat. Bank v. Watt*, 7 Idaho, 510, 64 Pac. 223, the defendant attempted to plead on information and belief that a certain judgment had been entered. The court held that if he wanted to plead a judgment he must inform himself and plead it positively. This is eminently correct, as the party who asserts a matter to be of record ought not to be allowed to do so at random. The pleader who affirms a certain fact is the one who ought to be required to furnish the specific

facts. He should not, as a general rule, be allowed to shift that burden by making the general allegations in the nature of conclusions of law, and thereby shift the burden and responsibility onto his adversary. Defendant's denials of information as to the adjudication of insolvency and the allegation of appointment of plaintiff as trustee were sufficient, and should have been allowed to stand as an answer in the case. It is also worthy of observation in this case that the defendant, while admitting the sale and receipt of the money, denied any indebtedness. That, too, involved an issue, because, although it had received the money, it might have been paid over to the bankrupt before the appointment of a trustee, or to some duly constituted authority under the bankruptcy law.

For the foregoing reason, the judgment in this case must be reversed. Since, however, other questions essential to ³⁰⁵ the determination of the case on its merits are raised on this appeal, it becomes our duty to consider and pass upon them, in order that the case may be finally disposed of when it goes back for a new trial.

It is argued by appellant that this action cannot be maintained by the trustee in bankruptcy for the reason that he has no authority to waive the tort and sue as if on contract. In support of this counsel cites *Lewis v. Dubose*, 29 Ala. 219, and *Blackshear v. Burke*, 74 Ala. 239. In the first of these cases, the Alabama court held that a creditor who was pursuing the property of his debtor which had been wrongfully converted by another could not waive the tort and maintain an action in assumpsit. This was based upon the fact that the creditor is not the legal representative of and subrogated to all the rights of the debtor, and that if the creditor were allowed to waive the tort and sue in assumpsit, still the debtor might pursue the wrongdoer and elect to sue upon the tort. The court said: "But because the owners of the property wrongfully sold might maintain an action of assumpsit to recover the proceeds of the sale, it does not follow that the money can be attached by the creditors. The creditors have no right to waive the tort, or to surrender the right to recover back the property, or to release the damages against the tort-feasor. Those are rights which appertain to the owner of the property alone, and his creditors cannot defeat them by bringing a garnishment proceeding against him who may have the funds arising from the sale of the property: *Lundie v. Bradford*, 26 Ala. 512. Until the owner of the property has made his election to sue for the money, which may be done by bringing an action for it, the person having the money cannot, in any just sense, be deemed his debtor. To allow the money to be taken in attachment might be productive of confusion and wrong. It could not prevent the owners of the property from suing for its recovery, or for

the damages, and would yet concede to them the benefit of the appropriation of the money to the payment of their debts, and leave the clerk who received the money without ³⁰⁶ the means of reimbursing the person against whom an action might be brought."

The case of *Blackshear v. Burke*, 74 Ala. 239, is to the same effect, and cites and approves the case of *Lewis v. Dubose*, 29 Ala. 219. A different condition exists, however, in a case like the one at bar. Here the trustee in bankruptcy represents the bankrupt himself, and stands in his place and stead. The action must be maintained by the trustee, or if prosecuted by the bankrupt, it must be by permission and order of the court of bankruptcy, and then for the use and benefit of the trustee. An election to waive the tort by the trustee in bankruptcy is a waiver by and on the part of the estate and of the bankrupt himself. Our attention has not been called to any bankruptcy case where this identical question appears to have been raised. But the practice pursued in this case is the same as has been pursued in other cases in bankruptcy, and which have at least received the tacit approval of the court.

In *State Bank of Chicago v. Cox*, 143 Fed. 91, 74 C. C. A. 285, the trustee waived the tort and sued in *assumpsit*. His right to do so was recognized, although it does not appear to have been directly questioned. We have no doubt of the right of the trustee in bankruptcy to waive the tort where property has been wrongfully converted and sue as in *assumpsit*.

It is further contended by appellant that under the provisions of subdivision b, section 60 of the bankruptcy act, the plaintiff was not entitled to recover unless he was able to establish that defendant "had reasonable cause to believe" that the levy of the execution and sale of the property would amount to a preference. We do not consider that contention well taken. That provision of the bankruptcy act has reference to sales and compromises and transactions taking place between the bankrupt and persons to whom the bankrupt is endeavoring to grant a preference, and does not refer to such proceedings as this where the property is seized by legal process subsequent to the filing of the petition in bankruptcy. In *Ryan v. Rogers*, 14 Idaho, 309, 94 Pac. 427, ³⁰⁷ this court, following *In re Rodgers*, 125 Fed. 169, 60 C. C. A. 567, held that "the filing of a petition in bankruptcy, followed by an adjudication, is a seizure of the property by law which is equal in rank to seizure on attachment or execution." All the authorities sustain and uphold that construction of the law. The *Rodgers* case was cited and expressly approved in *State Bank of Chicago v. Cox*, 143 Fed. 93, 74 C. C. A. 285. The same view is maintained in *Clark v. Larremore*, 188 U. S. 486, 23 Sup. Ct. Rep. 363, 47 L. ed. 555. See, also, *Muel-*

ler v. Nugent, 184 U. S. 1, 22 Sup. Ct. Rep. 269, 46 L. ed. 405; In re Smith v. Longbottom & Son, 142 Fed. 291.

In *Re Mertens*, 131 Fed. 507, the court said: "The filing of a bankruptcy petition is notice to the world of the pendency of the proceedings, and operates as an attachment of the bankrupt's property, and is an injunction restraining all persons from intermeddling therewith."

On account of the error of the court in striking out defendant's answer and entering judgment on the pleadings, it is necessary to reverse the judgment and order a new trial as to such matters as are put in issue by the answer. The other questions determined in this opinion are questions of law, and will be applied in reaching a conclusion on a retrial. We take this occasion, however, to observe that there is no need for a new trial unless the appellant can successfully show that Danner has never been adjudged a bankrupt, or, if he has, that the plaintiff is not the duly elected or appointed trustee in bankruptcy, or that he has paid part or all of the sum received.

Judgment reversed and a new trial granted. Costs awarded in favor of appellant.

Sullivan, C. J., and Stewart, J., concur.

WHEN ARE DENIALS ON INFORMATION AND BELIEF PERMISSIBLE.*

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I. Introductory Remarks.

The discussion in this note will be supplementary to that in the one appended to *Humphreys v. McCall*, 70 Am. Dec. 625, where all the earlier cases bearing upon the subject of traverses or denials upon information and belief, or of want of knowledge or information sufficient to form a belief, are noted and need not be here repeated. But, as shown in the former note, this form of denial was unknown at common law; and it seems that in the absence of statutory authority a denial in this form will not be sufficient, but will constitute an admission of the facts alleged: *State v. Butte City Water Co.*, 18 Mont. 199, 56 Am. St. Rep. 574, 44 Pac. 966, 32 L. R. A. 697; *Rossiter v. Loeber*, 18 Mont. 372, 45 Pac. 560; *Montpelier Nat. L. Ins. Co. v. Martin*, 57 Neb. 350, 77 N. W. 769; *Wilson v. Neu*, 1 Neb. (Unof.) 42, 95 N. W. 502. Since, then, this form of denial is purely a creature of the statute, and therefore subject to changes, our present discussion will bring the former note up to date; and even if it should appear that there has been no substantial change in the law of those states which then recognized this form of denial, the discussion here may show other states which have since departed from the common-law rule and adopted the modern procedure which permits a defendant to set up in his answer denials based only on information or belief.

Indeed, the code provisions which allow this form of denial would seem to have arisen from necessity, for where the statute requires a defendant to answer under oath the allegations made against him in a verified complaint, a denial made on information appears to be the only one which, in many cases, he can conscientiously make to any or all of the allegations in the complaint when he has no personal knowledge or means of personal knowledge of the truth of the matters therein alleged against him.

II. Denials Under the Codes.

a. Of Knowledge or Information.—An examination of the codes of the different states will show that, at present, nearly all of them contain a provision with respect to denials, that the defendant's answer must contain a general or specific denial of each material allegation of the complaint controverted by him, or "of any knowledge or information sufficient to form a belief thereof"; and the courts of these states have almost uniformly held that such a denial will, by virtue of the statute, be deemed sufficient to put the plaintiff on proof of such facts to the same extent as though they were denied absolutely. Among the cases so holding the following are directly in point: *Cary v. Ducker*, 52 Ark. 103, 12 S. W. 204; *Colorado Coal*

& I. Co. v. John, 5 Colo. App. 213, 38 Pac. 399; Sayles v. Fitzgerald, 72 Conn. 391, 44 Atl. 733; Carr v. Bosworth, 68 Iowa, 669, 27 N. W. 913; Beyre v. Adams, 73 Iowa, 382, 35 N. W. 491; Provident Bank-Stock Co. v. Schafer, 110 Iowa, 440, 81 N. W. 689; Dickinson v. Gray (Ky.), 9 S. W. 281; Milwaukee Gold Extraction Co. v. Gordon, 37 Mont. 209, 95 Pac. 995; Pengelly v. Peelor, 39 Mont. 26, 101 Pac. 147; Clark v. Apex Gold Min. Co., 13 N. M. 416, 85 Pac. 968; United States Casualty Co. v. Jamison, 122 App. Div. 608, 107 N. Y. Supp. 490; Johnston v. Simpson Crawford Co., 115 N. Y. Supp. 141; Farmers' & Merchants' Bank of Baltimore v. Alderman of City of Charlotte, 75 N. C. 45; Colburn v. Barrett, 21 Or. 27, 26 Pac. 1008; Gilreath v. Furman, 57 S. C. 289, 35 S. E. 516; Cumins v. Lawrence County, 1 S. D. 158, 46 N. W. 182 (affirmed on rehearing in 2 S. D. 452, 50 N. W. 900); Seattle Nat. Bank v. Meerwaldt, 8 Wash. 630, 36 Pac. 763; Colby v. City of Spokane, 12 Wash. 690, 42 Pac. 112; Pearson v. Neeves, 92 Wis. 319, 66 N. W. 357; State v. Trask, 135 Wis. 333, 115 N. W. 823.

In Nebraska and Ohio it is held that a want of belief is sufficient to authorize a denial, and it is not improper when the statute does not authorize a denial of knowledge or information to state in connection with the denial that defendant has no knowledge or information on which to form a belief: McIntosh v. Omaha, 3 Neb. (Unof.) 408, 91 N. W. 527; State v. Hancock County, 11 Ohio St. 183.

b. On Information and Belief.—Few of the codes authorize a denial on "information and belief" in express terms, the usual provision, as we have seen, only authorizing a denial of "knowledge or information sufficient to form a belief."

In California and Montana, however, and possibly in a few other states, the codes require (Cal. Code Civ. Proc., sec. 437; Mont. Code Civ. Proc., sec. 89), that in case the complaint is verified, the defendant must answer positively or "according to information and belief," and in these states denials in this form are held sufficient by virtue of the statute: Vassault v. Austin, 32 Cal. 597; Mulcahy v. Buckley, 100 Cal. 484, 35 Pac. 144; Dingley v. Buckner (Cal. App.), 104 Pac. 478; Lewis v. Weyerhorst, 16 Mont. 267, 40 Pac. 589; State v. Butte City Water Co., 18 Mont. 199, 56 Am. St. Rep. 574, 44 Pac. 966, 32 L. R. A. 697; Rossiter v. Loeber, 18 Mont. 372, 45 Pac. 560.

A denial based on information and belief is, of course, essentially different from one based on want of sufficient knowledge or information to form a belief, in that the former presupposes the existence of knowledge which in the latter is wanting.

But a denial upon information and belief was a familiar proceeding under the old chancery practice (Agnew v. McGill, 96 Ala. 496, 11 South. 537; Fairhurst v. Lewis, 23 Ark. 435; Carpenter v. Edwards, 64 Miss. 595, 1 South. 764; Griffith v. Griffith, 9 Paige Ch. (N. Y.) 315; Jones v. Hawkins, 41 N. C. 110; Earle v. Art Lib. Pub. Co., 95 Fed. 544); and the courts have generally construed that the code provisions allowing a denial of knowledge or information also allows a denial on information and belief. Speaking to the question whether a denial upon information and belief was authorized under subdivision 1 of section 500 of the New York Code of Civil Procedure, which provides only for "a general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief," the court of appeals said: "Upon reason, this form of denial in a plead-

ing would seem to be justified. Information is the source of much, indeed of the most, that we call knowledge. We affirm or deny the existence of an alleged fact, either from personal knowledge of its existence, or because we have information thereof which we credit. This latter is the source of most of our knowledge of the facts of history; and in the ordinary affairs of life we often accept and act upon facts known to us only by information, as fully and confidently as though they were personal incidents in our experience. But assertions of facts are frequently made, of which facts we neither have absolute knowledge, nor are they accredited in such a way as to satisfy us of their existence. We may not be able either to affirm or deny their existence, or even to form a judgment or belief in respect to them. It is obvious that each of these several conditions may exist in the case of a defendant brought into court to answer a complaint. The facts alleged may be true or false to his personal knowledge. If he has no personal knowledge of their truth or falsity, nevertheless he may have information which satisfies him that they are either true or false, and a belief founded thereon. Still, again, he may have no information upon which he can affirm or deny the facts alleged; or, if he has some information, it may not be such as to create a belief one way or the other as to their existence, or whether the assertions made are true or untrue. In the first and third cases supposed, concededly the defendant can put the plaintiff to his proof. He may do this in the one case by a direct and positive denial, and in the other by denying any knowledge or information sufficient to form a belief as to the existence of the alleged facts. If the defendant is in the condition of having information, and a belief founded thereon, that the facts alleged are untrue, but no actual knowledge, unless he can deny absolutely the allegations of the complaint, or deny them upon information and belief, he will be precluded, in such a case, when the complaint is verified, from answering at all, and judgment may go against him by default, although the plaintiff might not be able on a trial to establish the facts alleged. . . . We think, therefore, upon reason as well as upon the construction of the code, a denial, in a verified answer, of a material allegation in the complaint, 'upon information and belief' is good. Any other conclusion would lead, in some cases, to great injustice": *Bennett v. Leeds Mfg. Co.*, 110 N. Y. 150, 17 N. E. 669.

And in North Dakota, where the statute is identical with that of New York (N. D. Rev. Code 1905, sec. 5869), the court said: "A denial made upon 'information and belief' is sufficient when made in a certain class of cases. In strictness, it is the only proper form of denial in a case where, with reference to the fact sought to be denied, defendant has certain information which induces him to believe that such facts are untrue, and yet has not absolute knowledge that such facts are untrue. Having information inducing a belief, which falls short of knowledge, defendant cannot truthfully deny the facts absolutely, nor can he truthfully deny that he has neither knowledge nor information sufficient to form a belief as to the fact": *Russell v. Amundson*, 4 N. D. 112, 59 N. W. 477.

The conclusion reached by the courts of New York and North Dakota in the opinions just quoted is opposed by the court of appeals of Colorado in *Solomon v. Brodie*, 10 Colo. App. 353, 50 Pac. 1045, and by some earlier New York cases (*Therasson v. McSpedon*, 2 Hilt. 1; *Swinburne v. Stockwell*, 58 How. Pr. 312; *Pratt Mfg. Co. v.*

Jordon Iron & C. Co., 33 Hun, 143), but has the sanction of the supreme court of the United States in *Maclay v. Sands*, 94 U. S. 586, 24 L. ed. 211, and as will presently appear, is not only supported by the great preponderance of authority, but that the same rules and limitations which have been applied to the one form of denial are also applied to the other.

III. Limitations on Use of These Forms of Denials.

a. Matters Necessarily or Presumptively Within Knowledge of Defendant.

1. **In General.**—The rule which allows a defendant, by a denial of knowledge or information, or upon information and belief, to put in issue material facts alleged against him, is not absolute or universal, but is subject to the limitation that facts either actually or presumptively within the knowledge of defendant, or facts which are at hand and accessible and which it is the duty of the defendant to ascertain, cannot be traversed by a plea of defendant's that he lacks knowledge or information sufficient to form a belief thereof, or to deny the truth of such facts on information and belief.

This limitation on the authorized use of this form of denial has been very clearly stated by many of the courts.

In the early case of *Curtis v. Richards*, 9 Cal. 33, Justice Field declared: "If the facts alleged in the complaint are presumptively within the knowledge of defendant, he must answer positively, and a denial upon information and belief will be treated as an evasion"; and the same court again said in a later case:

"A defendant is not at liberty to answer an allegation in this form [information and belief], when he may be presumed to know, or when he is aware, before answering, that he has the means of ascertaining whether or not such allegation is true": *Mulcahy v. Buckley*, 100 Cal. 484, 35 Pac. 144; and the rule as thus stated was quoted and adopted by the court of appeals in the recent case of *Bartlett Estate Co. v. Fraser* (Cal. App.), 105 Pac. 130.

"If the facts are presumptively within his [defendant's] knowledge, this form of denial [want of knowledge and information] controverts nothing and amounts to an admission": *Fravert v. Fesler*, 11 Colo. App. 387, 53 Pac. 288.

A denial in an answer on information and belief of "a matter peculiarly and exclusively within the personal knowledge of the defendant" is no denial at all, and "a court will not permit itself to be trifled with by an attempted denial of such matters on information and belief": *Ensley v. Page*, 13 Colo. App. 452, 59 Pac. 225.

"A denial of knowledge or information sufficient to form a belief is not good as to facts within the defendant's knowledge": *Kentucky Coal Mining Co. v. Mattingly* (Ky.), 118 S. W. 350.

"When the facts are within the defendant's knowledge, he must answer positively, and not as to his information and belief": *Avery v. Stewart*, 136 N. C. 426, 48 S. E. 775, 68 L. R. A. 776.

"The permission to deny any knowledge or information, etc., is not absolute. If the fact charged is evidently within the defendant's knowledge—as an act done by himself, and within the period of recollection, or where he has the means of information—a denial of information in the language of the statute would be clearly false or evasive, and such answer should be disregarded": *Gjerstadengen v. Hartzell*, 8 N. D. 424, 79 N. W. 872.

The limitation to which the use of this form of denial is subject seems to have been very fully considered by the appellate division of the supreme court of New York, in a recent case, and the conclusion reached by that court was thus expressed by Justice Gaynor: "It is permitted only out of necessity, to meet certain rare cases where the defendant is honestly without any knowledge or information of allegations of the complaint sufficient to form a belief of them, does not know whether they are true or false, and is therefore unable to positively deny them"; and then stated the rule to be: (a) "If the facts alleged in the complaint which are denied by this form of denial are presumptively within the defendant's knowledge, as would be the case of transactions with him personally, for instance, he cannot use such form of denial. It would be a mere evasion, and that the courts will not allow. It was not meant to enable defendants to deny their own personal transactions, but only things which did not come within their own personal knowledge. 'The true distinction to be observed in determining when a defendant may avail himself of the privilege accorded to him of answering in the qualified form allowed by the code, and when he must positively admit' (he is not required to make formal admission of anything under our code) 'or deny the allegations, is to inquire whether the facts alleged are presumptively within the defendant's knowledge. If they are, he cannot avail himself of this form of denial: 1 Ency. of Pl. & Pr. 811. (b) Nor may this form of denial be used in a case of intentional ignorance of the defendant when it is his duty . . . to know or learn the facts, and they are at hand and accessible": *Rockkind v. Perlman*, 123 App. Div. 808, 108 N. Y. Supp. 224, 1151. And in the still later case of *Balliet v. Metropolitan Life Ins. Co.*, 125 App. Div. 705, 110 N. Y. Supp. 77, the same court said: "A denial of knowledge or information sufficient to form a belief as to matters which the party pleading is bound to know does not raise an issue."

There being no conflict of authority over the limitations to which this form of denial is subject, it only remains to see what matters the courts consider presumptively within defendant's knowledge, or concerning which he is bound to inform himself within the rules above given.

2. Personal Acts.—A defendant is presumed to know of his own personal acts, and therefore cannot deny knowledge of his own actings and doings; nor can he deny knowledge of matters which relate to personal transactions with him. Thus in an action on a contract made by defendant, the alleged consideration for which was the assignment by plaintiff to defendant of certain judgments, defendants cannot traverse such allegation by a denial upon information and belief that the judgments were assigned: *Brown v. Scott*, 25 Cal. 189.

And in an action on an account stated, defendant's denial of indebtedness on want of information and belief raises no issue, since a party must be held to know whether he is indebted to another: *Brady v. Ranch Min. Co.*, 7 Cal. App. 182, 94 Pac. 85.

So, too, when the complaint alleged that defendant received a certain quantity of wood for transportation and the answer admitted that defendant received and transported a large quantity of such wood, but denied knowledge or information sufficient to form a belief as to the quantity so received, it was held that this denial was bad, since it failed to show any reason for want of knowledge which de-

defendant was presumed to possess: *Starbuck v. Dunklee*, 10 Minn. 168 (Gil. 136), 88 Am. Dec. 68.

And where the complaint alleged that plaintiff informed defendant of plaintiff's contract with a third person for the purchase of land by plaintiff from the third person, and then contracted with defendant that defendant should buy the land from the third person for plaintiff, and allow plaintiff a specified time to pay for it, it was held that an answer merely stating that defendant was informed and believed that the allegations of the complaint were not true, and denied the same, was insufficient to raise an issue, since whether defendant had been informed by plaintiff as to plaintiff's contract was a matter within defendant's knowledge, which should have been met by a direct denial: *Avery v. Stewart*, 134 N. C. 287, 46 S. E. 519.

Likewise when a complaint alleges that a writ, under which plaintiff was arrested, was caused to be issued by defendants, an answer alleging that defendants have no knowledge or information sufficient to form a belief of the allegations of the complaint not therein admitted is insufficient, as defendants must know whether they caused the writ to be issued: *Lawrence v. Derby*, 15 Abb. Pr. 346, note, 24 How. Pr. 133.

And when the complaint set forth an agreement between the parties, defendant could not evade a positive denial by a denial in the answer of information or knowledge sufficient to form a belief as to the facts set forth: *Raymond v. Johnson*, 17 Wash. 232, 61 Am. St. Rep. 908, 49 Pac. 492.

But this rule does not prevent an executor, in an action against him as such, to recover moneys claimed by plaintiff to be due for services rendered the decedent, from denying on information and belief the character and value of the alleged services, or the amount alleged to have been paid thereon or the amount still due, since these matters are not presumably within the executor's knowledge: *Etchas v. Orena*, 121 Cal. 270, 53 Pac. 798.

And when a complaint to recover for services rendered as an architect fails to state who performed the services, or that plaintiff is an architect, or for whom the services were performed, or that defendant promised to pay plaintiff anything, defendant may answer by a general denial on information and belief: *Humble v. McDonough*, 5 Misc. Rep. 508, 25 N. Y. Supp. 965.

Further instances of the rule that a defendant will not be permitted to deny want of knowledge or information regarding his own personal acts, or with respect to matters which relate to personal transactions with him, arise when such denials are attempted in actions founded on written instruments executed by the defendant, and these will be next considered.

3. Written Contracts and Notes.

A. Denial of Execution.—A defendant cannot deny for want of knowledge or information, the existence of a written contract alleged to have been executed by him; hence a plea of non est factum must be an affirmative one: *Dugan's Admr. v. Harris' Admr.*, 6 Ky. Law Rep. (Abstract) 596; and to the same effect is the late case of *Kentucky Coal Min. Co. v. Mattingly* (Ky.), 118 S. W. 350. In the latter case the mining company, which was defendant in the court below, had a custom of issuing to its miners aluminum checks with the company's name stamped on one side and on the other side the

words, "Good for one dollar." By arrangement with the company these checks were accepted by certain merchants as cash. Mattingly, the plaintiff below, though having no such arrangement with the mining company, became the owner of a large number of these checks for value, and the company declining to pay them, brought suit to recover the amount. The defendant's answer averred that "the defendant says it has no knowledge or information sufficient to form a belief as to whether or not it ever issued the checks sued on and described in plaintiff's petition, or that the same were ever delivered by defendant to any employé, or that they represented the true value of the labor performed." The judgment in favor of plaintiff was affirmed, the court saying: "The rule is that a denial of knowledge or information sufficient to form a belief is not good as to facts within the defendant's knowledge. The defendant is presumed to know its own checks, and it cannot require the plaintiff to prove the genuineness of a check when it is unwilling to say the check is not genuine."

But as the rule which does not permit a defendant to deny on information the existence of an instrument alleged to have been executed by him, is based entirely on the theory that he must have personal knowledge of such fact, or can readily ascertain the truth regarding it, the rule is relaxed when either of these presumptions is overcome by the circumstances of the case. Thus, in *Hall v. Woodward*, 30 S. C. 564, 9 S. E. 684, it was held that an answer denying the execution of a note on information and belief is proper, where the note has been lost for about twenty years, and the defendant has not had an opportunity to examine it or had it called to his attention during that period.

B. Denials of Contents or Compliance With Terms.—When a party does not deny the making of a contract, he cannot deny knowledge of its contents. Thus, in an action for breach of a contract, where the answer does not deny the existence of the contract pleaded, but merely states that defendant has no knowledge or information of it, the contract is confessed: *Howard v. Maysville & B. S. R. Co.*, 24 Ky. Law Rep. 1051, 70 S. W. 631; and to same effect is *Hand v. Miller*, 58 App. Div. 126, 68 N. Y. Supp. 531.

Neither can a defendant deny knowledge or information as to whether a written contract to which he was a party has been complied with according to its terms. Thus, in *Fravert v. Fesler*, 11 Colo. App. 387, 53 Pac. 288, suit was brought by plaintiff on a contract between his assignors and defendant. The answer denied knowledge or information sufficient to form a belief as to whether plaintiff and his assignors had complied with the terms of the contract. It was held that this answer controverted nothing, and amounted to an admission, because defendant was a party to the contract and was presumed to know whether or not there was a compliance between the plaintiff and his assignors with its terms.

Likewise in *Angier v. Equitable Building & Loan Assn.*, 109 Ga. 625, 35 S. E. 64, where action was brought for alleged breaches of a bond executed by defendant, it was held that an answer to the allegations in the petition relating to the bond and to defendant's own actings and doings, which averred that for want of sufficient information defendant was unable to admit or deny such allegations, was without merit, when there was no explanation of the alleged ignorance, for the reason, as Judge Lumpkin said: "The allegations in ques-

tion related to a written instrument executed by himself, and to matters of which he must, in the nature of things, have had personal knowledge."

C. Denial of Transfer or Assignment of Note by Payee.—While a defendant cannot, as we have seen, deny on information and belief that he made a note, and consequently that he indorsed or transferred it, for the reason that he is presumed to have knowledge of his own personal acts, he is not thereby estopped from making this form of denial with reference to an alleged indorsement or transfer of it by the payee, since this is not a matter to which he is a party. Thus, in *Flood v. Reynolds*, 13 How. Pr. 112, the holder of a promissory note sued the maker with an indorser, alleging the execution of the note by the defendant maker, and that it was indorsed by the other defendant to the plaintiff. The answer of the defendant maker admitted that he had made the note and indorsed it to the other defendant, but stated that whether or not the other defendant had indorsed the note and transferred it to the plaintiff he had "no knowledge or information thereof sufficient to form a belief"; and this was held sufficient to put the allegation as to indorsement and transfer in issue. "This was a material allegation," said the court. "The defendant [maker] had a right to controvert it, if he could. Whether true or not, was a matter not necessarily within his own knowledge. He had a right, therefore, instead of denying the truth of the allegations, to put its truth in issue, by asserting that he could not say whether it was true or not, because he had no knowledge or information on the subject from which he could form a belief." And the general rule that in a suit on a note against the maker he can deny on information and belief an allegation that the note has been indorsed and transferred to the plaintiff by the payee is fully sustained by the following cases: *Nunnemacker v. Johnson*, 38 Minn. 390, 38 N. W. 351; *Snyder v. White*, 6 How. Pr. 321; *Sherman v. Bushnell*, 7 How. Pr. 171; *Brown v. Ryckman*, 12 How. Pr. 313; *Hecker v. Mitchell*, 5 Abb. Pr. 453; *Roby v. Hallack*, 55 How. Pr. 412; *Robert Gere Bank v. Inman*, 51 Hun, 97, 5 N. Y. Supp. 457 (affirmed in 115 N. Y. 650, 21 N. E. 1118); *Taylor v. Smith*, 8 N. Y. Supp. 519, 29 N. Y. St. Rep. 365; *Hughes v. Wilcox*, 17 Misc. Rep. 32, 39 N. Y. Supp. 210; *Byrne v. Hegeman*, 24 App. Div. 152, 48 N. Y. Supp. 788; *Western Carolina Bank v. Atkinson*, 113 N. C. 478, 18 S. E. 703.

But in *McClure v. Bigstaff*, 18 Ky. Law Rep. 601, 37 S. W. 294, 38 S. W. 431, where the assignee of two notes brought suit on the notes and for a vendor's lien against the administrator and heirs of the maker of the notes, it was held that an answer of one of the heirs denying information and belief as to whether the payees assigned the notes sued on and filed with the petition was insufficient. The court said: "It has been held that a defendant may 'rely upon a want of belief where he has not sufficient knowledge or information upon the subject of the controversy to enable a person of ordinary intelligence to form a belief. But when the record as made up at the time of the preparation furnishes the necessary information, or when the fact is necessarily within his personal knowledge,' this plea has been treated as a sham, and judgment rendered as if no answer had been filed. In this case the notes were a part of the record, with all the assignments indorsed upon them, at the time of the preparation of the answer, and we are therefore of opinion that this paragraph presented no defense to the action."

D. Denial of Presentment, Nonpayment and Protest.—It has been held that an answer, in an action on a note, averring that as to presentment and nonpayment of the note, defendant had not information in respect thereof sufficient to form a belief on the subject, is sufficient to raise an issue as to the presentment for payment: *Dickerson v. Kimball*, 1 Code Rep. 49.

But in *Gridler v. Farmers' & Drovers' Bank*, 12 Bush, 333, it was held that want of knowledge or information sufficient to form a belief is not a sufficient denial by the defendant of the alleged presentation, demand, refusal of payment, and protest of the bill sued on, when the protest of the notary showing these facts is filed with the petition.

E. Denial of Ownership.—As a general rule, in an action on a note, an answer denying on information and belief that plaintiff is the owner and holder of the note are held to be insufficient: *Beers v. Squire*, 1 Code Rep. 84; *Fleury v. Roger*, 9 How. Pr. 215; *Fleury v. Brown*, 9 How. Pr. 216; *Hammer v. Kline*, 9 How. Pr. 217; *Gilbert v. Covell*, 16 How. Pr. 34; *Kamlah v. Salter*, 6 Abb. Pr. 220; *Bronson v. Rock Island etc. R. Co.*, 40 How. Pr. 48; *Conselyea v. Swift*, 103 N. Y. 604, 9 N. E. 489; *DeLoatch v. Vinson*, 108 N. C. 147, 12 S. E. 895.

In most of these cases the ruling was based on the ground that the substance of the denials was a conclusion of law, and the fact that the denial was on information and belief did not evoke much discussion. Thus, in *Beers v. Squire*, 1 Code Rep. 84, the action was by the holder against the maker and indorser of the note. The answer of defendants alleged that the note was an accommodation note, that defendants had no personal knowledge that the plaintiffs were the holders of the note, and that defendants were not indebted to the plaintiffs. It was held that the answer was no denial of the facts upon which the complaint was founded, and that the indebtedness followed as a conclusion of law.

Also, in *Gilbert v. Covell*, 16 How. Pr. 34, in a suit on a note, the complaint alleged, after setting out the note, that the payer "sold, transferred, and delivered" the note to plaintiff, "who is now the lawful owner and holder of said note."

The answer which denied, upon information and belief, that the plaintiff was the owner and holder of the note sued on, was held insufficient. Said the court: "The answers are clearly insufficient. They neither of them deny any material fact stated in the complaint. . . . They both consist only of denials of conclusions of law."

And in *Conselyea v. Swift*, 103 N. Y. 604, 9 N. E. 489, which was an action by the indorsees against the indorser, the answer set up that defendant was an accommodation indorser, and alleged upon information "that the said plaintiffs are not the lawful owners and holders of said note, and that he is not indebted to them thereupon in any sum whatever." In holding the answer insufficient the court said: "It put in issue no part of the plaintiff's case. The whole burden of proof lay upon the defendant, and without evidence the plaintiff was entitled to a verdict." This case reversed the decision of the supreme court in 39 Hun, 656.

But there are some New York cases, as well as one from Ohio, which are not in harmony with the rule supported by the foregoing cases: *Temple v. Murray*, 6 How. Pr. 329; *Duncan v. Lawrence*, 3 Bosw. 103; *Stoutenburg v. Lybrand*, 13 Ohio St. 228. In both of the

New York cases it was held that an answer denying on information and belief an allegation in the complaint that plaintiff was the lawful owner and holder of the note was sufficient to compel plaintiff to establish *prima facie* at least his ownership of the note, and in *Temple v. Murray*, 6 How. Pr. (N. Y.) 329, the supreme court said: "If it was material for the plaintiff to allege ownership, in order to sustain his action, it is there quite clear that this branch of the answer is not immaterial or 'frivolous.' It casts the onus probandi on the plaintiff of proving his ownership of the note."

In *Stoutenberg v. Lybrand*, 13 Ohio St. 228, it was not only held that an answer denying on information and belief an allegation of plaintiff's ownership of the note was not demurrable upon the ground that it stated only a conclusion of law, but unlike the other cases the court entered into a somewhat extended discussion as to the effect of denials of ownership on information, without reference to the substance of the denial. The petition in this case alleged that the note was assigned by the payer to one H., who afterward indorsed it in blank, and that after this indorsement in blank E., being then the owner and holder of the note, indorsed and assigned the same to plaintiff. The answer of the defendant maker denied on information and belief that H. was ever the owner of the note, and that "he verily believes the said Archibald Lybrand [plaintiff] was not at the commencement of this suit, and is not at the present time, the owner of the note in said petition described, and the said J. C. Evans was the holder of said note when the same became due, and has since made demand of payment thereon." A demurrer to this answer was sustained by the trial court upon the ground that the matters set forth in it were stated upon information and belief, and did not state facts, but only conclusions of law. In holding that the court erred in sustaining the demurrer the supreme court, speaking to the form of the denial, said: "Now, though in this case, by giving a strict construction to the language used, it might be said that the party attempts to set up the facts of his information and belief as a defense, yet it is quite apparent, without much liberality of construction, that it is not his belief, but the facts believed to exist, upon which he relies for his defense. Any pleading under the code, taken in connection with its proper verification, amounts to nothing more than a statement, under oath, of what the party pleading believes to be true. As a general rule, the proper mode is to state the facts directly and positively in the body of the pleading, and let the verification show that this statement is made as matter of belief only. But violations of this rule which do not affect the substance of the cause of action or the grounds of defense cannot be reached by demurrer." The court then went on to say that the plaintiff might, perhaps, upon motion have had the words "he is informed and believes" stricken out from the answer, as redundant; and speaking to the objection that the answer did not state facts, but only conclusions of law, the court said that an allegation denying ownership was not an allegation of a mere conclusion of law, but should be regarded as an allegation of the facts upon which the legal conclusion rests, which, while possibly objectionable on motion, was good on demurrer.

4. **Acts of Agent.**—The rule which forbids a defendant from denying on information and belief matters which are presumably within his knowledge, or which he can readily ascertain before answering, applies to the acts of defendant's agent, so that neither a corporation

nor individual defendant can deny knowledge of the acts of its or his agent: *Loveland v. Garner*, 74 Cal. 298, 15 Pac. 844; *Gribble v. Columbus Brewing Co.*, 100 Cal. 67, 34 Pac. 527; *Thorn v. New York Cent. Mills*, 10 How. Pr. (N. Y.) 19.

Thus, a corporation cannot deny for want of sufficient information and belief, if the matters alleged are presumptively within the knowledge of any of its officers, though the officer verifying the answer is himself without any information on the subject: *Sloane v. Southern Cal. Ry. Co.*, 111 Cal. 668, 44 Pac. 320, 32 L. R. A. 193.

In *Nashville etc. Ry. Co. v. Carrico*, 95 Ky. 489, 26 S. W. 177, plaintiff sought to recover damages for injuries to livestock, alleged to have been received through the negligence of defendant while being carried on its road. The answer did not deny the injury to the stock, but simply stated that defendant did not have sufficient information to form a belief on the subject. In holding the answer was not sufficient the court said: "It is the duty of a railroad company, by its managing officers, to know whether its trains have been operated properly, or in such manner as to destroy life and property."

In *Beyre v. Adams*, 73 Iowa, 382, 35 N. W. 491, which was an action for the value of a cow, plaintiff alleged that the animal died in consequence of the negligence of defendant's servant. Defendant's answer alleged "that of the alleged negligence of said [servant] and the death of said cow, the defendant has no knowledge or information to form a belief that said cow died in consequence of such negligence, and therefore denies the same." It was held that, under Code, section 2655, paragraph 3, the answer put upon plaintiff the burden of proving that "said cow died of such negligence," but that the allegation that the servant was guilty of the negligence alleged was to be deemed true.

An excellent illustration of the doctrine that acts done by the agent of the defendant are within the rule that the defendant must be presumed to know what he himself has done is afforded by the case of *Thorn v. New York Cent. Mills Co.*, 10 How. Pr. 19. Here the action was on a note against a corporation. The defendant, by one of its directors, answered with a verification that it had no knowledge or information sufficient to form a belief that it did, by its authorized agent, make the note as alleged in the complaint, in that it was indebted to the plaintiffs upon said note as in said complaint mentioned. The answer was held to be frivolous. Said Justice Bacon, speaking for the supreme court: "If this were the case of an individual defendant, and it was alleged that he gave the note in question to the plaintiffs, and the answer should pursue the form adopted in this case, and state that he had no knowledge or information sufficient to form a belief whether or not he gave the note, I suppose there can be no doubt that . . . the answer would be utterly evasive and frivolous. Is there any different rule to be applied to the defendant in this case, because it happens to be a corporation? I apprehend not. A corporation is as much bound to know whether it has entered into contracts, made purchases, given promissory notes, in the course of its business and by its appropriate agents, as an individual. . . . It is not to be tolerated that a corporation defendant, when sued on an obligation purporting to have been given by its agent directly to the party seeking his remedy upon it, may hunt up a director who is in such a blissful state of ignorance as to all the business transactions of the corporation, that he can safely swear he has no knowledge or

information on the subject, and assuming equal incompetency or inattention on the part of all his associates, may confidently ignore any knowledge or information sufficient to form a belief on the part of the corporation. I hold, therefore, that in this case the defendant was bound to know, or at least to inquire, and thus gain information as to the fact of the existence of the note in question in this suit, and that the company are not at liberty to answer otherwise than by an explicit admission or denial of the giving of the note."

But where plaintiff made a contract with a corporation's general counsel to perform certain services for the corporation, and subsequently sued the corporation for services rendered and moneys expended thereunder, the allegations of the complaint as to the extent and character of such services and the amount of money disbursed are not "presumptively within the knowledge of defendant" (Code, sec. 56), so as to render a denial on information and belief insufficient: *Colorado Coal & Iron Co. v. John*, 5 Colo. App. 213, 38 Pac. 399.

5. **Sales.**—In an action to recover for merchandise alleged to have been sold and delivered to defendant, defendant cannot deny its purchase on information and belief: *Raphael Weil & Co. v. Crittenden*, 139 Cal. 488, 73 Pac. 238; *Wing v. Dugan*, 8 Bush, 583; *Chapman v. Farmer*, 12 How. Pr. 37.

But in *Newberger v. Webb*, 24 Hun, 347, where the action was brought to recover a demand against defendants arising from the sale of merchandise sold on commission as alleged in the complaint, it was held that a verified answer made by the defendant's attorney, on information and belief, as to the truth of material allegations was sufficient, the attorney giving as his reason why the verification was not made by the defendant, that the latter was a nonresident of the county in which the attorney resided, and also stating that the grounds of his belief were statements made to him by defendant.

In *Singer v. Eppler*, 16 Misc. Rep. 334, 39 N. Y. Supp. 720, it was held that a defendant in an action for goods sold and delivered to himself cannot deny any knowledge or information sufficient to form a belief as to such sale and delivery, unless, from lapse of time or other circumstances, he cannot admit or deny the allegations positively, in which case he should allege such circumstances.

6. **Questions of Law.**—The code provisions authorizing denials of facts pleaded to be based on lack of knowledge or information sufficient to form a belief do not apply to and authorize such denials of questions of law. Thus in a suit by the commonwealth against a company holding a lease of the stock and water improvements on the Kentucky river to rescind the lease because the company had permitted the improvements to remain out of repair and was insolvent, an answer setting up that the company did not have sufficient information to form a belief whether it was solvent, because it held certain subscriptions by certain counties and towns, and that it believed they were valid, but had not sufficient information to form a belief whether they would be judicially determined to be valid, was an insufficient denial of the direct charge of insolvency: *Kentucky River Nav. Co. v. Commonwealth*, 13 Bush, 435.

And in *Greer v. City of Covington*, 83 Ky. 410, 2 S. W. 323, where the city, as plaintiff in the lower court, sued to recover from defendant certain municipal taxes, it was held that a plea by defendant that "he has no information sufficient to found a belief" as to whether certain ordinances of the city were ever published "as required by

law," was properly stricken, it being, as the court said, "but a statement of the party's want of information of law."

Likewise, in *Soeding v. Bartlett*, 35 Mo. 90, an answer denying "any knowledge or information sufficient to form a belief" whether or not a certain notice was served on the defendants, "as required by law," was held not to put in issue the fact of such notice, but only its lawfulness.

7. Matters of Record.

A. General Rule.—Since the public records afford all means of information necessary to obtain positive knowledge of the facts contained therein, the general rule is that a party cannot plead ignorance as to matters readily accessible by reason of being in the public records. "With this means of positive information open before him," said the supreme court of North Dakota, "a party is not permitted to say that he has no knowledge or information sufficient to form a belief. While the statute authorizes a denial in that form, yet it requires good faith and honesty of purpose; and it cannot be tolerated that a party may shut his eyes to information thrust before them in order to be technically able to say that he has no such information": *Gjerstadengen v. Hartzell*, 8 N. D. 424, 79 N. W. 872.

Judge Hawley, in *Peacock v. United States*, 125 Fed. 583, 60 C. C. A. 389, declared that "The rule is universal that matters of public record within the reach of the defendant cannot be denied on the ground that he had no sufficient information or belief concerning them"; and we have found no cases which contradict the general rule as thus stated.

It only becomes necessary, therefore, to see to what extent the rule is carried when the denial relates to matters of which some public record exists.

B. Files and Records of Court Proceedings.—In the principal case, *Dittemore v. Cable Milling Co.*, 16 Idaho, 298, ante, p. 98, 101 Pac. 593, it was said that the rule prohibiting denials on information and belief of matters of record should not be extended to the length of requiring the defendant in a state court to inform himself as to the files and records in federal courts in cases in which he was not a party, and especially with reference to bankruptcy proceedings usually heard and passed upon by a referee, where the records and files are usually in the custody of the referee.

We find no other case, when the point here adjudicated has been considered, but the rule here upheld seems restricted to cases to which the defendant was not a party personally, for in *First Nat. Bank v. Martin*, 6 Idaho, 204, 55 Pac. 302, it was held that an answer which contains denials upon information and belief of matters which are entirely made up of the files and records in a case in which the defendant was a principal party is properly stricken out as sham and frivolous; and it was explained by the court in the principal case, ante, p. 98, that this decision does not conflict with the ruling there made, because in *First Nat. Bank v. Martin*, 6 Idaho, 204, 55 Pac. 302, the defendant was a party to the records which he sought to deny on information and belief.

C. When Copies are Filed With the Pleadings.—Where the record, as made up at the time of the preparation of the plea, furnishes the necessary information, a defendant will not be allowed to deny such facts on information and belief, but the courts will hold such pleas

as shams, and a judgment may be rendered as if no answer was filed: *Gridler v. Farmers' and Drovers' Bank*, 12 Bush, 333. Thus, where a material fact alleged in the pleading is evidenced by official documents, and such documents or authenticated copies thereof are filed with the pleading, an answer by defendant that he has no knowledge or information sufficient to form a belief as to such facts is insufficient: *Barret v. Godshaw*, 12 Bush, 592.

So, also, where in proceedings to foreclose railroad mortgages, the complainants assert a claim based on the payrolls of the company, which are made a part of the record of the cause, and the company has admitted the accuracy of such rolls, an adverse party cannot put the claimants on proof of their debts by a technical denial based on want of knowledge or information sufficient to enable him to form a belief as to the existence of the claims, as the information was within his reach: *Douglass v. Cline*, 12 Bush, 608.

D. Judgments.—A party will not be permitted to deny on information and belief the existence of a judgment against him when it appears that he had notice of or entered his appearance in the judicial proceedings in which the judgment was rendered: *Robling v. Long*, 60 How. Pr. 200; *Gjerstadengen v. Hartzell*, 8 N. D. 424, 79 N. W. 872; *Butler v. Sidell*, 43 Fed. 116.

But a denial upon information and belief of the existence of a judgment by a defendant who was not a party to the proceedings in which the judgment was rendered is good and sufficient: *Mower v. Stickney*, 5 Minn. (Gil. 321) 397.

This rule, however, which permits one not a party to the proceedings in which a judgment was rendered to deny its existence on information and belief does not authorize a sheriff to make such denial as to the validity of a judgment in an action against him for delay in levying an execution bond on a judgment recorded in his county: *Elmore v. Hill*, 46 Wis. 618, 1 N. W. 235. Said the court in this case: "The execution which the defendant had in his possession informed him of the existence of the judgment. It showed prima facie a valid judgment. The judgment was a public record in the defendant's county, and in the court of which he was an officer. So, also, were the proceedings in the action preliminary to the judgment. It was his duty to examine the record, and ascertain for himself whether the judgment was valid or not, and to answer accordingly."

E. Orders of Court.—A denial that an order of court, "as defendant is informed and believes," was made or entered of record in the county court accepting or approving a sheriff's bond, is not sufficient to raise an issue: *Herald v. Hargis*, 21 Ky. Law Rep. 1287, 54 S. W. 958.

F. Deeds.—Since an allegation of matters of public record cannot be traversed for want of knowledge or information, a defendant cannot deny for want of knowledge that a certain person was his grantor or that the premises had been platted and the plat recorded: *Daisy Realty Co. v. Brown* (Ky.), 35 S. W. 637.

And an issue on the allegation of a complaint that by deed dated and recorded on a certain day the premises were conveyed to plaintiffs by defendant's lessor is not raised by the averment of the answer that the defendant has no knowledge or information sufficient to form a belief, and denies the same, since one may not plead ignorance of a public record to which he has access: *Schwartz v. Ribando*, 52 Misc. Rep. 102, 101 N. Y. Supp. 599.

So, also, where the complaint alleges the execution of a deed, sets it out in *haec verba*, and states the volume and page of the record where it is recorded, an answer containing a denial of "sufficient knowledge or information to form a belief" as to such allegation is insufficient to raise an issue: *Goodell v. Blumer*, 41 Wis. 436.

Likewise, in an action for the foreclosure of a mortgage executed by defendant, when the complaint alleges the time, place, volume and page of the record of an assignment thereof, in the proper registry of deeds, an answer denying any knowledge or information sufficient to form a belief as to such allegations is sham, and should be stricken out, the record being in the county where the defendant resided and verified his answer: *Wheaton v. Briggs*, 35 Minn. 470, 29 N. W. 170.

G. Letters Testamentary and Appointment of Guardians ad Litem. An affidavit on which is based the order of revival of a suit in the name of a personal representative, showing when decedent died, that plaintiff was appointed executrix, the will admitted to probate, and letters testamentary granted to plaintiff, is not controverted by an affidavit by defendant, denying that he has any information or knowledge sufficient to form a belief as to the facts in the affidavit for the motion: *Simmons v. Craig*, 137 N. Y. 550, 37 N. E. 76.

In an action by legal representatives of a decedent, defendant cannot deny on mere information and belief an allegation of the complaint that plaintiffs are suing under authority of the will, and that the will was probated in a court of record, and all necessary steps were taken to enable them to sue: *Thompson v. Skeen*, 14 Utah, 209, 46 Pac. 1103.

But in *Wittman v. Watson*, 37 Wis. 238, where plaintiff sued as "executrix and residuary legatee," and the complaint averred that she was such, an answer alleging that defendant had no knowledge or information sufficient to form a belief as to that averment was held sufficient to require plaintiff to prove that she was such executrix and residuary legatee. And a defendant who has no knowledge or information of the appointment of a guardian ad litem is not required to examine the records to ascertain the fact, but may plead denial of information sufficient to form a belief, and rely on plaintiff to prove such appointment: *Neubauer v. American Slating Co.*, 171 Fed. 273.

H. Payment of Taxes.—In *Van Dyke v. Doherty*, 6 N. D. 263, 69 N. W. 200, where plaintiff brought action to foreclose a mortgage and sought to be reimbursed for taxes which he alleged he had paid, it was held that the defendant could not deny such payment on information and belief.

But in *Davis v. Louk*, 30 Wis. 308, when the complaint averred that plaintiff had paid taxes upon certain lands of which defendant was bound to pay a certain part, and demanded judgment for such part, it was held that defendant's denial of knowledge or information sufficient to form a belief as to such payment was sufficient. The court remarked that if the defendant had the means of information on hand so that she could ascertain without difficulty whether the plaintiff had paid the taxes, there would be force in the objection that the answer was insufficient, but then said: "The records doubtless will show whether the taxes were paid or not, but we do not understand that they will necessarily show by whom they were paid. The receipts given by the public officers are the most satisfactory evidence of those facts, and if they are in possession of the plaintiff,

as they doubtless are, if he paid the taxes, there can be no hardship in requiring him to produce them in support of his claim. At all events, we cannot assume that the defendant is willfully ignorant upon the subject, or has sources of information within her reach so as to make the form of denial in the answers evasive and insufficient."

I. Records of County Supervisors.—It has been held that the minutes of a board of county supervisors are such public records as will preclude anyone from denying their alleged contents upon information and belief. Thus, in proceedings by a county to condemn land for the widening of a highway, a denial, based on want of information and belief, touching the report of the viewers, the notice of hearing and the various orders of the board of supervisors, is sufficient, because defendant has the means of ascertaining the truth of such matters from the public records: *Mendocino County v. Peters*, 2 Cal. App. 24, 82 Pac. 1122.

So, too, in *State v. McGarry*, 21 Wis. 496, it was held in quo warranto proceedings against a county officer to try his title to the office, that resolutions of the board of supervisors when in writing and entered upon the minutes of the board, are matters of public record which cannot be denied on information and belief.

But in *People v. Curtis*, 1 Idaho, 753, which was also an action in the nature of quo warranto brought for the removal of a county officer, it was held that an answer denying on information and belief matters embraced in the records of the county commissioners was sufficient, the court saying that the facts could "have been ascertained by an examination of records possibly within his [defendant's] reach, but not such as he would be presumed to know the contents of."

b. Miscellaneous Cases Showing Application of Rule as to Limitations on Use of Denials on Information and Belief Under Particular Circumstances.

1. Where Answers were Held Sufficient.—In *Raymond v. Wimsette*, 12 Mont. 551, 33 Am. St. Rep. 604, 31 Pac. 537, the action was to enjoin defendants from diverting the waters of a creek. The complaint alleged that plaintiff's land was valuable for producing grain by irrigation; that plaintiff and his predecessors had appropriated the water by ditches, and had enjoyed their uninterrupted use till defendant's wrongful diversion; and that all the waters were necessary for irrigating plaintiff's land. It was held that these allegations were sufficiently traversed by an answer denying, on information and belief, plaintiff's ownership of the land, and denying that there was a creek having a regular and continuous flow from defendant's land to that of plaintiff; that grain could be grown on the land; that defendant had prevented plaintiff from using the waters of the creek to which he was entitled; or that plaintiff and his predecessors were ever the owners of all the waters of the creek, or had ever appropriated the same.

And in *Strauss v. American Publishers' Assn.*, 96 App. Div. 315, 89 N. Y. Supp. 172, it was held that an answer to a suit to set aside an alleged fraudulent combination in restraint of trade was not objectionable on the ground that defendants averred or denied facts on information and belief of which they had knowledge, since the defendants would rely upon legal advice as to the legality of their association.

Likewise in *Connolly v. Schroeder*, 121 App. Div. 634, 106 N. Y. Supp. 303, it was held that an answer may, for the purpose of putting plaintiffs to proof of the regularity of the institution and prosecution of summary proceedings which the complaint alleges were duly instituted in a court of competent jurisdiction, deny on information and belief the institution of such proceedings.

2. **Where Answers were Held Insufficient.**—On an alternative writ of mandamus requiring the clerk of a city of the sixth class to countersign and deliver a warrant or show cause, an allegation by defendant, on information and belief, of insufficient funds in the treasury to pay the warrant, is defective, since he should, of his own knowledge, know the exact amount in the treasury: *McConoughey v. Jackson*, 101 Cal. 265, 40 Am. St. Rep. 53, 35 Pac. 863.

Also, an answer to a petition for a writ of mandate to compel defendant, as treasurer of an irrigation district, to pay interest coupons on bonds issued by the district, denying knowledge or information sufficient to form a belief whether the coupons were ever signed by the secretary of the district, raised no issue on that point: *Hewell v. Hogin*, 3 Cal. App. 248, 84 Pac. 1002.

In *Lucas v. Lucas' Admr.*, 18 Ky. Law Rep. 661, 37 S. W. 588, it was held that, under Civil Code, section 113, providing that, where facts are presumptively within the knowledge of the party, they must be denied specifically, a rejoinder by the defendant that he had not sufficient knowledge or information upon which to form a belief whether an Ohio court named in the reply had jurisdiction of a former suit for divorce against him, as asserted in the reply, or whether he was before the court according to the laws of Ohio, was insufficient.

So, also, an allegation that defendants claim an interest in the fund in suit cannot be denied by alleging that defendants have no knowledge or information sufficient to form a belief: *McNeely v. Welz*, 20 App. Div. 566, 47 N. Y. Supp. 310 (affirmed in 166 N. Y. 124, 59 N. E. 697).

And when plaintiff alleges in the complaint that it is a corporation, its corporate existence is not put in issue by defendant's denial of knowledge or information sufficient to form a belief as to the truth of the allegation: *Snow Church Co. v. Hall*, 19 Misc. Rep. 655, 44 N. Y. Supp. 427, 26 Civ. Proc. Rep. 274; and to same effect is *Northwestern Cordage Co. v. Galbraith*, 9 S. D. 634, 70 N. W. 1048.

In a proceeding to recover possession of leased premises, an answer by the tenant, denying on information and belief, an allegation as to the amount due under a written agreement, for the rental of the premises for a certain month, is insufficient: *Browning v. Moses*, 60 Misc. Rep. 111, 111 N. Y. Supp. 651.

And where a complaint against a city alleges that plaintiff's claim was presented to the controller and that he failed to allow or pay it, a denial in the answer of any knowledge or information thereof sufficient to form a belief is frivolous, when the claim is on file in the controller's office: *Borough Const. Co. v. City of New York*, 131 App. Div. 278, 115 N. Y. Supp. 697.

Also, where the complaint in an action to recover of an assignee a note which prior to the assignment the assignor, as agent of petitioner, had in his possession, alleged that "the same came to the hands of the assignee," it was held that an answer alleging on information and belief that defendant "has not the note demanded, but it is in the hands of a former agent" of the assignor, admitted that

the note came to the hands of defendant, and did not show that it was not still within his control; the allegation as a denial being evasive because it attempted to deny on information and belief what was presumptively within defendant's personal knowledge: *Carpenter v. Momsen*, 92 Wis. 449, 65 N. W. 1027, 66 N. W. 692.

In *Appel v. State*, 9 Wyo. 187, 61 Pac. 1015, where a writ of mandate was sought to compel the chairman of the board of county commissioners to sign a warrant, an answer which alleged that defendant had no knowledge or information sufficient to form a belief as to whether there were sufficient funds in the treasury to pay the warrant, and therefore denied that there were sufficient funds, was held insufficient to put petitioner on proof of the fact of the existence of the funds, such fact being one of which defendant ought to know, and had means of knowing by reason of his office.

IV. Form of Denial—Necessity of Strictly Following the Words of the Statute.

Since the right of a defendant to raise an issue as to matters alleged against him in the complaint by a denial of knowledge or information thereof sufficient to form a belief is purely statutory, the courts are inclined to be technical with regard to this form of denial, and it is generally held that such denials must closely follow the language of the statute; otherwise they will not be sufficient. Thus, where the statute allows a defendant to answer by a denial "of knowledge or information sufficient to form a belief," both of the conditions must be stated. "It is not enough," said the supreme court of Arkansas in *Haggart v. Ranney*, 73 Ark. 344, 84 S. W. 703, "to allege a want of sufficient information to form a belief, without also alleging a want of knowledge, and it is not enough to allege a want of knowledge without also alleging a want of information." This decision was also referred to with approval by the same court in the still later case of *Wade v. Goza*, 78 Ark. 7, 96 S. W. 388; and identically the same question was raised and decided in the same way in many other jurisdictions: *James v. McPhee*, 9 Colo. 486, 13 Pac. 535; *Grand Valley Irr. Co. v. Leshner*, 28 Colo. 273, 65 Pac. 44; *Downing North Denver Land Co. v. Burns*, 30 Colo. 283, 70 Pac. 413; *Clafin v. Reese*, 54 Iowa, 544, 6 N. W. 729; *Terrell v. Jennings*, 1 Met. 450; *Mead v. Day*, 54 Miss. 58; *Revely v. Skinner*, 33 Mo. 98; *Reed v. Cumberland Mutual Fire Ins. Co.*, 36 N. J. Eq. 146; *Steinback v. Diepenbrock*, 52 App. Div. 437, 65 N. Y. Supp. 118; *Locomobile Company of America v. De Witt*, 59 Misc. Rep. 221, 110 N. Y. Supp. 413; *Genninger v. Frank A. Wahlig Co.*, 116 N. Y. Supp. 578; *Fagg v. Southern Building & Loan Assn.*, 113 N. C. 364, 18 S. E. 655; *Woodcock v. Bastie*, 128 N. C. 243, 38 S. E. 881; *Massachusetts Loan & Trust Co. v. Twitchell*, 7 N. D. 440, 75 N. W. 786.

The supreme court of New York has been exceedingly technical in some cases regarding the necessity of following strictly the language of the statute with respect to this form of denial. In *Jurgens v. Wichmann*, 124 App. Div. 531, 108 N. Y. Supp. 881, for example, it was held by the appellate division of the supreme court that, under section 500, Code of Civil Procedure, which permits issue to be joined on allegations of the complaint by a denial "of any knowledge or information thereof sufficient to form a belief," an answer that denies knowledge or information sufficient to form a belief as to the truth of any of the allegations in certain specified paragraphs of the com-

plaint is insufficient to put such allegations in issue for the reason, as given by Justice Gaynor, that it does not deny that the defendant had knowledge or information "thereof," but only knowledge or information in general, and is therefore "too slovenly and loose"; and this ruling was approved and followed in the still more recent case of *White v. Gibson*, 61 Misc. Rep. 436, 113 N. Y. Supp. 983.

But these two decisions of the supreme court of New York can hardly be taken as a safe guide, even in that state, for in both earlier and later cases decided by the same court no such narrow and technical view seems to have been taken, and an answer was held sufficient which denied that defendant had any knowledge or information sufficient to form a belief as to certain allegations in the complaint, and the fact that the word "thereof" was omitted does not seem to have been considered of any importance: *Rosensteil v. Van Cott*, 5 App. Div. 128, 39 N. Y. Supp. 53; *Hidden v. Godfrey*, 88 App. Div. 496, 85 N. Y. Supp. 197; *Hinds, Noble & Eldridge v. Bonner*, 63 Misc. Rep. 258, 116 N. Y. Supp. 663 (decided last year).

And in Montana, where the statute (Rev. Codes, sec. 6540) provides, like the New York statute, that when a defendant seeks to deny a material allegation of the complaint by pleading want of knowledge or information, he must deny any knowledge or information "thereof" sufficient to form a belief, etc., it was held in a very recent case that an answer specifically admitting certain allegations in the complaint, and that as to the allegations in the first and second paragraphs of the said complaint, "defendant denies that he has any knowledge or information sufficient to form a belief," followed by a denial of "each and every allegation in said complaint contained not herein specifically admitted or denied," was a sufficient denial of the matters not admitted; the omission of the word "thereof" used in the statute, not being material: *Pengelly v. Peeler*, 39 Mont. 26, 101 Pac. 147. The court in this case referred to the contrary ruling in the New York cases of *Jurgens v. Wichmann*, 124 App. Div. 531, 108 N. Y. Supp. 881, and *White v. Gibson*, 61 Misc. Rep. 436, 113 N. Y. Supp. 983, but declined to follow them, saying they were too technical and opposed to the rule that pleadings should be liberally construed with a view to substantial justice to the parties.

In California, also, when the statute required the denial to be "according to information and belief," defendant's denial "on information and belief" was held sufficient: *Kirstein v. Madden*, 38 Cal. 158; and so with a denial "upon information and belief": *Vassault v. Austin*, 32 Cal. 597.

But in *Shain v. DuJardin* (Cal.), 38 Pac. 529, it was held that an answer denying the allegations of the complaint, "as this defendant is informed and believes," does not constitute a sufficient denial thereof. In *Dickinson v. Gray*, 10 Ky. Law Rep. 292, 8 S. W. 876, 9 S. W. 281, it was held that a plea that "defendant has 'no knowledge or information' of a certain allegation, and therefore denies the same, was good, though the statute required a denial of 'sufficient' knowledge or information," etc.; and in *Gilreath v. Furman*, 57 S. C. 289, 35 S. E. 516, an answer denying "that defendant has knowledge and information sufficient to form a belief" was held a sufficient compliance with Code of Civil Procedure, section 170, requiring a denial of "any knowledge or information."

Also, in *Wilson v. Commercial Union Ins. Co.*, 15 S. D. 322, 89 N. W. 649, an answer that defendant has "no knowledge or informa-

tion" as to a certain fact alleged in the complaint sufficient "to enable it" to form a belief was held good, as a denial of knowledge or information, though it did not follow the language of the statute (Comp. Laws, sec. 4914, subd. 1), which provides that the answer shall contain a denial of the facts alleged in the complaint, or "of any knowledge or information thereof sufficient to form a belief."

But while these and perhaps a few other cases show that a slight deviation from the form prescribed by the statutes, with respect to purely unsubstantial variations, will not vitiate the answer, it is undoubtedly the better and safer practice to draft the answer in the exact words of the statute when this form of denial is to be used.

And in some of the states when a defendant is allowed to deny material averments in the complaint by a denial of any knowledge or information thereof sufficient to form a belief, it has been held that he must not only deny both knowledge and information, but the answer will be insufficient unless he also states that he could not obtain such knowledge or information. Thus, in *Haney v. People*, 12 Colo. 345, 21 Pac. 39, it was held that an averment in the answer that defendant has no knowledge upon which to base a belief as to material averments in the complaint is defective not only because it fails to state that he has no "information," but also because it fails to state that he could not obtain such knowledge or information, and to same effect is *Jones v. Perot*, 19 Colo. 141, 34 Pac. 728, and *Solomon v. Brodie*, 10 Colo. App. 353, 50 Pac. 1045.

Also in *English v. Grant*, 102 Ga. 35, 29 S. E. 157, it was held that, under the Georgia statutes (Acts 1893, p. 56), permitting a defendant to state that he can neither admit nor deny an averment because of the want of sufficient information, pleas which merely allege that the defendants "do not know," or that they "do not of their own knowledge know," whether or not certain averments of the plaintiff's petition are true, do not constitute a sufficient denial of such averments, the court saying: "The plea should contain the result of a fair and reasonable search for information."

HUTCHINSON v. WATSON SLOUGH DITCH COMPANY.

[16 Idaho, 484, 101 Pac. 1059.]

WATERS—Natural Watercourse, What is.—Evidence in this case examined and held sufficient to sustain the finding that Watson slough, in Bingham county, is a natural watercourse. (pp. 128, 129.)

APPEAL AND ERROR.—Findings based on conflicting evidence must be sustained in the appellate court. (By the editor.) (p. 129.)

WATERS, Appropriation of, What is.—A showing by a riparian proprietor that he has been for more than seventeen years using the water of a stream for "domestic, culinary and household purposes and for the use of his livestock," and that the water of the stream has continuously flowed through his land, "moistening the same," does not amount to an appropriation of any of the water of the stream within

the meaning of the constitution and statute of this state. The waters of this state are subject to appropriation and diversion in the manner prescribed by the constitution and statute, and priority of appropriation gives the better right to the use of such waters as between the appropriator and every other person, even though he be a riparian owner. (p. 129.)

RIPARIAN RIGHTS and Rights of Appropriation.—The common-law doctrine of riparian rights, in so far as those rights conflict with the right of an appropriator of the waters of a stream, is repugnant to, and in conflict with, the constitution and statutes of this state, and to that extent has been abrogated thereby. (p. 130.)

RIPARIAN RIGHTS, Extent to Which Exist in Idaho.—Riparian rights exist in the state of Idaho only to the extent that they do not come in conflict with the superior and paramount right of one who has appropriated the waters for a beneficial use in conformity with the constitution and statutes of the state. (p. 130.)

RIPARIAN OWNERS, Rights of as Against Strangers.—The rights of a riparian proprietor exist and may be maintained as against a stranger who does not claim or assert his right to interfere with or disturb the waters of a natural stream by or on account of an appropriation to a beneficial use. In such case the rights of a riparian proprietor are superior and paramount to the rights of a stranger or intermeddler who does not assert or establish any right to the use of the water by appropriation. (pp. 131, 132.)

WATERS.—Before a Riparian Owner can Acquire the superior right to the use of waters flowing by and through his lands, he must locate and appropriate the waters and divert them as any other user must do. (By the editor.) (p. 132.)

RIPARIAN RIGHTS, Conflict With Rights by Appropriation. A riparian owner's right to use the water of a stream for domestic and culinary purposes and watering his stock, and to have the water flow by or through his riparian premises, is such a right as the law recognizes as inferior to a right acquired by appropriation and superior to any right of a stranger to or intermeddler with the waters of such stream. (pp. 132, 133.)

WATERS, Appropriators of, Rights of, When Subject to Other Appropriations.—At such times as an appropriator is not using the water under his appropriation, and is not applying the water to a beneficial use, such water must be considered and treated as unappropriated public water of the state, and for such period of time is subject to appropriation and use by others. (p. 133.)

WATERS, Appropriation of, When may Permit the Water to Flow in the Original Channels.—When an appropriator is not using water under his appropriation and during the season not covered by his appropriation, he must allow the water to flow down the bed of the natural channel. (p. 133.)

(Syllabi by the court.)

Action to restrain the defendants from interfering with the flow of Watson slough. Judgment for the plaintiff, and the defendant appealed.

Hansbrough & Gagon, for the appellants.

John W. Jones, for the respondent.

486 AILSHIE, J. This action involves the right of the appellants to shut off the waters of a stream or body of water

called Watson slough, in Bingham county, and to prevent the waters flowing down the stream in the natural channel. Watson slough appears to be a natural channel diverting the waters of Snake river from the main stream at a point on the west side of the river about two and one-half miles southwest from Blackfoot, in Bingham county, and flowing thence in a southwesterly direction for a distance of about eight miles and then emptying back into the Snake river. This slough or stream flows through respondent's lands. About the year 1885, a man named Watson duly and regularly made an appropriation of a large volume of the waters of Snake river for the irrigation of agricultural lands. This appropriation was made at the head of Watson slough. The water to be diverted from the Snake river through Watson slough was carried down through the main channel of Watson slough for several miles and on past the premises now occupied by respondent, and thereafter diverted from the Watson slough by means of a canal through which the waters were carried and distributed to the several tracts of land to be irrigated. Watson made some slight improvements in the way of lowering the bed of the channel and removing sand and gravel bars, and also constructed a small wing dam in the Snake river in order to divert a larger volume of water into Watson slough than had formerly been flowing through that channel. Watson and his successors in interest, ⁴⁸⁷ the appellants herein, have continuously, during the irrigation season, diverted and used the waters of Snake river in the manner above designated since the year 1885. The appropriation and use seem to have been purely for irrigation purposes on agricultural lands. About the year 1891, the respondent established his residence on and acquired title to a tract of land through which Watson slough runs, and alleges that the slough is a natural stream and watercourse, and that he is a riparian proprietor thereon. He also alleges that he has for more than seventeen years last past been using the waters naturally flowing in the stream and watercourse for domestic purposes and for watering his livestock, and that as a riparian owner he is entitled to the continued use thereof, and to have the water flow through his lands in its natural course when not used for irrigation and other purposes by prior appropriators in conformity with law. The defendants and appellants deny that the Watson slough is a natural watercourse, but allege, on the contrary, that it is merely a high-water channel, and that in its natural state it only carried water during the high-water season, and that during the rest of the year it was dry, and they and their predecessors in interest acquired and appropriated the same for canal purposes, and enlarged and repaired the same so that it would carry a large volume of water, and that the same is their private property. It was alleged by plaintiff

and admitted by the defendants that after the irrigation season, and about October 15, 1907, the appellants shut down their headgate at the head of the slough and also placed therein a dam of earth and rock so as to prevent the water from flowing down the channel through Watson slough, and diverted and deflected the whole body of the stream into the main channel of Snake river, and thereby cut off the flow of water in Watson slough and deprived the respondent of the privilege of using the water for any purpose.

When the case was called for trial, a jury was impaneled and special interrogatories were submitted to them. These interrogatories were specifically directed to the character of the Watson slough—as to whether or not it was a natural ⁴⁸⁸ watercourse or merely a high-water channel for overflow waters of Snake river. The court gave certain instructions to the jury, and, among other things, instructed them as to what constitutes a natural stream or watercourse as defined by law. Both appellants and respondents agree that the court gave the correct definition of a watercourse, and for that reason we quote it here. The court said: “The jury is instructed that a watercourse is a stream of water flowing in a definite channel, having a bed and sides or banks, and discharging itself into some other stream or body of water. The flow of water need not be constant, but must be more than mere surface drainage occasioned by extraordinary causes; there must be substantial indications of the existence of a stream, which is ordinarily a moving body of water.”

The jury answered the interrogatories in favor of the contention that Watson slough was and is a natural watercourse. The court adopted the findings of the jury and made additional findings in accordance therewith. The court, among other things, found that: “Watson slough is now and at all times herein mentioned and from time immemorial has been a natural watercourse, diverting water from the Snake river, on the west side thereof, about two and one-half miles southwest of Blackfoot, in Bingham county, Idaho, and flowing through the said described land of the plaintiff, and on in a general southwesterly direction, emptying its waters into the said Snake river, the said watercourse being about seven or eight miles in length.”

There was a sharp conflict in the evidence as to the natural character of Watson slough—as to whether or not it had always carried a stream of water or whether it was dry during certain seasons of the year. It must be conceded, however, that much of the evidence sustains the contention that it is a natural watercourse and has from time immemorial carried a constant stream of water. The court found in favor of this contention. It being conceded by both parties that the court entertained the correct view of the law as to ⁴⁸⁹ what constitutes a watercourse, it necessarily follows that

the court, in arriving at his conclusions of fact, necessarily did so in view and understanding of the correct principle of law. The presumption is strongly in favor of the correctness of the court's finding of fact on that question. Under the well-established rule with reference to findings based on conflicting evidence, we must sustain the finding on this proposition. We must base our further consideration of this case upon the theory that we are dealing with a natural stream and watercourse.

In the further discussion of the case, it must be remembered that the respondent has not alleged or established any appropriation or diversion of the waters of this stream for any useful or beneficial purpose. He makes no claim to the water by reason of any appropriation or diversion in accordance with the statute, but rather bases and asserts his right on the fact that he is a riparian proprietor, and that as such he has for more than seventeen years been using the water for "domestic, culinary and household purposes and for the use of his livestock," and that the waters of the stream have continuously flowed through his lands "moistening the same." Whatever rights, therefore, respondent has established, are wholly dependent upon his proprietary rights as a riparian owner of lands through which the stream flows. It must also be noted that the claim respondent has asserted is not adverse to or in conflict with appellants' appropriation or right of diversion. Appellants' appropriation is for irrigation purposes. The cause of respondent's complaint is not that appellants are diverting and using the waters under their appropriation, but, on the contrary, that when they are not diverting and using the water under their appropriation for irrigation purposes, they are cutting off the natural supply of the stream and preventing the water of the stream from flowing down the channel thereof in its natural course. This is not a contest between two appropriators of water, because neither party either asserts or establishes any right or claim to the water by reason of appropriation or use at the time and for the period involved in this action. The ⁴⁹⁰ appellants claim, however, that by reason of this appropriation and their rights in this channel to carry and convey its water, they have the resultant right to shut down the head-gate at the head or intake of the slough, and thereby prevent the water flowing down the slough and divert and deflect it into the main channel of Snake river at any time they may see fit so to do.

It is well established in this state, and needs for its support no argument or citation of authority, that the waters of the state are subject to appropriation and diversion in the manner prescribed by law, and that priority of appropriation gives the better right to the use of such waters as between

the appropriator and a riparian owner. Section 3 of article 15 of the constitution provides: "The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water."

This constitutional provision was simply an enactment into the organic law of the state of a rule that had been enacted by the territorial legislature and recognized by the courts of the territory. The question of conflicting rights arising between an appropriator and a riparian proprietor was considered and passed upon by the territorial supreme court in *Drake v. Earhart*, 2 Idaho. 750, 23 Pac. 541, subsequent to the adoption of the constitution and immediately prior to the admission of the state. The court there held that the claim of a riparian proprietor to the use of water of a stream flowing through his land, which is not based upon appropriation under the territorial laws, is inferior to that of a prior appropriator of the waters of such stream. The court in that case seems to have been very careful not to hold that a riparian proprietor had no rights, as such, at all, but rather that his rights as a riparian proprietor, whatever they might be, were inferior to the rights of an appropriator of the waters. That rule has been uniformly recognized by the courts of the state ever since. The legislation of the state, even from the early territorial days, down to the present, ⁴⁹¹ has been framed upon that theory and principle. The common-law doctrine has not only been abrogated in this state in this respect, but it has been likewise abandoned in many other states of the arid and semi-arid sections of this western country: *Arizona Copper Co. v. Gillespie* (Ariz.), 100 Pac. 465; *Cole v. Richards Irr. Co.*, 27 Utah, 205, 101 Am. St. Rep. 962, 75 Pac. 376; *Walsh v. Wallace*, 26 Nev. 299, 99 Am. St. Rep. 692, 67 Pac. 914; *Hammond v. Rose*, 11 Colo. 526, 7 Am. St. Rep. 258, 19 Pac. 466; *Albuquerque etc. Irr. Co. v. Gutierrez*, 10 N. M. 177, 61 Pac. 357; *Nevada Ditch Co. v. Bennett*, 30 Or. 59, 60 Am. St. Rep. 777, 45 Pac. 472; *Long on Irrigation*, sec. 6; *Wiel on Water Rights*, secs. 18, 19. See, also, *Lux v. Haggin*, 69 Cal. 255, 10 Pac. 674; *United States v. Rio Grande Dam & Irr. Co.*, 174 U. S. 690, 19 Sup. Ct. Rep. 770, 43 L. ed. 1136.

A riparian proprietor in the state of Idaho has no right in or claim to the waters of a stream flowing by or through his lands that he can successfully assert as being prior or superior to the rights and claims of one who has appropriated or diverted the water of the stream and is applying it to a beneficial use. To this extent, therefore, the common-law doctrine of riparian rights is in conflict with the constitution and statutes of this state, and has been abrogated thereby.

Another question, however, must be considered in this case, for the reason that although the appellants are appropriators of the water of this stream, and, indeed, of the entire volume thereof, still their point of diversion from Watson slough is at a point down the stream below respondent, and they are accustomed to carry the water by and through respondent's lands. It is also true that their water appropriation is from Snake river at the head of the slough. When they are not using the water, and during the nonirrigation season, the water naturally flows down the channel of the stream through and by respondent's land. Appellants shut off the waters at their headgate at the head of this slough after the close of the irrigation season and during the period of time and season not covered by their appropriation, and during which they were not applying the water to any ⁴⁹² useful or beneficial purpose. Appellants were, therefore, during this period of time, and in reference to this stream, in the same position as if they had no appropriation whatever. For that period the water is to be treated the same as if unappropriated water of the state. Appellants were for the time as strangers and intermeddlers with the waters of this natural stream and watercourse. When they were not needing it or using it for carrying out or fulfilling the purposes of their appropriation, they were not content to allow it to flow in the natural channel of the stream where any and all might freely use it or acquire rights by appropriation and diversion, but they entirely cut off the source of supply and diverted it into another stream so that it could not flow in its natural channel and thereby supply riparian proprietors. This case must therefore be considered independently of the question of appropriation and diversion. It must be considered, so far as the question here involved is concerned, that the appellants are in the same position in reference to the acts and time involved as if they had no appropriation at all. The respondent is also without any appropriation or diversion. The question then arises under this state of facts as to whether or not the riparian proprietor has any such rights as he can assert against an entire stranger to and intermeddler with the waters of the stream for the period of time covered and involved in this action. The query arises: Is there anything in the constitution of this state contrary or repugnant to the assertion by respondent of his riparian rights as against one who attempts to shut off the source of supply of the stream and who does not found his right to do so upon his appropriation of such waters to a beneficial use? Section 18 of the Revised Codes of this state is as follows: "The common law of England, so far as it is not repugnant to, or inconsistent with, the constitution or laws of the United States, in all cases not provided for in these Revised Codes, is the rule of decision in all courts of this state."

⁴⁹³ As we have before seen, the common-law doctrine of riparian proprietorship, whenever it comes in conflict with a water right acquired by appropriation, is at once in conflict with, and repugnant to, both the constitution and statutes of this state. We are unable to find, however, any particular wherein it would be repugnant to any provision either of the organic or statutory law of the state where it does not come in conflict with a right acquired by appropriation in conformity with law. This court has on several occasions recognized some of the incidental common-law rights of riparian ownership in cases where those rights do not come in conflict with the rights of appropriators. This was the case in *Small v. Harrington*, 10 Idaho, 499, 79 Pac. 461, and *Powell v. Springston Lumber Co.*, 12 Idaho, 723, 88 Pac. 97, wherein we recognized and sustained the rights of riparian proprietors to employ such means as might be necessary to obtain ingress and egress to and from the waters of navigable streams.

In *Shephard v. Coeur d'Alene Lumber Co.*, 16 Idaho, 293, 101 Pac. 591, decided at the March (1909) term of this court, it was held that "The right of ingress and egress to and from the lands of a riparian owner is a property right, and must be respected, and for the protection of which the courts will afford a remedy."

Sight should not be lost of the correct principle involved in such cases, namely, that a riparian owner, as such, acquires no right to the waters flowing by or through his lands that is prior or superior to that of a locator, appropriator and user of such waters. In other words, there is no such thing in this state as a riparian right to the use of waters as against an appropriator and user of such waters who has pursued the constitutional and statutory method in acquiring his water right. In order to acquire a prior or superior right to the use of such water, it is as essential that a riparian owner locate or appropriate the waters and divert the same as it is for any other user of water to do so. But a riparian owner still retains such right to have the waters flow in the natural stream through or by his premises ⁴⁹⁴ which he may protect in the courts as against persons interfering with the natural flow, or who attempt to divert or cut off the same wrongfully and arbitrarily, and without doing so under any right of location, appropriation, diversion or use, and who do not rest their right to do so upon any right of use or appropriation. In other words, a stranger to the use and right of use of such waters for the time being cannot interfere, and if he does, the riparian owner has his remedy to restrain and enjoin such interference. The riparian owner's right to use the water for domestic and culinary purposes and watering his stock, and to have the water flow by or through his premises is such a right as the law recognizes as inferior to a right acquired by appropriation, but superior to any right of a stranger, inter-

meddler or interloper. While appellants have acquired by location and appropriation the right to carry and convey waters through this slough and natural stream and waterway to the full capacity of the stream for irrigation purposes, and for those purposes may control the stream in so far as it is necessary to keep the same open and in repair, and protected from breaks and damages, still they have no right to entirely divert the water from the stream and turn it to waste down another stream or into another channel at such times as they are not using the water or exercising their rights under their appropriation. They cannot waste the water and divert it from respondent simply because they cannot use it themselves. When they cannot or will not use it, they must allow it to flow in its natural channel, undisturbed, for the use of any other person who may have a subsequent or inferior right to appellants, or who may desire to acquire such right of appropriation or use. The fact they have acquired an easement in and right of way through this stream and public highway does not make them the sole and exclusive private owners thereof, or authorize them to obstruct that highway so that it cannot be used in like manner by other persons. A natural and navigable stream is a highway, and to cut off the supply of water flowing therein is as effectual an obstruction of the ⁴⁹⁵ highway as it would be to build a barrier across the same or to plow up or obstruct a public road. When you take the water out of the stream you take the bottom out of such highway. That can only be done in this state by an appropriator of waters when acting under and by authority of law in the exercise of his right of appropriation and beneficial use of the water. When the appropriator is no longer using the water either for the season or any specific time, his right to cut off or interfere with the flow of the stream for the time being lapses.

The decree in this case adjudges the appellants to have only such right in and to the use of Watson slough as is necessary and essential to carry the water for their appropriation from the head of the slough to the point of diversion and thence into their canal. It further adjudges and decrees that the appellants shall not shut off or divert the water at the headgate at the upper end of the slough at any time or for any purpose except upon application to the court for such times as may be absolutely necessary for cleaning out and repairing the channel of the slough, in order to keep it in such condition that it will carry the water required by appellants' appropriation. There can be no doubt of the right of appellants to employ such means as may be necessary and essential to keep this channel clear and in repair for the purpose of carrying and conveying the necessary body of water to meet the demands of their appropriation. This right, however, must be exercised with due diligence, and with proper respect for the rights of

other appropriators, and also of riparian proprietors as indicated in this opinion. They may not arbitrarily and without cause shut off and divert the flow of the stream. Both the evidence and findings in this case indicate that the water was shut off on October 15, 1907, and that it remained so until the commencement of this action on December 21st. This appears to have been an arbitrary action on the part of appellants, and not necessary or essential for the doing of work or making repairs on or along the channel of the stream. Work under such circumstances necessitating the ⁴⁹⁶ diversion of the entire flow of a stream into another channel must of necessity be prosecuted rapidly and with care and diligence. For the failure to do so, appellants are responsible in the proper proceeding. The decree in this case requires appellants to apply to the court at any time it may be necessary to shut off the water temporarily for the purpose of improvement or repair. We think it better to so modify the decree as to make the injunction perpetual, excepting for such reasonable times and under such extraordinary conditions as may make it necessary or essential that the water be shut off for the purpose of cleaning out the channel of the stream or making necessary repairs or doing construction work essential in carrying out the diversion and appropriation of the waters for the purposes to which appellants are applying them. The necessity and occasion for such work should be primarily left to the appropriators who are conveying water through this channel, and for an abuse of the exercise of this right they must be held liable by the court, and to that end the court will at any time inquire into the facts to ascertain and find out if they have acted wrongfully or arbitrarily. In all other respects the judgment will be affirmed. The judgment is reversed as to the particulars hereinbefore designated, and the cause is remanded, with directions to the trial court to enter an amended and modified judgment and decree in conformity with the views herein expressed. The total costs of this appeal will be equally divided between the appellants and respondent.

Sullivan, C. J., and Stewart, J., concur.

The Common-law Rule of Riparian Rights is regarded as underlying and fundamental in some jurisdictions, and takes precedence of appropriation of water if prior in point of time: *Crawford Co. v. Hathaway*, 67 Neb. 325, 108 Am. St. Rep. 647. But in the western states generally the common-law doctrine of riparian rights has been displaced by the doctrine of prior appropriation: *Walsh v. Wallace*, 26 Nev. 299, 99 Am. St. Rep. 692; *Cole v. Richards Irr. Co.*, 27 Utah, 205, 101 Am. St. Rep. 962, and cases cited in the cross-reference note thereto. The doctrine of prior appropriation is established in Wyoming as a rule of imperative necessity, and is an outgrowth of the custom of the earlier settlers upon the public lands for the purposes of mining or rendering the soil available for cultivation: *Wiley v. Decker*, 11 Wyo. 496, 100 Am. St. Rep. 939.

CALL v. ROCKY MOUNTAIN BELL TELEPHONE COMPANY.

[16 Idaho, 551, 102 Pac. 146.]

JUDGMENT, Amendment of, Return of Process in Support of.

Where actual service of summons issued from a justice or probate court has been made, but the return of service was insufficient and did not show a good service, and the default of the defendant was entered and judgment was taken against him, it is proper to thereafter allow an amended return of service to be made so as to show that a good and valid service had in fact been made. (p. 136.)

APPEAL AND ERROR—Amendment of Return of Service of Process and Certifications of to the Appellate Court.—Where the return of service of summons is insufficient to establish the fact of service, but judgment by default is entered and the defendant appeals to the district court on questions of law alone, and there moves to vacate and set aside the judgment on the ground that there is no valid proof of service, it is not error for the district court to permit the filing of an amended return of service which has been properly made in the justice or probate court in which the judgment was entered, and which return has been duly certified to the district court. (p. 138.)

JUDGMENT, Vacating on Appeal for Want of Service of Process and not on Its Return.—Jurisdiction to enter a judgment against a defaulting defendant rests upon the fact of service itself, and the return of service is simply the evidence of the jurisdictional fact, and is subject to amendment so as to make it conform to the facts. Jurisdiction of the person of the defendant is acquired by service of process, and attaches on the service and not upon the return. (p. 138.)

JUDGMENT, Vacating on Appeal for Want of Service of Process, Amending the Return to Prevent.—It would be a manifest miscarriage of justice to allow a defendant who has been actually served with process and who has permitted a default judgment to be entered against him to thereafter procure a vacation of the judgment either in the court in which it was rendered or on appeal, simply because the proof of service is insufficient, where the plaintiff is at the very time in court presenting a sufficient and amended proof of service, and asking for the opportunity to file the same and have it made a part of the record in the case. (p. 139.)

(Syllabi by the court.)

Action in the probate court. Judgment for the plaintiff by default and appeal by the defendant to the district court, which affirmed the judgment, and he appealed to the supreme court.

Clark & Budge, for the appellant.

Stanrod & Terrell, for the respondent.

554 AILSHIE, J. This appeal is from the judgment of the district court rendered and entered on appeal from a judgment of the probate court of Bannock county. The case was originally commenced in the probate court of Bannock county on June 16, 1908, for the recovery of the sum of four hun-

dred and seventy-seven dollars and seventy-three cents. Summons was issued on the same day the action was instituted and was returned the following day. The ⁵⁵⁵ defendant failed to appear and, after waiting the statutory time, the plaintiff introduced his evidence and judgment was entered in his favor. The defendant appealed to the district court on questions of law alone. In the district court the contention was made by the defendant and appellant that the return of summons was insufficient, and that the probate court therefore had no jurisdiction to enter judgment against the defendant. After the case was argued in the district court, the plaintiff secured an amended return and had it filed in the probate court as of the date of the original return, June 17th, and thereupon the probate judge certified the same to the district court. On application of the plaintiff, in the district court, the latter court permitted the amended return to be filed with the papers in the case. He thereupon overruled the contention made by the plaintiff on the jurisdictional question and affirmed the judgment of the probate court. This appeal is from the judgment thus made and entered by the district court.

The portion of the original return to which appellant takes exception is as follows: "That she received said summons on the sixteenth day of June, 1908, and thereafter on the sixteenth day of June, 1908, she served the said summons on the defendant Rocky Mountain Bell Telephone Company, the corporation mentioned in said action as the defendant herein, by delivering a true copy thereof to V. R. Lanestrem, the managing agent of said defendant corporation within the state of Idaho, who has charge of the business of said defendant within Bannock county."

Appellant's contention is that the return wholly failed to show where the service was made, and that it should have affirmatively shown that the service was made within the jurisdiction of the probate court, namely, within Bannock county, and that the failure to do so was jurisdictional, and left the court without any jurisdiction to enter judgment in the case. It is not denied but that service was actually made within Bannock county. The only controversy arises as to the proper proof of service not being made prior to ⁵⁵⁶ the entry of judgment. If the jurisdiction of the probate court was dependent on a proper proof of service being made prior to the rendition of judgment, then, of course, respondent should not have been allowed to file an amended return either in the probate court or in the district court. If, on the other hand, the question of jurisdiction is dependent on the fact of service, then the return might be amended even after judgment. On this question the courts are not in harmony. Some courts hold that proof of service is the jurisdictional question. Much that has been said on that side of

the question, however, has been in cases where the return was wholly insufficient to show service and support the judgment, and no amended return or proof of service was made or tendered. In such case the court has no alternative but to hold the judgment void for want of service of which the return is the evidence. The safe and reasonable rule, as it seems to us, is as stated by the California court that, "it is the fact of service which gives the court jurisdiction and not the proof of service," and that "jurisdiction of the person of defendant is acquired by the service of process, and dates from such service and not from the return": *Pico v. Sunol*, 6 Cal. 294; *In re Newman*, 75 Cal. 213, 7 Am. St. Rep. 146, 16 Pac. 887; *Herman v. Santee*, 103 Cal. 519, 42 Am. St. Rep. 145, 37 Pac. 509; *Howard v. McChesney*, 103 Cal. 536, 37 Pac. 523; *Woodward v. Brown*, 119 Cal. 283, 63 Am. St. Rep. 108, 51 Pac. 2, 542; *Hibernia Sav. etc. Soc. v. Matthai*, 116 Cal. 424, 48 Pac. 370; *Burr v. Seymour*, 43 Minn. 401, 19 Am. St. Rep. 245, 45 N. W. 715; *Allison v. Thomas*, 72 Cal. 562, 1 Am. St. Rep. 89, 14 Pac. 309, 24 Cyc. 527. Mr. Freeman, in his work on Judgments, fourth edition, section 89b, says: "If the return upon the summons or other writ designed to give the court jurisdiction over the person of the defendant is omitted, or incorrectly made, but the facts really existed which were required to give the court jurisdiction, the weight of authority at the present time permits the officer to correct or supply his return until it states the truth, though by such correction a judgment apparently void is ⁵⁵⁷ made valid. Though the proof of the service of process does not consist of the return of an officer, the like rule prevails. Thus, if the summons has been published in the manner required by law, but the proof of publication found in the files of the court is defective, the court may, on the fact of due publication being shown, permit an affidavit to be filed showing the facts, and when so filed it will support the judgment, as if filed before its entry": See, also, *Ranch v. Werley*, 152 Fed. 509; *Frisk v. Reigelman*, 75 Wis. 499, 17 Am. St. Rep. 198, 43 N. W. 1117, 44 N. W. 776; *Transier v. St. Louis etc. R. R. Co.*, 54 Mo. 189.

In *Woodward v. Brown*, 119 Cal. 283, 63 Am. St. Rep. 108, 51 Pac. 2, 542, the California court held in a case where service had been made by private party and the proof thereof was defective, that an amendment might be allowed two years after judgment had been entered. In that case the amendment was allowed and filed nunc pro tunc as of the date of the entry of judgment.

In *Frisk v. Reigelman*, 75 Wis. 499, 17 Am. St. Rep. 198, 43 N. W. 1117, 44 N. W. 776, the amended return was transmitted to the appellate court and there allowed. It has been contended by the appellant that a distinction should be drawn between cases that are heard in a court of record and cases

in courts of inferior jurisdiction. This argument proceeds on the principle that the presumptions are all in favor of the regularity of the proceedings of courts of record; while, on the other hand, no presumption can be indulged in favor of the regularity of proceedings of courts of inferior jurisdiction, such as justice courts. And this case must be considered and disposed of under the justice practice.

We fail to see the force of this argument in the consideration of the particular question involved here. If a judgment is void on its face, it cannot be any more void because it was entered by a court of inferior jurisdiction. The same is true if it is only voidable. For the same reason, when the actual fact of jurisdiction exists, it is just as much a fact, although the case was pending and heard in a court of inferior jurisdiction, as if heard in a court of record. If the proof of service may be so corrected and amended in a court of record as to make it speak the truth, we see no ⁵⁵⁸ reason why it may not be equally amended and corrected in a court of inferior jurisdiction in order to make it speak the truth in that court. If we are correct in concluding that jurisdiction depends upon the actual fact of service rather than the proof thereof, then the probate court that rendered the judgment in this case actually had jurisdiction to enter the judgment at the time. The proof being defective and insufficient rendered the judgment at least voidable. The attack made on the judgment was not on account of an actual failure to make service, but wholly on the ground that the proof of service was not sufficient. The party attacking the judgment could not possibly be prejudiced by the fact that the court permitted the party in whose favor the judgment was entered to procure an amendment to the return so as to make it speak the truth and consequently show that an actual service had been made.

In the case of *Martin v. Castle*, 182 Mo. 216, 81 S. W. 426, the supreme court of Missouri had under consideration the question of the right of a justice of the peace to permit an amendment to the return of service in a case where the amendment was proposed subsequent to the entry of judgment. In considering this question the court said: "The return of the constable upon the summonses did not, when returned, show that said townships were adjoining and in the same county; but after the returns were amended before the justice they did show this to be the fact. As was said in *Turner v. Kansas City etc. R. R. Co.*, 78 Mo. 578: 'The justice had jurisdiction of the cause, if the writ was in fact properly served on the defendant, whether the return of service made by the officer was defective or not. The service in this case was sufficient, and the return only was defective in not stating correctly the manner of service, and no error was committed by the circuit court in permitting the amendment.'

So, in the case at bar, the returns only were defective, in not stating that the townships of Nodaway and Rochester were adjoining townships in the same county, and the justice had the right to permit the amendments in this regard in subservience of the ends of ⁵⁵⁹ justice. . . . It is no objection that the amendment is permitted after the suit which the amendment is sought to affect has been begun: *Fee v. Kansas City etc. R. R. Co.*, 58 Mo. App. 90; *Corby v. Burns*, 36 Mo. 194. Nor is it any objection that the amendment is made during the trial of such suit, nor that the amendment was permitted thirteen months after the original returns were made; nor, where jurisdiction of the court in fact exists, will it be an objection that no jurisdiction appeared except by amendment."

It would be a lamentable commentary on the administration of justice if a defendant who has been actually served with process can allow a default judgment entered against him, and thereafter procure the judgment to be vacated and set aside, either in the court in which it was rendered or on appeal, simply because the proof of service on file is insufficient, when the plaintiff is at the same time in court presenting a sufficient and amended proof of service and clamoring for the opportunity to file the same and have it made a part of the record in the case. A different question would arise if defendant could be in any way prejudiced by the action, or if the interests of an innocent third party would be affected thereby. No such question arises in this case.

We are satisfied that the district judge properly allowed the amended return to be filed, and the judgment must therefore be affirmed. Judgment affirmed, with costs in favor of respondent.

Sullivan, C. J., and Stewart, J., concur.

The Fact of Service, not the Proof thereof, confers jurisdiction: *Burr v. Seymour*, 43 Minn. 401, 19 Am. St. Rep. 245; *Cunningham v. Spokane Hydraulic Min. Co.*, 20 Wash. 450, 72 Am. St. Rep. 113. See, also, *Brum v. Ivins*, 154 Cal. 17, 129 Am. St. Rep. 137; *Stout v. Baltimore & Ohio R. R. Co.*, 64 W. Va. 502, 131 Am. St. Rep. 940.

A Return of Service of Summons may be Amended after judgment so as to show jurisdiction, and the amendment relates to, and becomes a part of, the original return, and imparts vitality to the judgment: *Allison v. Thomas*, 72 Cal. 562, 1 Am. St. Rep. 89; *Shenandoah Valley R. R. Co. v. Ashby*, 86 Va. 232, 19 Am. St. Rep. 898. For limitations on the right of amendment, see the note to *Malone v. Samuel*, 13 Am. Dec. 179; and the recent cases of *Stubbs v. McGillis*, 44 Colo. 138, 130 Am. St. Rep. 116; *Knapp v. Wallace*, 50 Or. 348, 126 Am. St. Rep. 742; *Albright-Pryor Co. v. Pacific Selling Co.*, 126 Ga. 498, 115 Am. St. Rep. 108. As a rule, a liberal discretion is reposed in courts to authorize returns of service of process to be amended: *Jeffries v. Rudloff*, 73 Iowa, 60, 5 Am. St. Rep. 654. If the defendant does not appear and judgment is taken against him by default, but

the return does not show the necessary jurisdictional fact of service, though the proper party was in fact served, the return may be amended after the entry of judgment to show that fact, and without personal notice to the defendant: *Cunningham v. Spokane H. Min. Co.*, 20 Wash. 450, 72 Am. St. Rep. 113.

JUST v. IDAHO CANAL AND IMPROVEMENT COMPANY, LTD.

[16 Idaho, 639, 102 Pac. 381.]

CORPORATIONS—Stockholders. Right of to Maintain Suit for Matters Occurring Before the Acquisition by Them of Their Stock.—A stockholder suing on behalf of his corporation which is unable or unwilling to bring suit, and pleading a good cause of action, may maintain the same, though he was not an owner of stock at the time the breach of duty was committed or the cause of action accrued, except in cases where it is shown that he purchased the stock with the purpose of bringing suit, or where his vendor was for some reason estopped from maintaining the action and the purchaser had notice of such bar. (pp. 143, 144.)

CORPORATIONS—Minority Stockholders, When Should be Permitted to Sue.—Where two competing corporations enter into a contract, and before the same is fully performed and the debt thereby contracted is due one of the corporations obtains control of the other and elects a board of directors, and thereafter the directors and officers of the one corporation refuse to pay the debt contracted, and the directors and officers of the other corporation refuse to prosecute an action for the collection of such debt and obligation, such a conflict of interest and duty arises among the directors and officers, aside from and independently of any fraudulent motive, that a court of equity is warranted in permitting the minority stockholders to maintain their action on the contract. (p. 146.)

EQUITY—Laches, When not Fatal to the Complainants.—The doctrine of laches in the prosecution of an action, when the delay does not amount to a bar by any statute of limitations, does not apply where the relative position of the parties has not been materially changed since the time when the cause of action accrued, and the delay has worked no wrong or serious inconvenience to the adverse party, so that substantial justice can still be done between the parties. (pp. 148, 149.)

CORPORATIONS, Minutes of, When may be Contradicted by Parol Evidence.—Where the verity of the records of a corporation is attacked by minority stockholders, who deny that the transactions therein purporting to be recorded ever occurred, and they contend that the true minutes of a given meeting show the very contrary of that shown by the official record, parol evidence is admissible to show what actually occurred at such meeting. (pp. 152, 153.)

JURY TRIAL—Instructions, Considering as a Whole.—The instructions given in a particular case must all be read and viewed together, and if they are not in conflict with each other, and correctly state the law as far as they go, the circumstance that an isolated sentence or paragraph is obscure, incomplete or indefinite will not of itself constitute a ground of reversal. (p. 155.)

WITNESS, Cross-examination of When a Party to the Action.—A wide latitude should be allowed in the cross examination of parties

to the suit, but the action of the trial court in sustaining objections to immaterial questions is not prejudicial error. (p. 155.)

EVIDENCE, Sufficiency of.—Evidence in this case examined, and held sufficient to support the verdict. (p. 156.)

APPEAL AND ERROR—Conflicting Evidence.—A judgment will not be reversed where the evidence is conflicting and there is substantial evidence to support the verdict of the jury. (p. 156.)

(Syllabi by the court.)

Suit by the minority stockholders of the Taylor & Goshen Canal Company to collect debts alleged to be due from the Idaho Canal and Improvement Company, Ltd., also a corporation. Judgment for the complainants, and both corporations appealed.

Stanrod & Terrell, for the appellants.

A. M. Bowen, for the respondents.

⁶⁴⁴ AILSHIE, J. This action was instituted by the plaintiffs, who held a minority of the stock of the Taylor & Goshen Canal Company, a corporation existing under the laws of this state. The action is prosecuted by such stockholders for the use and benefit of the corporation, and is for the collection of a sum alleged to be due the corporation on a contract entered into by and between the Taylor & Goshen Canal Company, and the Idaho Canal and Improvement Company, Ltd., a corporation, both of which corporations are joined as defendants. The purpose of this action is to collect for and on behalf of the Taylor & Goshen Canal Company the sum due under the contract from the Idaho Canal and Improvement Company. For convenience, we shall hereafter refer to the former as the "Taylor & Goshen Company," and to the latter as the "Idaho Canal Company." Judgment was entered in favor of the plaintiffs for the use and benefit of the Taylor & Goshen Company, and both the defendant corporations have appealed.

The defendants demurred to the complaint, both generally and specially, and their demurrer was overruled. The action of the court in overruling the demurrer is assigned as ⁶⁴⁵ error. In order to intelligently consider the sufficiency of the complaint, it is necessary to make a brief statement of the allegations of the complaint and set out some portions thereof in detail. After alleging the corporate existence of the two corporations, it is alleged that the main canal owned and operated by the Idaho Canal Company runs parallel to the main canal owned and operated by the Taylor & Goshen Company, and that both canals receive their water from the Snake river for the purposes of irrigation, and that the two canals "cover and are available for the same lands," and are competing companies. It is then alleged that the plaintiffs are stockholders in the Taylor & Goshen Company, and have

owned their stock at all the times mentioned in the complaint, with the exception of the plaintiff, J. E. Tarr, who acquired his stock subsequent to the transaction involved in the action. It is also alleged that on or about April 1, 1903, the Idaho Canal Company and the Taylor & Goshen Company entered into a contract and agreement whereby the latter company rented to the former its canal for the irrigating season of the year 1903, and that the Idaho Canal Company promised and agreed to keep and maintain the canal in good and proper condition and to pay on October 1, 1903, the sum of fifteen hundred dollars to the Taylor & Goshen Company as rent for the use and benefit of the canal. This is followed by an allegation that the Taylor & Goshen Company fully and completely complied with its part of the contract, and that the defendant, the Idaho Canal Company, used and operated the Taylor & Goshen canal and had control of the same for the year 1903, in accordance with the contract and agreement. Paragraphs 7, 8 and 9 of the complaint contain the material allegations entitling plaintiffs, as stockholders, to maintain their action and embody the allegations that are particularly assailed by appellants. These paragraphs are as follows:

"7. That on or about the thirteenth day of June, 1903, one W. S. Chaney and one J. H. Brady, being at that time owners and in control, by themselves and others representing them, of a majority of the outstanding stock of the defendant corporation, the Idaho Canal and Improvement Company, purchased and caused to be purchased, by themselves and others ⁶⁴⁶ representing them, a majority of the outstanding stock of the defendant corporation, the Taylor & Goshen Canal Company, and on said day elected and caused to be elected a majority of the board of directors of the last-named company; and ever since said day the said Chaney and Brady are and have been in actual control of each of said corporations.

"8. That at all times since June 13, 1903, the said Chaney and Brady, by themselves and those representing them, have operated and controlled the said defendant, the Taylor & Goshen Canal Company, in their own interests, and in the interests of the said Idaho Canal and Improvement Company, and have regarded the rights and interests of these minority stockholders; and these plaintiffs allege, upon information and belief, that the control of the said Taylor & Goshen Canal Company was obtained by the said Chaney and Brady for the purpose of preventing competition with the said Idaho Canal and Improvement Company, and making it an adjunct thereto, disregarding the rights and interests of these plaintiffs.

"9. That the said Taylor & Goshen Canal Company, by its board of directors and legally constituted officers, being under the same control as the Idaho Canal and Improvement Company, has failed, neglected and refused to bring action against

the last-named company for said sum of money, due and owing as aforesaid, and have failed and neglected and refused to insist upon the payment thereof. That these plaintiffs have at various times requested said board of directors and the members thereof to bring action and collect said amount so due, and at all times have endeavored, by every means within their power, to secure action by said corporation on said claim, but said corporation, by its directors and officers, have at all times refused and neglected to do so. That on or about the first day of November, 1904, these plaintiffs served and caused to be served upon the board of directors of the said Taylor & Goshen Canal Company, a demand in writing that suit be commenced against the said Idaho Canal and Improvement Company upon said claim; but said board has refused, and ever since refuses, to ⁶⁴⁷ bring said action; and these plaintiffs are compelled to bring said action for the benefit of said Taylor & Goshen Canal Company, in order that they, as minority stockholders therein, may have their rights as such protected."

Rights of Transferee to Sue on Cause of Action Accruing Prior to His Purchase of Stock:

It is insisted by appellants that one who acquires stock subsequent to the commission of the wrongs complained of is not in a position to maintain an action as a minority stockholder for the redress of such wrongs. In support of this contention, appellants cite: *Taylor v. Holmes*, 127 U. S. 489, 8 Sup. Ct. Rep. 1192, 32 L. ed. 179; *Bimber v. Calivada Co.*, 110 Fed. 58; *Ulmer v. Maine R. E. Co.*, 93 Me. 324, 45 Atl. 40. This is undoubtedly the rule in the federal courts, but it is a rule that has been adopted for the purpose of preventing a transfer of stock to a nonresident in order to enable him to bring the case in the federal court. It is a rule of practice instead of a principle of law, and is not applicable in the state courts. Equity rule No. 94, adopted by the supreme court of the United States, specifically provides that "every bill brought by one or more stockholders in a corporation against the corporation and other parties founded on rights which may properly be asserted by the corporation must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that a share had devolved upon him since by operation of law": Preface to 104 U. S. ix. The rule prevailing in the majority of the state courts, however, is different, and rests on an entirely different principle.

Mr. Morawetz, in his work on *Private Corporations*, section 265, speaking of this question, says: "Causes of action belonging to the corporation increase the value of the corporate estate, and must be treated like any other assets; when enforced, they inure to the benefit of all the shareholders without distinction. It is plain, therefore, that a shareholder has

an interest in all causes of action belonging to the corporation, whether they arose before or after he purchased his shares. If the courts decline to ⁶⁴⁸ protect this interest in any particular case, their refusal must be based upon some principle of public policy, or the personal disqualification of the plaintiff."

And in section 266 the author continues: "There seems to be no good reason why a shareholder should not, as a rule, be permitted to sue on account of causes of action which arose before he purchased his shares, it being assumed, of course, that the corporation ought to sue, but is unable to act. If purchasers were disqualified from protecting their interests under these circumstances, the transferable value of shares might be impaired, and the loss would fall upon the innocent holders who were wronged."

Mr. Thompson, in his work on Corporations, at sections 4570 and 4571, comments on this rule, and adopts the same view expressed by Morawetz.

The general and prevailing rule in the state courts seems to be that a stockholder who pleads a good cause of action may maintain the same, even though he was not an owner of stock at the time the breach of duty was committed or the cause of action accrued, except in cases where it is shown that he purchased the stock with the intent and for the purpose of bringing suit, or where his vendor was for some reason estopped from maintaining the action, and the purchaser had notice of such bar: Morawetz, sec. 267; *Parsons v. Joseph*, 92 Ala. 403, 8 South. 788; *Sayles v. Central Nat. Bank*, 18 Misc. Rep. 155, 41 N. Y. Supp. 1063; *O'Connor v. Virginia etc. Passenger Co.*, 46 Misc. Rep. 530, 92 N. Y. Supp. 525; *Miller v. Murray*, 17 Colo. 408, 30 Pac. 46; *Forrester v. Butte etc. Min. Co.*, 21 Mont. 545, 55 Pac. 229, 353.

As said in *O'Connor v. Virginia P. & P. Co.*, 46 Misc. Rep. 530, 92 N. Y. Supp. 525: "It is only in cases where the party has bought the stock for the mere purpose of bringing the action—where he is a mere interloper seeking for trouble—that a court of equity refuses to grant him relief." The demurrer on that ground was properly overruled.

Right of Minority Stockholder to Maintain Action:

Appellants devote a great deal of time to the discussion of the right of these stockholders to maintain this action. ⁶⁴⁹ It is claimed that they have not made a sufficient case by their pleading to authorize a court of equity to permit them to maintain their action on behalf of the corporation. The chief argument is directed to the fact that there is no direct allegation of fraud made against any of the parties to the action. This question merits a very careful consideration. Appellants rely chiefly on the leading case of *Hawes v. Oakland*, 104 U. S. 450, 26 L. ed. 827, wherein the general rule

permitting minority stockholders to maintain an action is announced as follows:

"We understand the doctrine to be that, to enable a stockholder in a corporation to sustain, in a court of equity in his own name, a suit founded on a right of action existing in the corporation itself, and in which the corporation itself is the appropriate plaintiff, there must exist as the foundation of the suit:

"Some action or threatened action of the managing board of directors or trustees of the corporation which is beyond the authority conferred on them by their charter or other source of organization;

"Or such a fraudulent transaction, completed or contemplated by the acting managers, in connection with some other party, or among themselves, or with other shareholders as will result in serious injury to the corporation, or to the interests of the other shareholders;

"Or where the board of directors, or a majority of them, are acting for their own interest, in a manner destructive of the corporation itself, or of the rights of the other shareholders;

"Or where the majority of shareholders themselves are oppressively and illegally pursuing a course in the name of the corporation, which is in violation of the rights of the other shareholders, and which can only be restrained by the aid of a court of equity.

"Possibly other cases may arise in which, to prevent irremediable injury, or a total failure of justice, the court would be justified in exercising its powers, but the foregoing may be regarded as an outline of the principles which govern this class of cases."

650 From among the many cases that have followed the rule above stated, appellants cite the following: *Bimber v. Calivada Co.*, 110 Fed. 58; *Home Fire Ins. Co. v. Barber*, 67 Neb. 644. 108 Am. St. Rep. 716, 93 N. W. 1024, 60 L. R. A. 627; *Ulmer v. Maine R. E. Co.*, 93 Me. 324. 45 Atl. 40; *United Electric S. Co. v. Louisiana Electric Light Co.*, 68 Fed. 573; *Wood v. Corry Water Co.*, 44 Fed. 146, 12 L. R. A. 168; *Alexander v. Searcy*, 81 Ga. 536. 12 Am. St. Rep. 337, 8 S. E. 630.

Before undertaking to apply this rule to the case in hand, we will recall some of the chief reasons which are alleged as grounds for interference by stockholders. The majority of the stock of the Idaho Canal Company was owned by J. H. Brady, and it is alleged that W. S. Chaney and J. H. Brady were at all times in control of that corporation, the latter being president, while the former was secretary. At the time this contract was entered into between these two corporations, Chaney and Brady were not in control of the Taylor & Goshen Company, but subsequently they acquired a majority of all

the stock of that company, and thereafter obtained control of the board of directors, Chaney being elected president and Brady being elected a director. It is also alleged that the two corporations engaged in the sale, rental and distribution of water for irrigation purposes, and owned parallel canals and were competing companies. It is therefore apparent from the pleading that if the Idaho Canal Company, of which Brady was president and Chaney was secretary, declined to pay this alleged obligation to the Taylor & Goshen Company, of which Chaney was president and Brady a director, and it should become necessary for the latter corporation to sue the former, these two officers would be left in an anomalous position in an action in effect prosecuted by themselves against themselves. They might be ever so honest and conscientious in their transactions with reference to the matter, and yet there would be such an inevitable conflict between duty and opportunity as would justly arouse the interest and anxiety of the minority stockholders, whether any actual fraud or improper motive was either meant or intended. As we have heretofore had occasion to say, "It is the motive which the law imputes to a party, irrespective ⁶⁵¹ of his actual interest," that must control where an injured party is seeking relief in a court of equity: *Madden v. Caldwell Land Co.*, 16 Idaho, 59, 100 Pac. 360, 21 L. R. A., N. S., 332; *California Con. Min. Co. v. Manley*, 10 Idaho, 786, 81 Pac. 50. Regardless of actual fraud, such a state of facts is, in our opinion, sufficient to warrant a court of equity in permitting the minority stockholders to come in and maintain their action and take charge of the litigation. It sometimes occurs in the course of the administration of justice that it is quite as essential to maintain the confidence and respect of litigants in the due and proper administration of justice, as it is that they should recover a few dollars in damages for debt.

The supreme court of New York, in *Brinkerhoff v. Bostwick*, 88 N. Y. 52, in speaking of a case where the same parties had control of the affairs of two corporations, said: "A suit prosecuted under the direction and control of the very parties against whom the misconduct is alleged, and the recovery is sought, would scarcely afford to the shareholders the remedy to which they are entitled, and the fact that the delinquent parties are still in control of the corporation is of itself sufficient to entitle the shareholders to sue in their own names."

The case of *Pittsburg etc. Ry. Co. v. Dodd*, 115 Ky. 176, 72 S. W. 822, 74 S. W. 1096, was a case in most respects very similar to the one under consideration. There a bridge corporation made a lease to a railway company, and subsequently the stockholders of the railway company acquired the controlling interest in the stock of the bridge company, and thereafter the railway company ceased to make payments of rent

as stipulated by the contract, and the officers of the bridge company also refused to sue the railway company to collect the same. There the railway company was in control of the majority of the stock of the bridge company and was also in control of the board of directors. In discussing and considering the rights of the minority stockholders in the bridge company, the court of appeals of Kentucky held, among other things, as follows: "But there are admitted exceptions to the general rule that the acts of the directors are the acts of the corporation, ⁶⁵² and cannot be interfered with by the courts at the complaint of stockholders, which are as well established, perhaps, as the rule itself. . . .

"Whether the fraud or breach of trust must involve moral turpitude on the part of the director, the courts do not seem to be of one mind. It is our opinion that it is much the same thing to the corporation whether the wrongful act flows from an improper motive, or from such acts themselves, so wrong in the eyes of the law, that the improper motive that is an ingredient of fraud is imputed to it.

"In the case at bar the holders of the majority of the stock of the bridge company are also owners of a majority of the stock of the Pan Handle Railroad. The same votes elect the board of directors or managers of each corporation. They select the same persons to fill these places in each board. If there is a misunderstanding between the two corporations, it must be solved substantially by one and the same set of representatives, constituting complainants, defendants, and triers of the fact. The reason of the rule making the judgment of the directors that of the corporation depends in a large part upon their having been selected by the stockholders as their representatives, or proxy, in that matter; that their wills being free, as would be the principals', expediency favored the recognition of their act as that of the principals, the stockholders. But where the directors cannot act, and where every presumption founded in reason and ascribed by the law to their acts is resolved at once into a doubt, the reason of the rule fails, and the rule itself must cease. The directors need not be dishonest. It is enough if their situation is such that by reason of conflict of interest they cannot or should not act.

"We go no further than to say that upon an allegation of fraud on the part of his directors, or upon an allegation of facts showing that the directors (who are also directors of another contracting corporation), because of conflict of interest and duty, could not or ought not to act in the matter, coupled with the further allegation showing material damage to the complaining stockholder by reason of the transaction between the two corporations, a court of equity will hear ⁶⁵³ a single stockholder's complaint, and if the charges be sustained by the proof, will grant appropriate relief."

The complaint stated a cause of action and sufficient facts justifying the minority stockholders in maintaining this action.

Laches and Lack of Diligence:

The appellants further contend that the complaint fails to show that the respondents have acted with diligence, and that, on the contrary, no reason being given for the delay, the complaint upon its face shows the respondents guilty of laches and negligence in prosecuting their action. Appellants cite a great many authorities in which it has in effect been held "that, independently of any statute of limitations, courts of equity uniformly decline to assist a person who has slept upon his rights and shows no excuse for his laches in asserting them. . . . Laches and negligence are always discountenanced, and therefore, from the beginning of this jurisdiction, there was always a limitation to suits in equity." This statement of the rule is supported by the following authorities: *Speidel v. Henrici*, 120 U. S. 377, 7 Sup. Ct. Rep. 610, 30 L. ed. 718; *Penn Mut. Ins. Co. v. Austin*, 168 U. S. 685, 18 Sup. Ct. Rep. 223, 42 L. ed. 626; *Galliher v. Caldwell*, 145 U. S. 368, 12 Sup. Ct. Rep. 873, 36 L. ed. 738; *Chezum v. McBride*, 21 Wash. 558, 58 Pac. 1067; *Mullen's Admr. v. Carper*, 37 W. Va. 215, 16 S. E. 527; *Parker v. Dacres*, 130 U. S. 43, 9 Sup. Ct. Rep. 433, 32 L. ed. 848; *Richards v. Mackall*, 124 U. S. 183, 8 Sup. Ct. Rep. 437, 31 L. ed. 396; *Horr v. French*, 99 Iowa, 73, 68 N. W. 581; *Bryant v. Groves*, 42 W. Va. 10, 24 S. E. 605; *Williard v. Wood*, 164 U. S. 502, 17 Sup. Ct. Rep. 176, 41 L. ed. 531; *Sullivan v. Portland & K. Ry. Co.*, 94 U. S. 806, 24 L. ed. 324; *Lansdale v. Smith*, 106 U. S. 391, 1 Sup. Ct. Rep. 350, 27 L. ed. 219; *Whitney v. Fox*, 166 U. S. 637, 17 Sup. Ct. Rep. 713, 41 L. ed. 1145; *Abraham v. Ordway*, 158 U. S. 416, 15 Sup. Ct. Rep. 894, 39 L. ed. 1036; *Foster v. Mansfield etc. Ry. Co.*, 146 U. S. 88, 13 Sup. Ct. Rep. 28, 36 L. ed. 899.

There is no doubt but that the rule contended for by appellants is the general rule adopted in courts of equity. It has been recognized and followed in this court: *Idaho 654 G. M. Co. v. Union Min. Co.*, 5 Idaho, 107, 47 Pac. 95; *Ryan v. Woodin*, 9 Idaho, 525, 75 Pac. 261. As we understand the rule, however, it has this exception, that it is not invoked or applied by the courts in cases where it manifestly appears that its application is not essential in order to protect the adverse party from being placed in a worse condition by reason of the delay than he would have been in had the action been prosecuted with greater diligence. This exception is very clearly stated in *Parker v. Bethel Hotel Co.*, 96 Tenn. 252, 34 S. W. 209, 31 L. R. A. 706, wherein the supreme court of Tennessee said: "The doctrine rests upon the broadest principle of equity. Lapse of time obscures all human evidence, and often makes it impossible to discover the truth. When

the chances of discovering the truth are greatly impaired by lapse of time, it would be obviously unjust to enforce a demand after many years of acquiescence and delay. And so, where a party has done something, or had spent money, or altered his situation, in the belief, generated by the delay and acquiescence of his adversary, that he had the right so to act, a court of equity will not interfere. But delay alone, unaccompanied by other circumstances, will not necessarily preclude relief. In every case where the defense is founded on mere delay, that delay, of course, not amounting to a bar of any statute of limitations, the validity of that defense must be tested upon purely equitable principles. . . . The doctrine of laches, as understood in courts of equity, implies injury to the party pleading it as a defense. Where the situation of the parties has not been altered, and one has not been put in a worse condition by the delay of the other, the defense of laches does not generally apply."

In *Hamilton v. Dooly*, 15 Utah, 49 Pac. 769, the court said: "When the assertion of a right is neglected or omitted for a period of time more or less great, and under such circumstances as to cause prejudice to the adverse party, it may operate as a bar in equity. Although an important ingredient in the law of laches, the instances seem to be rare where courts have declared that mere lapse of time ⁶⁵⁵ might effect a positive bar, even in cases of purely equitable jurisdiction: while, on the other hand, relief has frequently been granted, notwithstanding great delay, when substantial justice could yet be done between the parties. . . . When, therefore, the parties remain in the same relative position, and the delay has worked no serious wrong to the adverse party, so that justice can still be done, the claimant should not be refused relief on the ground of laches."

No reason whatever appears in this case for applying to the respondents the doctrine of laches. Here, as shown by the complaint, the debt was not due until October 1, 1903. The complaint was filed by respondents, the minority stockholders, on January 31, 1906. It was just two years and four months from the date on which the cause of action accrued until this action was commenced. The complaint shows that in the meanwhile respondents were requesting and demanding that the board of directors proceed to collect the alleged indebtedness. They were evidently, judging from the complaint, diligent in making demands on the board of directors and insisting that they collect the debt or bring suit. The Idaho Canal Company has no right to complain because it has in no way changed its position or altered its relation either to plaintiffs or their corporation on account of any delay by the stockholders of the Taylor & Goshen Company in instituting their action. The claim was not barred by the statute of limitations, and would not have been for nearly three years after the com-

mencement of this action. It would, indeed, take an extreme case, where the action is on contract for the collection of a debt to apply the doctrine of laches to minority stockholders where their action is commenced at a time prior to the bar of the statute of limitations. The demurrer to the complaint was properly overruled.

Parol Evidence to Contradict Minutes of Corporation:

As has been previously observed, this was an action on contract for the collection of a debt. The defendants admitted the execution of the contract and pleaded rescission of the contract as a defense. In support of the allegations of the answer, the defendants introduced the minutes of ⁶⁵⁶ a stockholders' meeting and also of a directors' meeting held on June 13, 1903. That portion of the minutes of the stockholders' meeting bearing on the question involved in this action is as follows:

"Minutes of a special meeting of the stockholders of the Taylor & Goshen Canal Company held at Goshen on Saturday, June 13, 1903, a majority of the stock in said company being represented. On motion Mr. A. M. Neilson was elected to act as temporary chairman and Heber Arave was elected to act as temporary secretary. . . . On motion two tellers were appointed to canvass the votes on the directors and after the canvass was duly made, the following named stockholders were duly elected for the unexpired term: James Just, J. H. Brady, W. S. Chaney, Robert Hayes and John Clark. Mr. Carrier called up the matter of leasing by the board of directors of this company to the Idaho Canal & Improvement Company all of its water in this company's canal for the season of 1903, for \$1500, and on motion by Mr. Carrier and seconded by Mr. William Rogers, it was ordered that the action of the said board of directors be declared null and void, which motion was duly carried. There being no further business to come before the stockholders' meeting at this time, said meeting was duly adjourned.

"HEBER ARAVE,

"By V. R. PUGMIRE."

The portion of the minutes of the directors' meeting bearing on this subject is as follows:

"Directors' meeting of the Taylor & Goshen Canal Company, held on Saturday, June 13, immediately following the stockholders' meeting. Present: John Clark, James Just and W. S. Chaney. On motion Mr. Chaney was elected temporary chairman and James Just temporary secretary. . . .

"The matter of the leasing of the waters of this company for the season of 1903 for \$1500 to the Idaho Canal & Improvement Company came up for consideration.

"The stockholders having declared such lease null and void, after discussion, the following motion was made and unanimously carried:

657 " 'Resolved that the contract between this company and the Idaho Canal & Improvement Company for the leasing of all the waters of this company for 1903, be declared null and void and of no effect, and that the said contract be not entered into.'

"There being no further business before the meeting of the board of directors, on motion of Mr. Clark, said meeting was duly adjourned.

"JAMES JUST,
"By V. R. PUGMIRE, Secy."

It will be noted that the minutes of the stockholders' meeting is signed, "Heber Arave, by V. R. Pugmire," while the minutes of the directors' meeting, held on the same day, is signed, "James Just, by V. R. Pugmire, Secy." Pugmire was not the secretary at either one of these meetings, and, in fact, does not appear to have been present at either of the meetings. He was elected secretary of the corporation at the directors' meeting held on June 13th. He testified that he did not take the notes of that meeting, and did not of his own knowledge know what action was taken at either of the meetings. These minutes were not entered on the corporation books until November 15, 1903, which was nearly a month after the water rental was to become due under the contract between the two corporations. Pugmire also testified that he received these minutes in typewritten form from Chaney with Just's and Arave's names, respectively, signed thereto in typewriting. Chaney, on the other hand, testified that he took shorthand notes of the two meetings, and that he thereafter had his notes extended by a typewriter and delivered a copy to Pugmire, the corporation secretary. He also testified that these were correct minutes of the transactions of the two meetings, respectively. The plaintiffs assailed these minutes and claimed that they were not the true minutes of the meetings, and offered, and were allowed by the court, to introduce both oral and written evidence contradicting them.

Arave, who acted as secretary of the stockholders' meeting, testified that he took the minutes of the proceedings of that 658 meeting and reduced them to writing at the time, and produced them in court, and they were admitted in evidence.

The portions relating to this transaction are as follows:

"June, Sat. 13, 1903.

"The stockholders of the Taylor & Goshen Canal Company met in annual meeting June 13, 1903, Mr. A. M. Neilson was elected chairman and Heber Arave was elected secretary. . . . James Just, W. S. Chaney, J. H. Brady, John T. Clark, Robert Hayes were elected directors of the company by ballot. It was moved by Mr. Carrier and seconded by Mr. William Rogers, that the action of the board be condemned as unfair and unjust for leasing stockholders' water. Voted and carried. T. E. Wood, R. Hoff, James Just, Robert Hayes,

Charley Benton, W. S. Chaney, John Clark, J. H. Brady, A. Wadsworth, John Stoddard."

Just, who acted as secretary of the directors' meeting, testified that three directors were present at the meeting on June 13th, namely, Chaney, Clark and Just. He does not appear to have produced in court the minutes made by him at the time of the meeting, but he testified positively that the portion of the minutes as produced by the defendant purporting to be signed by himself, "By V. R. Pugmire, Secy.," was not correct, and that certain matters therein set forth were never mentioned in the meeting, and no resolution was ever passed concerning the same. That part of the minutes produced by defendants and disputed and repudiated by Mr. Just is the part reading as follows: "The matter of the leasing of the waters of the company for the season of 1903 for \$1,500 to the Idaho Canal and Improvement Company came up for consideration. The stockholders having declared such lease null and void, after discussion the following motion was made and unanimously carried: 'Resolved, that the contract between this company and the Idaho Canal and Improvement Company for the leasing of all of the waters of this company for 1903 be declared null and void and of no effect, and that the said contract be not entered into.'"

Now, the contention made by appellants is that it was error in the trial court to permit oral evidence to dispute ⁶⁵⁹ the minutes of the corporation as appearing in the corporation books produced on the trial by the defendants, and that it was also error to admit in evidence the minutes of the stockholders' meeting made by Arave. Appellants contend that since, under the provisions of section 2775 of the Revised Codes of Idaho, all corporations for profit are required to keep a record of all their business transactions and a journal of all meetings of their directors and stockholders, such records therefore become the best evidence of the transactions and proceedings of both stockholders' and directors' meetings. This is undoubtedly correct as a general statement of the rule, and was considered and adopted in *Coreoran v. Sonora Min. & Mill. Co.*, 8 Idaho, 651, 71 Pac. 127. The rule as to the minute-book of directors' meetings being proper evidence to prove corporate acts is announced and adopted by a long line of authorities. The cases, however, holding that such records are conclusive evidence of the things therein recorded come within an exception to the rule instead of the rule itself: 6 Thompson on Corporations, secs. 7739, 7740. The general rule is that they are only *prima facie* evidence of the facts and occurrences therein recorded. Where strangers and innocent parties have acted on the faith of and belief in the statements contained in the records and minutes of a corporation, the corporation itself has generally been estopped to question or deny the correctness of such records. The rule

that the record is conclusive has never been applied to strangers to the record, and we see no good reason for its application¹ in a case of this kind to minority stockholders. More especially is this true where they absolutely deny that any such transactions ever occurred, and that the true minutes of a given meeting show the very contrary of that shown by the corporation books.

Mr. Thompson, in volume 6 of his work on Corporations, section 7740, says: "The general rule is believed to be that, except for the purpose of proving what the corporation did, or what action its corporators took in effecting its organization, its books and records are not evidence as against a stranger, or as against a stockholder holding adversely to it. It is believed ⁶⁶⁰ that a little careful reflection will make clear the proper distinction which obtains in this relation. They are evidence, in any form of proceedings and against any party, for the purpose of showing that the corporation passed the vote recited, adopted the resolution recorded, or enacted the by-laws spread out upon its minutes—whenever, under the frame of the issues, it becomes material or relevant to show that fact, and always subject to contradiction, by proving that the record is a false one. But where it is sought to introduce such records for the purpose of disposing of the rights of strangers to the corporation, or even of its own members in their private dealings with it, or where they hold adversely to it, then those records cannot be so used, because the law ascribes no such force to them."

In *Gilson Quartz Min. Co. v. Gilson*, 51 Cal. 341, it was held that the corporation may introduce parol evidence to show that a resolution of its board of directors spread upon the minutes of its proceedings does not express correctly the proposition that was voted by the board.

In *Holden v. Hoyt*, 134 Mass. 181, the court, in considering the admissibility and weight to be given books and records of corporations, said: "We have no doubt that the books and records of a corporation are *prima facie* evidence against it, as admissions; and, under some circumstances, may be conclusive evidence. But, at most, a corporation can only be bound conclusively by its records, either when they are the records, duly made by the recording officer, and its proceedings, or when some person, who has had proper access to them has become aware of their contents, and has acted upon the faith that they were the records of its proceedings. And a corporation is not bound, as to third persons, by interpolations fraudulently inserted in its records, where such third persons have not acted on, or seen, or known of the existence of the matters so interpolated and appearing to be recorded. It is not estopped or bound by such fraudulent addition, unless it is shown to have been negligent in omitting to make

due correction of the records, and that some innocent third person has been misled thereby."

⁶⁶¹ To our mind this is as clear and concise a statement of the rule and its exceptions as we have found. This statement of the law covers the case at bar. While the plaintiffs were trying to recover on the contract sued upon for the use and benefit of the corporation, it was by force of circumstances obliged to make that very corporation a defendant in the case, because the real defendant, Idaho Canal Company, through its stockholders, officers and directors, had control of the Taylor & Goshen Company. And whatever action the directors of the Taylor & Goshen Company might take with reference to this litigation and the circumstances out of which it arises would necessarily be the will of the stockholders and directors of the Idaho Canal Company. The president of the Taylor & Goshen Company was secretary of the Idaho Canal Company, while the president of the latter was a director in the former, and in connection with its president had control of its board of directors. The same two men were in absolute control of both corporations. Under such circumstances one company could easily suffer to the profit and advancement of the other. This was a case of showing that the minutes produced by the defendants were not only false, but that they were not the minutes as taken at the meeting and did not correctly state what occurred. It has been suggested on the argument that the plaintiff in the lower court did not object to the introduction of these records by the defendants. We do not think this contention is well taken in this court. The plaintiffs did, at the time these records were offered by defendants, specifically reserve the right to cross-examine the secretary regarding them, and, following that reservation, did examine the secretary and elicited from him the fact that he did not know anything about the correctness of the minutes, and that he had received the typewritten copies from Chaney, the president of the Taylor & Goshen Company, and had entered them accordingly. Following upon the evidence thus elicited, the plaintiffs, on rebuttal, offered and were allowed to introduce the evidence hereinbefore mentioned tending to prove the incorrectness and falsity of these records. We are satisfied there was no error committed by the court in ⁶⁶² permitting this proof, and that the question of the genuineness and correctness of the minutes of these meetings was a proper question to be submitted to the jury.

Instructions:

The appellants complain of instructions 4 to 9, inclusively, given by the court. These instructions all related to the defense of the rescission of the contract interposed by defendants. Some of them, if taken separately, would be open to objection. Some of them, standing alone, we think would be

too favorable to the plaintiffs, while at least two of them, taken separate and alone, were too favorable to defendants. As we have repeatedly said, however, the instructions given in a particular case must all be read and viewed together. The court cannot give all the law of a case in one sentence. The entire instructions must be taken together, and if not in conflict with each other, and, when read as a whole, correctly state the law in so far as they go, it will not constitute a ground of reversal because a particular sentence or paragraph thereof, when standing alone, is obscure, incomplete or indefinite. It should be further observed in this case that the appellants did not request any instructions on the question of rescission and did not offer any more complete, concise or accurate statement of the law than was given by the court. We find no error in the instructions as a whole.

Cross-examination of Witnesses:

Appellants complain of the action of the court in denying them the right to cross-examine witnesses Larson, Just. Carrier and Hensen with reference to certain matters. The question propounded to one witness was with reference to his understanding as to whether the contract had been annulled; of another witness if these minutes introduced by defendants had not been used in another action prosecuted against defendant Idaho Canal Company, and that the plaintiffs had notice of their contents long prior to the commencement of this action. The other matters were equally as unimportant. There would have been no error or impropriety ⁶⁶³ in allowing the witnesses to answer these questions. This is especially true with reference to witnesses who are themselves parties to the action, as two of these witnesses were plaintiffs in this case. A wide latitude should be allowed in the cross-examination of parties to the action. The questions, however, were not material, and the action of the court in sustaining objections to them was certainly not erroneous or prejudicial to appellants.

Sufficiency of Evidence:

From what has heretofore been stated with reference to the pleadings and evidence in the case, it will at once appear that the evidence tending to establish or refute the allegations of the pleadings was properly submitted to the jury. There was evidence produced which tended to establish the contention made by the plaintiffs, and there was likewise evidence produced which tended to establish the position maintained by the defendants. It has been contended that no showing was made by the plaintiffs on the trial of this case that the defendant, Idaho Canal Company, ever received the benefits of this contract. There was a sufficient showing on that point to justify a recovery. It appears that an employé of the Idaho Canal Company took charge of the canal belonging

to the Taylor & Goshen Company and distributed the water during the season of 1903. It also appears that the water represented by the majority of the stockholders and controlled by Chaney and Brady was under their direction diverted into the canal owned by the Idaho Canal Company, and all the other water that was not used by either the permission of the officers of the Idaho Canal Company or through force by certain of the stockholders of the Taylor & Goshen Company was also diverted into the canal of the Idaho Canal Company. The fact that the Idaho Canal Company permitted some individual stockholders in the Taylor & Goshen Company to use water from that canal without charging or collecting any rent was not sufficient to defeat the right of recovery of the Taylor & Goshen Company on the contract, or defeat the minority stockholders who are maintaining this action on that contract. 664 There was, in our opinion, sufficient evidence to support the verdict of the jury in favor of the plaintiffs. Under the uniform rule established by this court with reference to conflicting evidence, and likewise reinforced by positive statute (Revised Codes, sec. 4824), we are prohibited from reversing a judgment in a case where there is substantial evidence to support the verdict of a jury.

The judgment must be affirmed, and it is so ordered, with costs in favor of respondents.

Sullivan, C. J., and Stewart, J., concur.

Actions by Stockholders on Behalf of Their Corporations are discussed in the note to *Johns v. McLester*, 97 Am. St. Rep. 29. Courts of equity are prompt to redress the injuries of minority stockholders against the wrongdoing of the majority, after having sought relief through the corporation without success: *McC Campbell v. Fountain Head R. R. Co.*, 111 Tenn. 55, 102 Am. St. Rep. 731. See on this question the subsequent cases of *McConnell v. Combination Min. etc. Co.*, 30 Mont. 239, 104 Am. St. Rep. 703; *Hearst v. Putnam Min. Co.*, 28 Utah, 184, 107 Am. St. Rep. 698; *McCloskey v. Snowden*, 212 Pa. 249, 108 Am. St. Rep. 867; *Wormser v. Metropolitan St. Ry. Co.*, 184 N. Y. 83, 112 Am. St. Rep. 596; *Dunbar v. American Telephone etc. Co.*, 224 Ill. 9, 115 Am. St. Rep. 132; *Paxton v. Herron*, 41 Colo. 147, 124 Am. St. Rep. 123.

As to the Application of the Statute of Limitations to actions by stockholders on behalf of the corporation, see *Bates v. Estate of Boyce*, 135 Mich. 540, 106 Am. St. Rep. 402.

A Purchaser of Stock in a Corporation cannot attack it by suit for prior acts of mismanagement, it has been held, unless such mismanagement or its effects continue and are injurious to him, or affect him specially and peculiarly in some other manner: *Home Fire Ins. Co. v. Barber*, 67 Neb. 644, 108 Am. St. Rep. 716.

The Minutes of Corporation Meetings are only prima facie evidence of the proceedings, and parol testimony is admissible to prove what actually occurred: *State v. Guertin*, 106 Minn. 248, 130 Am. St. Rep. 610.

CASES
IN THE
SUPREME COURT
OF
IOWA.

GRIBBEN v. CLEMENT.

[141 Iowa, 144, 119 N. W. 596.]

MORTGAGE—Release by Change in Form of Debt.—No change in the form of the debt originally secured will release a mortgage, so long as the identity of the debt can be traced. Hence where a principal has given a mortgage to his surety on a note, as indemnity against loss, payment of the note by money borrowed from another source with the same person as surety does not terminate the suretyship and extinguish the mortgage. (p. 160.)

ACTION—Effect of Bringing Prematurely.—The old rule which required an action to be abated merely because prematurely brought has been borne down by the trend of modern decisions. (p. 161.)

ACTION.—When an Action is Prematurely Brought, the court has full power to impose proper terms upon the plaintiff for the protection of the defendant. (p. 161.)

ACTION.—If an Action Prematurely Brought is complete and mature before it comes to hearing, the plaintiff will ordinarily be permitted to file a supplemental petition and try the case on its merits. (p. 161.)

SURETY.—Whether His Action Against Principal Premature.—Where the surety on a note to a bank agrees with the cashier that the amount due on the note shall be charged to his account in the bank, his action on a mortgage given him by the principal debtors as indemnity is not premature because commenced before he pays the bank formally. (p. 162.)

ACKNOWLEDGMENT.—The Denial by a Woman That She Acknowledged a mortgage does not necessarily overcome the notary's certificate containing her name. (p. 163.)

ACKNOWLEDGMENT — Genuineness of Signature.—If a woman acknowledges a mortgage before a notary, it becomes immaterial whether her name was put to it by her own or another's hand. (p. 163.)

Action to foreclose a mortgage given to secure a note. There was a decree against both defendants, except that no personal judgment was entered against defendant M. A. Clement. The defendants appeal.

White & Clarke, for the appellants.

D. H. Miller and R. S. Barr, for the appellee.

145 EVANS, C. J. The note and mortgage sued on bear date of July 9, 1897. They purport to have been executed by both defendants, who are husband and wife. The note was drawn in ordinary form, and by its terms became payable in ninety days from its date. The real consideration, however, for the note and mortgage was that the plaintiff became surety for the defendant H. O. Clement. At the time of this transaction, Clement was engaged in the business of buying and shipping stock. He maintained an open account at the Bank of Minburn, checking thereon for the payment of stock purchased, and depositing therein the proceeds of stock sold. We infer from the record that he was operating without capital, relying upon the proceeds of his sales to meet the checks issued for his purchases. To secure itself against loss by his overdrafts the bank required him to deposit with it as security a promissory note for five hundred dollars, to be signed by himself and a surety. The plaintiff became such surety, and Clement carried on his business **146** under this arrangement. This surety note was extended from time to time until January, 1901. At this time Clement's account at the bank was overdrawn nearly to the full amount of five hundred dollars, and Clement was unable to pay. For the purpose of obtaining funds to pay this overdraft a new note was executed for a like amount to the Bank of Dallas Center, and the plaintiff became surety on this note in lieu of the note originally given to the Bank of Minburn. With the proceeds of this note the overdraft account of Clement at the Bank of Minburn was paid. The second note was extended from year to year until June 14, 1906. On this date another note for a like amount was executed by the same parties to the Bank of Minburn, for the purpose of obtaining money to pay the note at Dallas Center. The last note matured June 14, 1907. At this time the bank called upon the plaintiff surety to pay the same. The plaintiff at that time had an open account to his credit at such bank for more than the amount of the note. He orally directed the cashier to charge the amount thereof to his account, which the cashier orally agreed to do. This suit was begun on June 29, 1907. The plaintiff did not actually issue a check on his account for the payment of the note until September 26, 1907, nor was the note formally canceled by the bank until such date. The plaintiff first pleaded such formal payment in his reply filed September 27, 1907. A demurrer to his reply being sustained, he set up the same matter in an amended and supplemental petition filed November 18, 1907. The points relied upon by the defense may be stated briefly as follows: (1) That the suretyship indemnified by the mortgage terminated in 1901, when the overdraft account was paid at the Bank of Minburn, and that the mortgage was thereby discharged; (2) that plaintiff's

only cause of action was set up in a supplemental petition, filed November 18, 1907, and that under the terms of the note and mortgage the statute of limitations had fully run before such date; (3) that no cause of action ¹⁴⁷ accrued to the plaintiff until September 26, 1907, being the date on which he formally paid the debt for which he became surety, and that his suit was therefore prematurely brought, and could not be saved by the filing of a supplemental petition; (4) that the defendant M. A. Clement never signed either the note or the mortgage, and that her purported signatures thereto are forgeries, and that such note and mortgage were fraudulently altered by the plaintiff. The whole controversy in the case turns about these points of defense, and we will consider them seriatim.

1. In his original petition the plaintiff declared upon his note and mortgage according to their terms. The consideration for such note and mortgage was developed by the later pleadings. There is no dispute in the evidence but what they were given to the plaintiff to indemnify against loss by reason of his suretyship for Clement. Clement himself testifies: "It was for any purpose that might come up. He might sustain a loss that might be good there against me. I will admit that they were given to protect Mr. Gribben, but it was not talked or understood at the time." The parties differ in their testimony in this respect, that the plaintiff claims that he received the note and mortgage at the time of their date and at the time he signed as surety. Clement testifies that he voluntarily gave the note and mortgage to the plaintiff some time subsequently. We think the contention of the plaintiff must be accepted in this respect. Counsel for appellants contend that when the overdraft was paid in 1901, and the five hundred dollar note upon which plaintiff was surety was surrendered, the function of the security held by the plaintiff was fully performed, that his suretyship had terminated, and that he had sustained no loss by reason thereof. This argument rests upon the letter rather than upon the spirit. If Clement had paid his overdraft at the Bank of Minburn, and thus released the plaintiff from his suretyship, then doubtless appellant's position would be sound, ¹⁴⁸ even though the plaintiff had afterward voluntarily entered into another suretyship for a like amount. But in this case it was not so. Plaintiff was able to terminate his liability as surety on the first note only by becoming surety on another note, the proceeds of which should pay the first note. This only changed the form of his suretyship. Its substantial identity was not changed. To hold otherwise would be exceedingly technical. We hold, therefore, that the suretyship of the plaintiff on the successive notes throughout the period of ten years was a continuing suretyship. The mortgage, having been given as surety against any loss which

the plaintiff might suffer, thereby continued as long as the suretyship. It is well established in this state that no change of form of the debt originally secured by mortgage will release the mortgage so long as the identity of the debt can be traced: *Chase v. Abbott*, 20 Iowa, 154; *Heively v. Matteson*, 54 Iowa, 505, 6 N. W. 505; *Port v. Robbins*, 35 Iowa, 208. In the case last cited a note secured by mortgage was surrendered, and in lieu thereof a new note with surety was accepted. It was held that the surety was entitled to the security of the original mortgage. If we were to hold otherwise as to the continuance of the suretyship, it would hardly avail the defendants. In such case it would logically follow that plaintiff's cause of action accrued in January, 1901. Plaintiff's liability on the surety note at that time became absolute. The defendant was unable to pay the overdraft. The money to pay it could only be procured upon the credit of the plaintiff. The plaintiff's rights and remedy in such a case were not confined to those that are implied by the law of suretyship. In this case the mortgage and note were an express promise to pay, and it would be competent for him to show in a court of equity the liability he had incurred in order to discharge the suretyship.

2. We will consider together the second and third points of the defense. The one is that the statute of limitations had run before plaintiff set up his cause of action in ¹⁴⁹ a supplemental petition. The other is that his cause of action had not accrued until after he commenced his suit. These two propositions are not consistent, and one or the other, or both, must necessarily be fallacious. If plaintiff's cause of action had not accrued until September 26, 1907, then the statute of limitations did not begin to run until such time. If the statute of limitations had fully run at the expiration of ten years after the date of the maturity of the note according to its terms, namely, October 9, 1907, it must be because the plaintiff was entitled to maintain an action upon the note and mortgage in accordance with their express terms. On that theory it would be incumbent upon the defendants to plead the fact relating to suretyship as defensive matter. This theory will not avail the defendants, because the plaintiff did commence his suit in this form on the twenty-ninth day of June, 1907. If it was necessary for the plaintiff to set up, not only his note and mortgage, but to plead the facts in relation to suretyship and to aver payment, then his cause of action did not accrue until such averment could be made, and the statute of limitations would not commence to run until a cause of action accrued. On either theory the plea of the statute of limitations is untenable.

Was the suit prematurely brought? And if so, were the defendants entitled to a dismissal thereof on that account? As already indicated, the plaintiff did not draw his check for

the payment of the note until September 26, 1907, although, as between him and the bank, it was deemed as paid by him and to be charged against his account as of the date it matured. No interest was charged or claimed by the bank after June 14th. This arrangement between the plaintiff and the bank was binding upon each of them. As between them it would be deemed a payment in a court of equity. Inasmuch as the arrangement was actually carried out later, and the note surrendered ¹⁵⁰ to the plaintiff long before the trial of this cause, defendant could not be prejudiced thereby. He does not claim that he was prejudiced. We would not therefore feel warranted in holding that the commencement of plaintiff's action was premature. If we should so hold, we do not think that such fact would entitle the defendant to a dismissal of the action. The old rule which required an action to be abated, merely because prematurely brought, has been borne down by the trend of modern decisions. Under the later decisions, if the plaintiff's cause of action is complete and mature before it comes to a hearing, he will ordinarily be permitted to try it out on its merits. If the action was prematurely brought, the court has full power to impose proper terms upon the plaintiff for the full protection of the defendant. The usual terms imposed are that plaintiff be required to pay all costs incurred prior to the maturity of his cause of action. If other terms ought in justice to be imposed, the court has plenary power in the matter. The rule is to permit a supplemental petition to be filed and to allow the case to proceed: See *Little v. Pottawattamie County*, 127 Iowa, 376, 101 N. W. 752; *Bloom v. State Ins. Co.*, 94 Iowa, 359, 62 N. W. 810. *Dennison v. Soper*, 33 Iowa, 183, was a case prematurely brought by a surety as plaintiff before payment of the note, and his action was ordered dismissed, although he had paid the note before the trial. In that case, however, the suit was brought, not only before the surety had paid the note, but seven months before the note matured. The ground of the dismissal was that the only liability of the defendant to the plaintiff was one implied by the law of suretyship, and under such law no liability existed until after maturity and payment of the surety debt. Even upon the state of facts existing in that case, we doubt whether it can be regarded as entirely consistent with the holding in later decisions. In the case of *Zalesky v. Home Ins. Co.*, 102 Iowa, 613, 71 N. W. 566, the reasoning of the court was ¹⁵¹ grounded upon the express prohibition of the statute. The facts in that case were exceptional in that respect. As distinguishing the *Dennison* case (33 Iowa, 183) from the one at bar, it should also be noted that a distinction is recognized by the authorities between a case where the plaintiff surety has no other right or remedy than those

arising by implication of law out of the suretyship relation and a case where the plaintiff has been expressly indemnified by a written contract. In the latter case the surety is entitled to avail himself of the express terms of the written contract of indemnity, and he may thereby obtain an enlarged remedy. For a collation of cases upon this subject, see 27 Cyc. 1067, 1068, and cases therein cited; 27 Am. & Eng. Ency. of Law, 474, and cases therein cited. In such a case it has been held that a surety mortgagee may foreclose his mortgage before paying his principal's debt, and obtain a decree ordering the proceeds of the foreclosure to be applied upon the debt: *Meeker v. Waldron*, 62 Neb. 689, 87 N. W. 539. The effect of such a decree would be to treat the mortgage, at the election of the surety, as security for the original debt. From any view of the case at bar, we must hold that plaintiff's case was neither barred by the statute of limitations nor prematurely brought.

3. It is earnestly contended that the purported signatures of the defendant M. A. Clement to the note and mortgage are forgeries. The testimony of Mrs. Clement on this question consists of the following, and no more: "The signature M. A. Clement to this note, Exhibit A, is not my genuine signature. The signature M. A. Clement to this mortgage, Exhibit B, is not my signature." This testimony was not contradicted by any other oral testimony. One Boyd also testified that in his opinion the signatures were not the signatures of this defendant. It is said in argument that the court found the signature on the note was a forgery. From such finding it is argued ¹⁵² that there was necessarily a fraudulent alteration of the note on the part of the plaintiff, and that therefore his whole case should fail. We are not able to determine from the record that the lower court definitely made such a finding as here stated. There is no statement in the record to that effect. The court rendered no personal judgment against this defendant. The inference might therefore be drawn that the court found in her favor as to the alleged forgery of the signature to the note. The court, however, entered no personal judgment against either defendant on the note Exhibit A. This note did not represent a debt. It was simply a part of the form of security. The court determined the amount of the personal liability of H. O. Clement from the amount paid by plaintiff as surety in his behalf. It allowed the plaintiff six per cent interest thereon, although the note called for eight per cent interest. It is undoubtedly true, however, that if the note, Exhibit A, was signed by the defendant M. A. Clement, it would render her subject to a personal judgment, not for the amount of the note, but for the amount of plaintiff's loss as surety. The court having failed to enter such personal judgment, it

is perhaps the fair inference from the record that the court found that she did not sign the note. Does it necessarily follow that the plaintiff was guilty of a fraudulent alteration of the note so as to render it void? And does consistency require a finding that her signature to the mortgage was also a forgery? We think not. As to the alleged fraudulent alteration, we are well satisfied from the evidence that the purported signatures of Mrs. Clement were upon the note and mortgage when the plaintiff received them from her husband. If either signature was a forgery, the forgery had occurred before the instrument left the hands of the husband. As to the genuineness of the signature to the mortgage, it appears that the mortgage was duly acknowledged before one Bligh, a notary public, and had been on record ¹⁵³ since 1901. Bligh had died before the trial was had, and no other person was found who could personally testify to the transaction. The name of Mrs. Clement was written in the body of the notarial certificate in the handwriting of Bligh. It has heretofore been held by this court that the certificate of a notary in such cases is entitled to great weight, and should not be lightly overcome. Such certification has been regarded as sufficient proof of the genuineness of the signature, not only to the mortgage, but to the note also: See *Mixer v. Bennett*, 70 Iowa, 329, 30 N. W. 587; *Herrick v. Musgrave*, 67 Iowa, 63, 24 N. W. 594; *Baily v. Landingham*, 53 Iowa, 722, 6 N. W. 722; *Van Orman v. McGregor*, 23 Iowa, 300; *Morris v. Sargent*, 18 Iowa, 90. The defendant denied only the genuineness of her signature. That of itself would not defeat her liability on the mortgage. She did not deny that she had appeared before a notary public and acknowledged the execution of the instrument in the manner certified to by him; and, if she had made such denial, it would not of itself necessarily be sufficient to overcome the weight of such certificate. If she acknowledged the instrument before the notary public, it was quite immaterial whether her name was put to it by her own hand or by the hand of another. It is true that the plaintiff himself did not see her sign the paper, nor is he able to produce any witness that did. He took the mortgage from her husband, assuming that the purported signature was genuine. He was doubtless imprudent in that respect. A more cautious man would have made himself certain of the genuineness of the signature in advance. But if the plaintiff had possessed such degree of prudence, he would probably not have become surety at all. It is the "man void of understanding" who "becometh surety for his neighbor": Proverbs, xvii, 18. In any event the finding of the lower court is well sustained by the record.

The decree furnishes the defendants no legal ground of complaint, and it is affirmed.

A Mortgage is not Discharged by a Change in or renewal of the note or debt which the mortgage was given to secure: Baunker v. Barrow, 79 Me. 62, 1 Am. St. Rep. 282; Austin v. Bailey, 64 Vt. 367, 33 Am. St. Rep. 932; Kern v. Hotaling, 27 Or. 205, 50 Am. St. Rep. 710; Jarboe v. Shively, 109 Ky. 402, 95 Am. St. Rep. 384; First Nat. Bank v. Citizens' State Bank, 11 Wyo. 32, 100 Am. St. Rep. 925.

The Undertaking of a Principal to Pay His Surety the amount of the demand for which he stands liable, whenever he is called upon for payment by the creditor, or whenever he should have reason to doubt his principal's ability ultimately to save him harmless, is valid, and may be enforced upon either of these contingencies arising, although the surety has not yet paid the creditor any part of the debt: Fletcher v. Edson, 8 Vt. 294, 30 Am. Dec. 470. And, according to Miller v. Howry, 3 Penr. & W. 374, 24 Am. Dec. 320, where a surety holds a counter bond in the amount of the sum secured, given in consideration of his liability, he may sue thereon before payment. See, further, Howell v. Cobb, 2 Cold. 104, 88 Am. Dec. 591; Nettleton v. Ramsey etc. Land Co., 54 Minn. 395, 40 Am. St. Rep. 342.

HUGHES v. CHICAGO, BURLINGTON AND QUINCY RAILWAY COMPANY.

[141 Iowa, 273, 119 N. W. 924.]

RAILWAY—Flooding Land—Intermittent Injuries.—The fact that a railway embankment and bridge which cast water upon adjacent land are permanent in character does not preclude the injuries from being temporary or intermittent, as distinguished from permanent, and bar successive actions to recover therefor. (p. 167.)

NEGLIGENCE—Intermittent Injuries—Successive Actions.—When the cause of an injury to property is permanent, and the resulting damage intermittent, but likely to recur from time to time in the future, the injured person may elect to treat the injury as permanent and recover all his damages in a single action, which bars his right to recover for subsequent injuries from the same cause; but if he elects to treat the injury as of a temporary or continuing character, and sues for damages resulting from one or more specific invasions of his property, a recovery thereunder is no bar to an action for subsequent similar injuries. (p. 168.)

RAILWAY—Flooding Land—Intermittent Injuries.—Where a railway bridge obstructs the water in time of floods and sets it back across intervening land upon the premises of a proprietor not crossed by the railroad, the invasion of his property is regarded as temporary, not permanent, and each recurring invasion is a new wrong for which a new action will lie. (p. 168.)

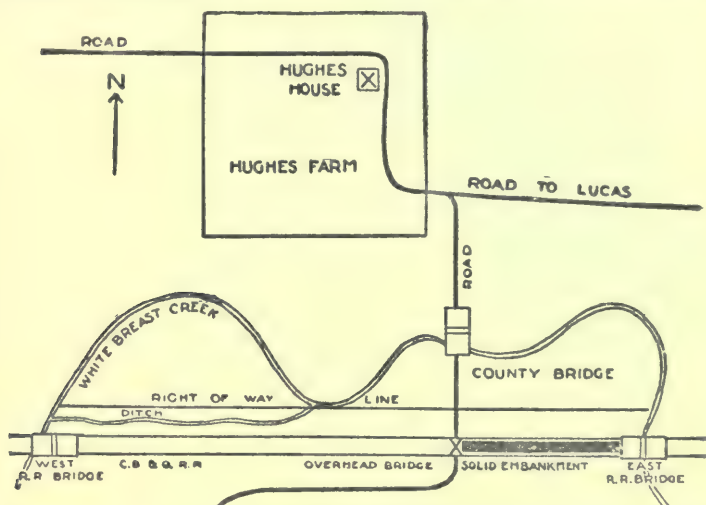
Stuart & Stuart, for the appellants.

Mitchell & Hunter and John T. Clarkson, for the appellee.

271 **WEAVER, J.** The plaintiff owns a farm of one hundred and sixty-five acres in Lucas county. A stream of water known as "Whitebreast creek," flowing from the southwest in a somewhat northeasterly direction, lies to the southward, and a considerable portion of the farm is bottom

land adjacent to this watercourse. The railroad company's right of way follows substantially an east and west course along the valley or bottom lands, crossing the bends of the stream at more or less frequent intervals. The relative situation of the plaintiff's farm to this stream and to the right of way is indicated by the rough outline plat herein included:

MAPS.—Both parties used and introduced maps on the trial substantially the same as the following, which were shown to be approximately correct:



275 At a crossing of the creek to the southwest of plaintiff's land the company has constructed what is known in the record as the "West bridge," and again at a point slightly to the southeast of said premises what is known as the "East bridge." Between these bridges, for much of the distance, at least, the railway track is laid on a high and solid embankment, in which there is an opening for the public road, and another to allow the drainage from the south to pass under the track into a ditch running from the point marked "A" on the plat eastward to "B." As a cause of action the plaintiff alleges that defendant's east bridge is negligently constructed and maintained, in that the opening for the passage of water thereunder is smaller and of less capacity than is afforded by the west bridge, with the result that in times of floods and freshets the waters passing under the west bridge, augmented by the additional drainage entering the stream between the bridges, is dammed or held back an unreasonable and unnecessary length of time. He further alleges that by reason of such negligence his lands were flooded during the years 1904, 1905 and 1906, destroying his crops and injuring said lands for which he demands com-

pensation in damages. The original petition was drawn on the theory that the alleged injury to plaintiff's lands was of a permanent character, but by amendment the injury was alleged to be of a continuing or recurrent character and damages were asked accordingly.

The defendant denies the alleged negligence, and avers that said bridges were reconstructed about the year 1900, with an enlarged waterway under the same, using all reasonable care and skill to avoid obstructing the natural and proper flow of the stream, and that as so constructed said bridges, and each of them, do afford ample passageway for the prompt escape of all the waters flowing therein. The answer further alleges that the damage, if any, which plaintiff has sustained is chargeable to the ²⁷⁶ insufficient waterway afforded by the county bridge which spans the same stream between the two railway bridges. It further alleges that said railway bridges were not constructed by itself, but by a preceding owner of the railway, and if insufficient the injury therefrom was of a permanent character for which the party building it then became liable once for all, and the defendant, as a purchaser of the road, is in no manner liable therefor. For further answer it is alleged that in the year 1904 the plaintiff brought action against the defendant, making substantially the same allegations of negligence as he now relies upon, and demanding damages for injuries to his farm for the years 1902, 1903 and 1904, and that on November 28, 1904, the parties made a full and final settlement by which the defendant paid the plaintiff the sum of four hundred dollars in full satisfaction of all his claims for damages, including those for which this suit is brought. On trial to a jury there was a verdict for plaintiff for seven hundred and fifty dollars, and from the judgment entered thereon defendant has appealed.

1. The first and principal contention of appellant's counsel is that if plaintiff's charge of negligence in the construction of the railway or bridge be true, the injury resulting to him therefrom was of a permanent character, and having once presented a claim for damages which has been satisfied and discharged by the settlement of November 28, 1904, no further action can be maintained. The question thus presented is a frequently recurring one, and the precedents thereon are not entirely harmonious. In this state, however, the general features of the rule are fairly well settled, though owing to variations of fact conditions there may often be room for difference of opinion as to its proper application. So far as the distinction between original and continuing injuries is involved in claims for damages on account of the negligent construction of a railway, the case now before us is clearly governed ²⁷⁷ by *Harvey v. Mason Co.*, etc., *R. R. Co.*, 129 Iowa, 465, 113 Am. St. Rep. 483, 105 N. W. 958, 3

L. R. A., N. S., 973, where that subject was quite thoroughly considered, and, as we are still satisfied with the conclusions there announced, it is unnecessary to here repeat the discussion of authorities. We may say, however, that counsel for appellant makes the mistake of assuming that, because the structure in question, the railway embankment and bridges, may be considered of a permanent character, the injuries resulting to the plaintiff are therefore also original and permanent. But this does not follow. Referring to this very question in the Harvey case, we said that the term "permanent," as here used, "has reference not alone to the character of the structure or thing which produces the alleged injury, but also to the character of the injury produced by it. In other words, the structure or thing producing the injury may be as permanent and enduring as the hand of man can make it; yet if the resulting injury be temporary or intermittent, depending on future conditions which may or may not arise, the damages are continuing, and successive actions will lie for successive injuries." The same proposition is affirmed in *Troy v. Cheshire R.R. Co.*, 23 N. H. 83, 55 Am. Dec. 177; *St. Louis etc. Ry. Co. v. Biggs*, 52 Ark. 240, 12 S. W. 331, 6 L. R. A. 804, and note to same case in 20 Am. St. Rep. 176.

It is to be remembered that the railway in this case is not constructed upon the land of the plaintiff. In constructing it there was no trespass upon his premises. He was not required to stand guard over the work nor take notice of the plans or methods adopted by the company in performing it. He had the right to assume that the company would exercise the proper degree of care to avoid obstructing the flow of water to his injury. If the waterway provided by the bridge was sufficient for ordinary stages of the stream as the evidence indicates it was, he sustained no injury in ²⁷⁸ fact or in law until a period of high water arrived to test its capacity. Until the delayed floods had set back across the intervening land and invaded his premises, he had no legal right to complain—no cause of action. Until then there was no certainty that he would even suffer injury from such cause. The invasion of his premises was not permanent, but temporary, and each recurring invasion was a new wrong for which a new action would lie. If, when subjected to the test of use, the bridge was found to unduly obstruct the flow of flood waters, to plaintiff's injury, he had the right to assume that the railway company would remedy the defect, or, failing so to do, would make adequate compensation for such injuries, if any, as might from time to time result therefrom to him. What would have been plaintiff's right in the premises had the structure complained of been placed upon his own land without his authority or consent, or had the railway embankment or bridge operated from the first to

set the water back upon his land in the form of a permanent pond or lake, we need not consider. As it was, the railway was outside the limits of his farm, no injury followed till the floods came, and without some injury he could not rightfully demand damages or maintain an action therefor. Suppose, without waiting until his land had been actually invaded and injured by high water, he had sued the railway company because of anticipated or possible injuries from such source, would counsel contend that the company's demurrer to such demand might not be sustained? To uphold such a cause of action would be to say that a farm owner, whose negligent neighbor erects an insufficient partition fence, need not wait until his crops have been destroyed by trespassing cattle before bringing action therefor, but may sue at once because of the loss which is quite sure to come some time in the indefinite future if the defects in the fence are not sooner remedied. This illustration would of course not be applicable to the case ²⁷⁹ at bar if, to use the language of Mr. Freeman (20 Am. St. Rep. 174), the construction of the bridge in question had at once upon its completion been "productive of all the damage which could ever result from it." for in such case the injurious act would have spent its force, and action would at once lie for original damages. It is an elementary proposition that negligence alone gives rise to no right of action; it is not until injury results from the negligent act or omission that damages may be recovered. It is true that where the cause of the injury is permanent, and the resultant injury is of an intermittent character, but likely to occur from time to time in the future, the party injured may elect to treat the injury as permanent, and recover all his damages in a single action. If he does so it is obvious that subsequent injuries from the same cause will give him no right to an additional recovery. If, however, he elects to treat the injury as of a temporary or continuing character, and sues for damages resulting to him from one or more specified invasions of his property, a recovery thereunder is no bar to an action for subsequent similar injuries: *Harvey v. Mason Co. etc. R. R. Co.*, 129 Iowa, 465, 113 Am. St. Rep. 483, 105 N. W. 958, 3 L. R. A. N. S., 973, and cases there cited. We find nothing in the facts of the present case to take it out of the rule to which this court has repeatedly given its adhesion, as indicated by the authorities cited, and we hold that the court did not err in refusing to hold that the injury of which plaintiff complains was of a permanent character, or in submitting the claim to the jury as one for continuing damages.

2. The conclusion reached in the preceding paragraph necessarily disposes of the alleged settlement adversely to the claim asserted by appellant. It appears in evidence, without dispute, that the settlement referred to was made in

November, 1904, and by its express terms related solely to the damages claimed by plaintiff for injuries to lands during the years 1902 and 1903, and the ²⁸⁰ voucher made out by the railway company for payment of the sum so agreed upon states it to be for damages "for the years 1902 and 1903." Indeed, we do not understand counsel to claim anything on account of this settlement, if this theory of the permanent character of the damages suffered by the plaintiff is not sustained by us, and upon that point we uphold the position taken by the trial court.

3. Error is assigned upon the alleged failure of the trial court to properly instruct the jury concerning the measure of plaintiff's recovery in case it should be found that the injury was caused in whole or in part by the alleged inadequate waterway afforded by the county bridge, or by hedge-rows or driftwood or other causes than the negligence of the defendant. On this point it is sufficient to say that the jury specially found and returned that the flooding of plaintiff's land was caused by the railway bridge and embankment, and not by any of the other suggested possible obstructions. There was evidence on which these findings could properly be based, and in view of such finding, the jury had no occasion to consider what might have been the measure of amount of plaintiff's recovery under a state of facts which it found did not exist.

Other questions argued are all general, governed by the conclusion already announced. The judgment of the district court is affirmed.

The Question Whether a Railroad Company is Liable to successive actions for repeated injuries to adjacent property caused by water being cast thereon by embankments and bridges which it has constructed along its right of way is considered in the recent cases of Harvey v. Mason City etc. R. R. Co., 129 Iowa, 465, 113 Am. St. Rep. 483; Hurthal v. Boom Co., 53 W. Va. 87, 97 Am. St. Rep. 954, and cases cited in the cross-reference note thereto; note to St. Louis etc. Ry. v. Biggs, 20 Am. St. Rep. 176.

The Right to Maintain Successive Actions for a Nuisance is considered in Platt v. Waterbury, 80 Conn. 179, 125 Am. St. Rep. 111; American Locomotive Co. v. Hoffman, 108 Va. 363, 128 Am. St. Rep. 953, and note.

McDOWELL v. McDOWELL.

[141 Iowa, 286, 119 N. W. 702.]

ESTOPPEL—Whether Paramount to Statute of Frauds or Wills.—A property right created by estoppel is superior to the statute of frauds and the statutory provisions with reference to the execution of wills and conveyances of real and personal property. (p. 171.)

DESCENT—Estoppel of Heir to Claim Estate.—One may be estopped by declarations or conduct from claiming under the statutes of descent. (p. 171.)

ESTOPPEL of Heir Who Induces Ancestor not to Make Will.—Where a man, realizing that dissolution is near, states to his wife and mother that he desires the wife to have all his property, to which the mother expressly consents, and he dies a few hours later without making any will or conveyance, the mother is estopped to assert any interest under the statutes of succession. (pp. 170, 173.)

Action to quiet title. From a decree for the plaintiff, the defendant appeals.

W. W. Bulman, for the appellant.

Hickman & Wells, J. A. Penick and Stuart, Stuart & Stuart, for the appellee.

²⁸⁶ **DEEMER, J.** Plaintiff is the widow and defendant the mother of G. J. McDowell, who died intestate and ²⁸⁷ without issue December 20, 1906, seised and possessed of the real and personal estate in controversy. For appellee it is contended that while deceased was lying on his death-bed, and fully comprehended that dissolution was near, plaintiff and defendant came to the bedside, and that he then, which was within a few hours of his death, stated in the presence of both of them that he desired his wife, plaintiff herein, to have all his property and to keep it, which she said she would do, and that he then turned to defendant, his mother, and asked her if that was all right, to which she responded: "Yes, Jack, it is. I don't want a cent you have got. You and Rhoda have worked hard for what you have got, and I don't want it. She can have it." With this he expressed satisfaction, and it is claimed that in consequence he made no will or other conveyance to plaintiff. These facts, somewhat elaborated in the testimony, are relied upon as being sufficient foundation for plaintiff's claim to the entire property left by her husband. The trial court found that defendant was estopped from claiming any interest in or to the property left by the deceased, and quieted the title thereto in plaintiff, and it is from this decree that the appeal is taken.

Defendant argues the case as if plaintiff were relying upon an oral will made by deceased during his lifetime, but that is not her position. She is claiming the property as the

widow of the deceased, and pleads as against defendant, the mother of the deceased, an estoppel, based upon her statements and conduct just prior to the demise of G. J. McDowell. While there is a conflict in the testimony regarding a conversation which took place between the deceased, his mother, and his wife just prior to his decease, we think the preponderance thereof shows that deceased intended that his wife should have all of his property; that when he realized death was at hand, and within three or four hours of the time it ²⁸⁸ occurred, he stated to his wife and his mother that it was his desire that his wife should have it all, and at the same time asked his mother if this was satisfactory to her, to which she responded in language substantially as indicated above; all parties having agreed that nothing further was done by deceased in the way of making a will or deed, and that shortly thereafter he died in the belief that his wife would take all his estate. Following our usual custom, we do not set out the testimony upon which we base these conclusions, as to do so would serve no useful purpose. The fact question being settled, the only remaining one is of law, and that is, Will these facts constitute such an estoppel upon defendant as will deprive her of her right to take under the law as mother of the deceased, who left no children surviving?

The better procedure, of course, to have been pursued by the deceased was to have made a deed and bill of sale of his property, running directly to his wife, or, better still, he could easily have made a will. But he did neither, and the ultimate question here is, May an heir or successor in interest to a decedent's property so conduct himself as that he will be barred from claiming any interest therein? Unless our statutes of descent are to be regarded as absolute and as inflexible as the laws of the Medes and Persians, the facts recited should estop the defendant from claiming any interest in her son's estate. And the ultimate question in the case is, May one be estopped by declarations or conduct from claiming under the statutes of descent? The general rule announced by the decisions is that a property right, created in favor of one by an estoppel, is superior to the statute of frauds and the statutory provisions with reference to the execution of wills and conveyances of real estate and personal property: *Cooley on Torts*, 2d ed., latter part sec. 569. As supporting this rule, see *Dowd v. Tucker*, 41 Conn. 197; ²⁸⁹ *Judd v. Mosely*, 30 Iowa, 423; *Burden v. Sheridan*, 36 Iowa, 125, 14 Am. Rep. 505.

No case to which our attention has been called is exactly in point, although the *Dowd* case (41 Conn. 197) is like it in principle. There was a statement by testator that he wished and intended a particular person to have his property, or a part thereof, and a devisee under the testator's will,

who would take if the will were not changed, was informed of this desire, and consented that the party named should have it. On the strength of the promise testator did not change his will by codicil, as he might have done, and died leaving his original will unchanged. The Connecticut court on this state of facts held that the devisee under the will was a trustee for the benefit of the person to whom the testator wished to give the property, and ordered the devisee to make a conveyance thereof to the party to whom the testator intended the property to go. This case seems to announce the correct doctrine. The deceased was induced not to make a will or deed on the strength of defendant's assurance that plaintiff was to have all the property. On the faith of the agreement he permitted a title to one-half of the property to vest under the statutes of descent in his mother. After his death the mother asserts title absolute to one-half of the property under the statutes of descent. Under such circumstances it is not difficult to find a trust, either expressed or implied, either in virtue of the promise or by reason of the fact that to allow defendant to disregard it would constitute a fraud upon plaintiff, and thus create a constructive trust for her benefit. Whether this be worked out by estoppel, or upon the theory of a trust, is entirely immaterial.

Appellant's counsel do not seriously contend that such an arrangement as is claimed by plaintiff may not be enforced in equity, but she insists that no such arrangement was made, and that whatever the agreement, it did not ²⁹⁰ contemplate anything more than that the deceased might make a deed or will transferring or devising the property to the plaintiff, which he never did. In this connection it must be remembered that the conversation between the parties occurred but a few hours—less than four—before his death. Indeed, under the most favorable aspect of the case, there were not to exceed two or three hours within which deceased could have made a will or conveyance. True he might have done so during this interval had he thought it advisable, and the very fact that he did not do so is indicative of his reliance upon defendant's assurance that she would not assert any claim to his property, and that his (testator's) wife should have it all. This, as we have said, makes out a very clear case of estoppel. The foundation of this doctrine is equity and good conscience. And its object is to prevent the unconscientious and inequitable assertion and enforcement of claims or rights which might have existed or been enforced by other rules of law unless prevented by estoppel. In practical effect there is, from motives of equity and fair dealing, the creation and vesting of opposing rights in favor of the party who gets the benefit of the estoppel: *Horn v. Cole*, 51 N. H. 287, 12 Am. Rep. 111. See, also, 2 Pomeroy's

Equity Jurisprudence, 1417. We are abundantly satisfied from a perusal of this record that the trial court correctly found that defendant is estopped from claiming any title to the property, and that plaintiff's title thereto should be quieted.

The decree is therefore affirmed.

While the Doctrine of Estoppel in Pais is a rule of last resort, yet, where applicable, it is not subordinate to other rules; it is not to be discredited, but is entitled to the distinction of being one of the greatest instrumentalities to promote the ends of justice which the equity of the law affords: Marling v. FitzGerald, 138 Wis. 93, 131 Am. St. Rep. 1003.

That an Heir may be Estopped to Claim His Inheritance by concealing his rights until distribution has been made and the estate closed, see *Lewis v. Jerome*, 44 Colo. 459, 130 Am. St. Rep. 131.

As to the Remedy of a Person Deprived of a Legacy intended for him through the fraud of the person drafting the will, see *Lewis v. Corbin*, 195 Mass. 520, 122 Am. St. Rep. 261.

BURCHARDT v. SCOFIELD.

[141 Iowa, 336, 117 N. W. 1061.]

TAXATION—Sale Through Mistake—Rights of Parties.—

Where through mistake a receipt for taxes does not describe the land assessed, but after a sale for taxes and before the expiration of the time for redemption the treasurer, having his attention called to the matter, concedes the error and in accordance with the statute makes an entry in his record designating the sale as erroneous and presenting a case for a refund by the county to the purchaser, he cannot afterward erase the entry and issue a deed without notice to the owner and opportunity to redeem or protect his rights. (p. 175.)

TAXATION—Correction of Erroneous Sale in Record.—The entry of a treasurer, in accordance with the statute in such cases provided, that a tax sale is erroneous and presents a case for a refund by the county to the purchaser, is an official record on which the owner of the land may rely, and which the treasurer cannot change or erase. It must stand until a court of competent jurisdiction adjudges it erroneous. (p. 176.)

TAXATION—Mistake of Officer—Rights of Taxpayer.—A taxpayer is not chargeable with negligence simply because he relies upon information given him by the county treasurer with respect to his taxes. If he makes a timely and honest attempt to pay them, or to redeem from a tax sale, but is misled by the conduct or mistake of such officer, equity will grant him relief. (p. 176.)

Action to set aside a tax deed and redeem the land from the sale. From a decree for the defendant the plaintiff appeals.

Charles A. Dewey, for the appellant.

W. M. Keeley, for the appellee.

³³⁷ **WEAVER, J.** The record in this case is quite complicated, and not a little difficult to understand, but we gather therefrom the following facts: Prior to September 28, 1901, the plaintiff owned, among other tracts in the same section, twenty-three and three-quarter acres of land in section 27, township 74, range 8, in Washington county. Of this land fifteen acres constituted a part of the west half of the southeast quarter of the northeast quarter of said section, while the remainder lay on the other side of the half section line. The land now in controversy is the north five acres of the fifteen acre tract. On the date above named plaintiff conveyed the twenty-three and three-quarter acres to one Simpson, who held the same until the year 1905, when he reconveyed all of the tract to plaintiff. In 1902 Simpson, who then owned no other land in said section, paid the taxes on the entire twenty-three and one-half acres for the year 1901, and on October 28, 1903, offered to the county treasurer to make payment of the taxes thereon for the year 1902. It appears, however, that none of the land had been assessed in his name, and the five acres in question were assessed to one Van Sant, a former owner, while the rest of the twenty-three and one-half acres was included in the assessment to the plaintiff Burchardt, who was the owner of several other small tracts in the immediate vicinity. The description of Simpson's land being somewhat complicated, he or the treasurer, or both, appear to have become confused over it, with the result that the treasurer received the taxes, ³³⁸ and issued to Simpson a receipt for the taxes of 1902 upon twenty-three and one-half acres of land by an indefinite description, which, as near as can be traced, covers land immediately south and east of the true description. At the tax sale in December of the same year, the tax assessed to Van Sant upon the five acre tract being unpaid, said tract was struck off to the defendant herein. Later, when Simpson reconveyed to plaintiff, he passed over to the grantee the tax receipt above mentioned, and plaintiff, being unable to identify the land by its description as a fractional part of the section, took it believing it evidenced the payment of the taxes upon the entire twenty-three and one-half acres. The evidence, however, tends to show that Simpson had become aware of the tax sale, and visited the treasurer's office, where he exhibited his receipt, and asked to have the matter corrected. He claims to have been informed by the treasurer, who does not deny the statement, that an error had been made, and the money received from defendant for the sale of this tract would be refunded to him, thus clearing the cloud from Simpson's title. After plaintiff had become repossessed of the title he employed the assistance of one Deeds, and went with him to the treasurer's office, where he again exhibited the tax receipt, and with the aid of counsel

sought to have the land relieved from the sale. The treasurer, appearing to be convinced that it was a meritorious case, wrote upon the proper book, opposite the record of the tax sale of the five acre tract, as provided in Code, section 1447, the following entry: "Erroneous. Double assessment. Get refund by order of Board." This entry was made both in the auditor's record of sales and in the appropriate books in the treasurer's offices. Plaintiff testifies that at the time this entry was made he informed the treasurer he was ready and willing to pay the taxes, if any were required, to clear the land from the claim, but was informed by said officer that no payment was necessary, as the board of ³³⁹ supervisors would refund the money to the defendant. Thereafter, the three year period of redemption having expired, the defendant presented his certificate of purchase to the treasurer, and demanded a deed. The treasurer thereupon, after some investigation and inquiry, but without notice to plaintiff, erased from his books the entry we have above quoted, and executed and delivered the tax deed under which the defendant claims title.

We have been favored by quite elaborate briefs by counsel for the respective parties, discussing various phases of the law governing tax liens and tax titles, but we think it unnecessary to review all the points made. We regard it as well established by the record that Simpson, who then held the title, applied in due time and in good faith to the county treasurer to pay the taxes on the land in question. He paid the taxes demanded of him, and the treasurer gave to him a receipt therefor covering an indefinite ambiguous description, which, so far as it is capable of location, does not seem in fact to include this tract. After the sale had been made, but before the time for redemption had expired, the attention of the treasurer being called to the confusion in the record, and to plaintiff's claim that the tax had been paid, he conceded the claim, and, following the direction of the statute above quoted, made an entry upon the record designating this sale as erroneous, and presenting a proper case for a refund by the county to the purchaser, and therefore requiring no redemption by the plaintiff. In our judgment the plaintiff had a right to rely upon this action of the treasurer, and upon the record so made, and the treasurer could not rightfully thereafter erase such record, and issue a deed to the purchaser, without notice or opportunity to plaintiff to redeem or otherwise protect his rights in the premises. The statute referred to provides that when it shall be made to appear to the treasurer, before the execution of a deed for ³⁴⁰ land sold for taxes, that such taxes had in fact been paid before the sale, he shall make an entry opposite such tract in the sale book that the same "was erroneously sold, and such entry shall be evidence of the fact

therein stated, and the purchase money shall be refunded to the purchaser." Such entry, once made, is not to be treated as a mere private memorandum of the officer, subject to be erased or changed by him at the solicitation of any person adversely interested. It is an official record, presumed to have been made upon sufficient showing and due investigation, and is by statute made evidence of the truth and correctness of the fact therein stated. For the purposes of this case it is immaterial whether the finding so made and entered by the treasurer might, upon proper trial, have been found to be a mistaken one. It was not for him to attempt to correct the mistake, if any was made. While the treasurer is, generally speaking, not a judicial officer, he is charged with some quasi judicial functions, and his finding and entry in this matter involve a finding from evidence which satisfied his own mind that the case was one of double assessment or taxation, and such finding, entered upon the appropriate books, constitutes a statutory record, which we think must stand until a court of competent jurisdiction shall adjudge it to have been erroneously made. He is not empowered to sit in review of his own acts done under statutory authority or direction.

The case of *People v. Wemple*, 144 N. Y. 478, 39 N. E. 397, is quite in point. There the comptroller, acting in ignorance of certain material facts, and having granted an order permitting a redemption from tax sale, was asked to reconsider his action, but refused, on the ground that he had no power to correct or change the order when once made. On certiorari this position was held to be sound, the court saying: "His action, so far as it was of a judicial character, was bounded and controlled by the strict and limited jurisdiction conferred by ³⁴¹ the statute. That gave him no right to review his own orders and annul or vacate them except in the simple case of a cancellation of a tax sale. . . . But it is said that, since an officer acts judicially in granting the redemption, he has inherent power to vacate his own orders. I do not understand he has any power except such as the statute gives him. It is the general rule that officers of special and limited jurisdiction cannot sit in review of their own orders or vacate or annul them." Any other rule, in cases like the one before us, would expose the land owner to great prejudice and loss without fault on his part, and without adequate remedy or redress.

The taxpayer is not to be charged with negligence simply because he relies upon information given him by the county treasurer with respect to the taxes he is required to pay; and, if he makes a timely and honest effort to pay such taxes, or to redeem his land from tax sale, and is misled by the conduct or mistake of said officer, a court of equity will grant him relief: *Corning v. Davis*, 44 Iowa, 622; *Henders n. v.*

Robinson, 76 Iowa, 603, 41 N. W. 371; Hintrager v. Mahoney, 78 Iowa, 537, 43 N. W. 522, 6 L. R. A. 50. The case at bar appears to come fairly within the equitable principles recognized and applied in our precedents. When the treasurer found that the sale was erroneous, and made entry of such finding upon the sale book, it necessarily had the effect to remove that tract of land from the list of those for which a deed could properly be issued, until at least such finding had been properly set aside or canceled by some competent tribunal. It follows that the tax deed should have been set aside by the trial court.

The record does not fairly disclose whether the defendant has paid any taxes upon the property pending this litigation for which he has an equitable claim to be reimbursed, but if there be any, his rights can be protected by the final decree.

³⁴² The decree appealed from is reversed, and cause remanded, for a decree in harmony with this opinion.

Where One Attempts in Good Faith to Pay His Taxes, but is told by the county treasurer that they have been paid, this is the legal equivalent of payment so far as to discharge the lien and bar a sale for nonpayment: Gleason v. Owens, 53 Wash. 483, 132 Am. St. Rep. 1087.

GRIFFITH v. MERCHANTS' LIFE ASSOCIATION.

[141 Iowa, 414, 119 N. W. 694.]

INSURANCE—Payment of Assessment, What is not.—Where an assessment association makes a bank its depository, authorizing it to receive assessments from members but directing it not to accept those past due unless specially authorized, and a member, who is a depositor at the bank and there pays his assessments, has an agreement with the cashier to pay his assessment, if he should at any time forget it, and charge the same to his account, such agreement does not constitute payment, so as to prevent a lapse of the policy, of an assessment of which neither the cashier nor the bank has notice. (p. 179.)

INSURANCE—Action on Policy—Amendment After Trial.—Where, in an action on a policy, defended on the ground of nonpayment of an assessment, no issue on the validity of the assessment is raised until after the case is submitted, that issue cannot be raised by an amendment to the petition filed after the trial, without taking steps to set aside the submission and giving the defendant opportunity to meet the changed front. (pp. 179, 180.)

Haddock & Son and Seerley & Clark, for the appellant.

W. M. Jackson, for the appellee.

⁴¹⁵ SHERWIN, J. The appellant is an assessment association, and in 1903 it issued a policy of two thousand dollars on the life of Sheridan D. Griffith. All dues and assessments

were regularly paid until April 30, 1907, at which time there became due on said policy an assessment or call that was made in March. Whether this assessment was paid is the only question for determination. The defendant had made the Citizens' Bank of Bedford, Iowa, its depository, and had directed its certificate holders in that vicinity to pay their calls at said bank. The authority under which the bank acted for the defendant, and its only authority to transact its business, was contained in a writing which appears in the record. The authority therein conferred upon the bank, so far as collections were concerned, was contained in the following excerpts from the writing: "We furnish you with the necessary remittance blanks. Our members will present deposit slips. Stamp the call 'paid' and mail the addressed postal card to us. . . . ⁴¹⁶ Unless specially authorized, do not receive any money after the close of the month in which this call is payable. . . . Blank deposit tickets will be prepared by our solicitors for signature, for such cash as may be left with you on our account, and the business will be conducted in such a manner as to give you the least possible annoyance." The assessments under this policy were made quarterly, and were paid at the bank. Mr. Griffith paid the January, 1907, assessment, and at the time of making such payment he said to the cashier of the bank: "Now, my time was pretty near up for this last assessment. . . . Now, if I should ever forget to come in and pay my assessment, you pay it for me and charge the same to my account." To this statement and request Mr. Long, the cashier, answered, "All right." Mr. Griffith was a depositor in the bank in question, and the record shows that at the time of the January talk with the cashier, and at all times thereafter until his death on the 14th of May, 1907, he had a balance due him of more than enough to pay the April assessment. The call for this assessment was made in March and directed to Mr. Griffith. He did not pay it, nor was it paid by the bank, and there is no evidence tending to show that either the bank or Mr. Long, its cashier, had any knowledge of the call that had been sent to Mr. Griffith.

The appellee contends that Mr. Griffith directed the bank to pay his assessments out of the funds in its hands and charge the same to his account, and that, if they failed to do so, it was the negligence of the defendant's own agent, and would not defeat her right to recover. We are of the opinion that the contention cannot be sustained on any sound principle of law or equity. The authority given the cashier by Mr. Griffith was limited. He had no authority to pay an assessment from Mr. Griffith's funds unless it was necessary to do so to protect Mr. Griffith against his ⁴¹⁷ own neglect. In other words, Mr. Griffith authorized the cashier to pay only when it became apparent to him that Griffith had him-

self forgotten the assessment, and that the policy would lapse unless it was paid by him. The bank was not the general agent of the defendant as to any matter. On the contrary, its power was limited. It could accept payment of calls, stamp the calls paid, and mail the addressed postal card and remit at the end of the month. It was no part of the bank's employment to push collections for the defendant. Nor was it employed to protect members of the defendant association against their own carelessness or neglect. The assessment or call in question was sent directly to Mr. Griffith by the defendant. It did not pass through the bank, nor did the bank or its cashier have express notice that such a call had been made, or that Mr. Griffith had neglected to pay it. The only knowledge that the bank had was that Mr. Griffith was a member of the defendant association when he paid the assessment in January, and that a call had been made on other members thereof at the time in question.

It is said, however, that the bank should have had in mind Mr. Griffith's membership, and should have known that a call had probably been made upon him for the last assessment. If the appellee's contention as to this be conceded, it still remains true that, as Mr. Griffith had the right to pay the call directly to the home office, the bank acting as the agent of the defendant was not bound to know that he had not so paid it or that it was unpaid when the time within which payment could have been made had expired. That the alleged agreement did not constitute a payment is clear. It does not bring the case within the rule announced in *British & American Mortgage Co. v. Tibballs*, 63 Iowa, 468, 19 N. W. 319, and *Griffin v. Erskine*, 131 Iowa, 444, 109 N. W. 13, relied upon by the appellee.

After the close of the trial, but on the same day, the plaintiff, without notice to, or knowledge on the part of, ⁴¹⁸ the defendant, filed an amendment to the petition alleging that the deceased was not in arrears at the time of his death, and that all sums and assessments had been fully paid. This amendment states that it was made to conform the pleadings to the proof. No issue was theretofore made as to assessments. In her petition the plaintiff specifically alleged as follows: "Your orator further shows that, by the rules and regulations of the said defendant, certain small amounts of dues became due and owing from Sheridan D. Griffith on account of his membership which should have been paid on or before April 30, 1907." And the amount thereof was alleged to be five dollars and sixty cents. Moreover, it was stipulated on the trial that an "assessment was issued or call made for the month of April, 1907," and, further, "that said assessment or call has never been paid to the company, and at the present time remains unpaid." It is manifest that the amendment to the petition not only did not conform

to the proof, but that it directly contradicted the original petition and the stipulation that had been made during the trial. The trial court held that the assessment had been paid, and refused to consider the question raised by the amendment in question. It is now too late to urge the proposition that no legal assessment was shown. If the appellee concluded, after the submission in the lower court, that such an issue should have been made, steps should have been taken to set aside the submission, and the appellant should have been given an opportunity to meet the changed front.

For the reasons pointed out, the judgment must be reversed.

The Failure to Pay an Insurance Assessment or premium when due ordinarily results in a forfeiture of the policy, and this without affirmative action on the part of the insurer: *Thompson v. Fidelity Mut. Life Ins. Co.*, 116 Tenn. 557, 115 Am. St. Rep. 823; *Pacific Mut. Life Ins. Co. v. Galbraith*, 115 Tenn. 471, 112 Am. St. Rep. 862; *Grand Lodge A. O. U. W. v. Marshall*, 31 Ind. App. 534, 99 Am. St. Rep. 273.

ARISPE MERCANTILE COMPANY v. QUEEN INSURANCE COMPANY OF AMERICA.

[141 Iowa, 607, 120 N. W. 122.]

FIRE INSURANCE—Policy Issued by Interested Agent.—A policy of insurance issued on property of a corporation in which the agent is a stockholder and officer and in which a bank wherein he is a stockholder and cashier owns stock, is voidable only and subject to ratification by the insurer. (pp. 180, 181.)

FIRE INSURANCE—Estoppel to Avoid After Demanding Proof of Loss.—Where the adjuster, with knowledge that the agent who issued the policy was financially interested in the property insured, proceeds as though the insurance were valid and puts the insured to the trouble and expense of making proofs of loss, the insurer is estopped to urge the invalidity of the policy arising from the agent's dual relation to the parties. (pp. 181, 182.)

Temple & Temple, for the appellant.

Sullivan & Sullivan, for the appellee.

608 LADD, J. A policy of insurance, covering the stock of merchandise owned by the plaintiff, was issued January 9, 1905, by D. W. Stevenson as recording agent of defendant. Stevenson was cashier and stockholder of a bank which held some stock in the plaintiff company, and also was a director and the treasurer of said company. These facts were set up by way of defense, and that they were sufficient, in the absence of waiver or estoppel, appears from *Arispe Mercantile*

Co. v. Capital Ins. Co., 133 Iowa, 272, 9 L. R. A., N. S., 1084, 12 Ann. Cas. 93.

The reply pleaded a waiver and ratification in that defendant's adjuster, with full knowledge of the facts, put plaintiff to the trouble and expense of furnishing proofs of loss. D. J. Carpenter was defendant's adjuster for the territory, including Arispe, but, owing to sickness, he invited A. A. Clark, who was agent of the Phoenix Insurance Company of Brooklyn, to adjust the loss in his stead, and the latter, in connection with J. F. Rice, representing the Des Moines Fire Insurance Company, went to Arispe on February 1, 1905, and there investigated the loss. What occurred then is somewhat in dispute. Stevenson testified that, in response to an inquiry by Clark, he told the latter who the ⁶⁰⁹ officers and agents of the plaintiff company were, that he (Stevenson) was treasurer and one of its directors, and that the bank of which Clark knew he was cashier also owned stock in the company. This evidence was corroborated by two other witnesses, but denied in part by Clark. With the assistance of Phillips, plaintiff's bookkeeper, Clark examined the books, and also the bills ascertaining the value of the goods destroyed. The entire day was given to this by plaintiff's officers, as its evidence tended to show, subsequent to imparting the above information. Upon computation and apportionment among the several companies it was found that defendant's portion of loss was seventeen hundred and twenty-nine dollars and seventy-nine cents. Clark prepared proofs of loss, and required these to be signed by plaintiff's officers, and the company itself through its president, who swore to it. He also prepared a schedule containing the data in detail, with computation and a statement of the amount allowed as that above stated. The proofs, with this schedule, were transmitted to the company's office in Chicago, where it was received February 6th. According to the witnesses for the plaintiff, Clark advised them that the company would avail itself of the sixty days allowed within which to pay the loss. In a letter to Stevenson as treasurer of the company, dated February 27th, the insurance company wrote that: "As we previously advised you, we referred the matter of prepayment of the claim to Special Agent Carter, and he advised us, after conferring with other adjusters, that with the exception of the Des Moines Insurance Company, the companies all agreed to pay the loss at maturity; we therefore do not care to send draft in advance of that time." It thus appears that the jury might have found that the adjuster, after being fully advised of the relationship of Stevenson to the plaintiff company, proceeded with the examination of its books and bills, exacted their production and the assistance of the officers in ascertaining their contents, and required the execution of the proofs of ⁶¹⁰ loss. As adjuster of the loss

for defendant, Clark was endowed "with authority to transact all business within the scope of his employment" (Code, sec. 1750): and, as such adjuster might waive any condition affecting the validity of the policy (*Liquid Carbonic Acid Mfg. Co. v. Phoenix Ins. Co.*, 126 Iowa, 225, 101 N. W. 749), the policy was not void because of Stevenson's dual relationship to the parties. It was voidable only, and subject to ratification by the company or to repudiation precisely as though voidable because of some breach of condition. The insurer was charged with the knowledge acquired by the adjuster; and if, after ascertaining the facts, it proceeded as though the policy were valid, and through such adjuster induced the plaintiff to go to trouble and expense, in the production of its books and bills, to expend time in aiding the investigation, and to furnish proofs of loss, it ought not thereafter be permitted to set up the invalidity of the policy. The only ground upon which it could have made the requirements mentioned was its obligation to perform as stipulated in the contract; and, having induced plaintiff to act to its disadvantage in reliance thereon, it was estopped from thereafter changing its position to the plaintiff's prejudice. These propositions are too well settled to require the citation of authority.

Affirmed.

The Fact That an Insurance Agent has an interest in the property which he induces his company to insure may invalidate the policy. Thus it has been held that if an insurance agent is appointed receiver of a stock of merchandise, and issues a policy thereon to himself without the consent of his principal, the policy is invalid: *Wildberger v. Hartford Fire Ins. Co.*, 72 Miss. 338, 48 Am. St. Rep. 558. See, too, *Ramspeck v. Patillo*, 104 Ga. 772, 69 Am. St. Rep. 197. But an insurance agent who is also employed by the owner of property to watch it may bind the company by a policy of insurance thereon: *Northrup v. Germania Fire Ins. Co.*, 48 Wis. 420, 33 Am. Rep. 815.

The Waiver by an Insurance Agent of forfeitures and conditions in policies of insurance is the subject of a note to Johnson v. Aetna Ins. Co., 107 Am. St. Rep. 99.

DEE v. SEARS-NATTINGER AUTOMOBILE COMPANY.

[141 Iowa, 610, 118 N. W. 529.]

RAFFLING—Recovery of Property by Successful Party.—Where the owner of an automobile, after disposing of it at a raffle, gives the successful participant an order for the machine on the persons having the actual possession thereof, they cannot refuse delivery because of the illegality of the transaction by which title was transferred, especially after recognizing the order and consenting to hold the machine for the new owner. (p. 184.)

EVIDENCE—Parol to Contradict Writing.—In an action to recover personal property, wherein the issue is whether the defendant agreed to hold the property as bailee for the plaintiff, evidence is admissible, without any pleading, that a stipulation in the receipt given for the property is not binding on the plaintiff because inserted without his knowledge and contrary to agreement. (pp. 184, 185.)

Action to recover possession of an automobile. The court directed a verdict for the defendant, and the plaintiff appeals.

Ira W. Anderson and J. K. Macomber, for the appellant.

Mills & Perry, for the appellees.

611 McCLAIN, J. There is testimony in the record tending to show that the automobile in question was put up by the owner, one Van Werden, at a raffle; that plaintiff was the holder of tickets in this raffle; that at the conclusion of the drawing Van Werden gave to plaintiff an order on defendant, in whose possession the machine had been during **612** the time the tickets were being sold and the raffle conducted, advising defendant as follows: "Mr. Dee has drawn the automobile, so you can deliver it to him as I telephoned you"; that plaintiff presented this order to defendant, and asked that defendant recognize the order and keep the machine on storage for plaintiff; that an officer of the defendant took and retained this order, and proposed to give to plaintiff a receipt for the machine; that the instrument, purporting to be a receipt, but containing a stipulation that the machine should be held as the joint property of plaintiff and interveners, and only delivered on their joint order, was delivered to plaintiff, who, believing the instrument to be a simple receipt to him from defendant for the machine, accepted and retained it without knowledge of its contents, he being unable to read the instrument on account of defective sight, and being assured that it was such receipt as he had requested; and that subsequently, on demand by the plaintiff for the possession of the machine, with tender of the storage charges, defendant refused to deliver the machine to plaintiff. In their arguments counsel have discussed many questions which we think are not involved in determining the correctness of the court's holding that there was no evidence to sustain plaintiff's right of recovery. From a finding made of record by the trial judge, it appears that under the evidence he considered plaintiff's title to be so affected with the illegal nature of the transaction as that he could not recover, and this is the only view of the case which we think it necessary to discuss.

There is nothing in the record to indicate that defendant was a stakeholder of the machine. The fact that a part of the proceedings connected with the drawing took place in the

defendant's garage is wholly immaterial with reference to this question. Defendant was not to determine the result of the drawing. That was left to other ⁶¹³ persons for decision, and, so far as this record shows, was decided by Van Werden himself. Up to the time the drawing was decided Van Werden had the entire ownership and constructive possession of the machine. He then recognized plaintiff as entitled to possession, and did not attempt to rescind on account of illegality in the transaction, nor object to the delivery of the machine to plaintiff. If defendant had delivered actual possession of the machine to plaintiff on this order, and plaintiff had taken the machine away, neither defendant nor Van Werden, nor any other party to the illegal transaction, could have questioned plaintiff's right on the ground of illegality. After property has been delivered to the successful party in consequence of a bet or wager, it is too late for another party to the transaction to attempt rescission or raise the question of illegality: *Trenery v. Goudie*, 106 Iowa, 693, 77 N. W. 467; *Okerson v. Crittenden*, 62 Iowa, 297, 17 N. W. 528; *Thrift v. Redman*, 13 Iowa, 25; *Himmelman v. Pecaut*, 133 Iowa, 503, 110 N. W. 919. Defendant, as Van Werden's bailee, had nothing to do with the legality of the transfer of title from Van Werden to plaintiff; but, in any event, if defendant recognized plaintiff as the owner of the machine by accepting Van Werden's order and agreeing to hold the machine for plaintiff, it was then too late to go into the legality of the transaction between Van Werden and plaintiff. It is to be borne in mind that defendant is not now claiming to hold the machine for Van Werden, but insists that it has become bailee, not for plaintiff, but for plaintiff and interveners as joint owners. The question as to the validity of the transfer of title from Van Werden to plaintiff as the result of a lottery scheme is finally disposed of, so far as this case is concerned, by the evidence showing that, as between Van Werden and plaintiff, the transfer of title has been completed and the title of Van Werden effectually extinguished.

When plaintiff proposed to testify as a witness that defendant accepted the Van Werden order and assented to ⁶¹⁴ hold the machine as bailee for plaintiff, the court ruled that such oral testimony was inadmissible, for the reason that plaintiff admitted the receipt of some instrument in writing delivered to him by or in behalf of the defendant. This instrument, already referred to, had not been received in evidence except for purposes of identification, and we think that, until it was shown that the obligations of defendant as bailee were evidenced in writing, it was not proper to exclude plaintiff's testimony as to a parol acceptance. But however this may be, a more important consideration is that a receipt in writing does not exclude parol evidence of the fact of such receipt. It is said for appellee that the instru-

ment was more than a receipt; that it contained a stipulation in the nature of a contract. But plaintiff was proposing to prove that the stipulation in the instrument was not binding upon him. Evidence to this effect for plaintiff was admissible without any pleading, for the issue was simply whether defendant had agreed to hold the machine as plaintiff's bailee. The court erred, therefore, in excluding evidence offered for plaintiff that defendant orally agreed to keep the machine as plaintiff's bailee, and further erred in directing a verdict for defendant on the record; for there was enough in plaintiff's evidence to show that the title of the machine had passed to him, in the absence of any proof to the contrary. While something had been said in the course of the trial with reference to the receipt as proving joint ownership in interveners with plaintiff, no competent evidence of that fact had been introduced when plaintiff rested his case, and a verdict for defendant was directed.

The judgment is therefore reversed.

The Right to Recover the Subject Matter of a Gambling Contract from a stakeholder is generally recognized by the authorities. See the note to *Hobbs v. Boatright*, 113 Am. St. Rep. 734; *Pabst Brewing Co. v. Liston*, 80 Minn. 473, 81 Am. St. Rep. 275. According to *Martin v. Richardson*, 94 Ky. 183, 42 Am. St. Rep. 353, one who purchases a lottery ticket in violation of law may recover the proceeds of a prize drawn by it from one who has collected them after fraudulently obtaining possession of the ticket.

CASES

IN THE

SUPREME COURT

OF

KANSAS.

HENDRICKS v. BROOKS.

[80 Kan. 1, 101 Pac. 622.]

MORTGAGE, Identity of, When a Question of Fact.—The identity of a mortgage, dated November 1st and acknowledged November 20th, with a mortgage described in a deed as for the same amount and as dated on the twentieth day of the same month, is a question of fact which may be proved by evidence aliunde. (pp. 187, 189.)

EVIDENCE—Negative of the Nonexistence of a Mortgage.—It is proper to permit an abstracter to testify of his examination of the records and that he did not find any mortgage recorded on the property in suit prior to a specified date. (By the editor.) (p. 187.)

MORTGAGE—What Amounts to the Assumption of a Personal Obligation to Pay.—The acceptance of a deed by the terms of which the grantor warrants the land to be free and clear of all encumbrances, "except a mortgage of five hundred dollars, dated November 20, 1888, which grantee assumes and agrees to pay," makes it a contract in writing binding upon the grantee to pay the mortgage, and suit can be instituted upon it and the same rights maintained as though the deed were also signed by the grantee; and a subsequent conveyance of the land by the grantee is conclusive evidence of his acceptance of the deed and of the contract therein contained. (p. 189.)

LIMITATION of Actions upon Suit to Foreclose a Mortgage Which the Grantee of the Property has Agreed to Pay.—Upon the acceptance of such deed the debt becomes the independent debt of the grantee to the holder of the mortgage. The limitation of the time for bringing a suit thereon begins to run upon such acceptance, and the running of the statute may be suspended by the absence of the obligor from the state, as in other cases. (p. 189.)

MORTGAGE—Acceptance of a Conveyance Made by a Mortgagor Containing a Promise of the Grantee to Pay the Debt, What Sufficient Evidence of.—If a conveyance is made of property which is subject to a mortgage, and such conveyance contains an agreement on the part of the grantee to pay the mortgage debt, and the grantee subsequently conveys such property to another, this conveyance constitutes conclusive evidence of the acceptance of the debt

by the grantee and his assumption of the obligations referred to. (By the editor.) (p. 189.)

LIMITATIONS OF ACTIONS to Foreclose Mortgage Where Mortgagor Remains Liable to Suit.—One to whom the grantee in such deed conveys the land takes the title subject to the mortgage lien, if such mortgage be of record, and the lien of the mortgage subsists against the land so long as a suit may be maintained on the indebtedness against his grantor; in other words, a suit to enforce the mortgage lien is not barred by limitation until an action against the debtor for a personal judgment is also barred. (p. 189.)

(Syllabi by the court except where stated to be by the editor.)

Suit to foreclose a mortgage executed by Collins to Frahm. The mortgagor acquired title from the government November 3, 1888. The mortgage in suit was dated November 1st of the same year, but was not acknowledged until November 20th, one day after which it was recorded. On the 28th of the same month the mortgagor and his wife conveyed the property to one Tate. The conveyance warranted the property to be free and clear of all encumbrances "except a mortgage of five hundred dollars, dated November 20, 1888, which grantee assumes and agrees to pay." Before the mortgage had become due, Tate removed from the state and continued absent therefrom, but he had conveyed the land to the defendant Hendricks prior to the commencement of the present action. The original mortgagee transferred the deed and mortgage to the plaintiff Brooks. Judgment for the complainants directing a sale of the property, and the defendant prosecuted writ of error.

J. P. Noble, for the plaintiff in error.

Bennett R. Wheeler, John F. Switzer and Fred Robertson, for the defendant in error.

³ SMITH, J. Four questions are involved in the determination of this case: (1) The identity of the mortgage foreclosed with the mortgage which Tate assumed and agreed to pay in his deed from Collins and wife. (2) Did the acceptance of the deed from Collins and wife by Tate constitute an independent contract of indebtedness from Tate to the mortgagee or his assignees upon which the latter could, with personal service, have obtained a money judgment against Tate? (3) Was the personal action, if any such action ever existed in favor of an assignee of the mortgage against Tate, barred by the statute of limitations? (4) If the mortgage mentioned in the deed was the same as the one assigned to Brooks, and if, as it appears, an action on this indebtedness was barred by limitation as against Collins, was the lien of the mortgage upon the land thereby destroyed?

⁴ The question as to the identity of the mortgage is simply a question of fact to be determined upon evidence by the court. It is said that because the mortgage was described in

the deed as dated November 20, 1888, while the mortgage in suit is dated November 1, 1888, and acknowledged on November 20, 1888, this of itself conclusively proves that there were two instruments. The evidence, however, showed that Collins did not perfect his title to the land until November 3, 1888, and it is as reasonable to suppose, especially as the mortgage was recorded November 21, 1888, that it was not completed or delivered until the 20th as that it was executed and delivered two days before he acquired title to the land. At any rate, this is not conclusive, but is only a circumstance which may be overcome by other evidence.

The plaintiff, to show the identity of the instruments, produced a bonded abstractor, who testified that he had made an abstract of this land, and that there was no other mortgage of record thereon dated prior to the time of the execution of the deed from Collins to Tate. It is urged that the evidence of the bonded abstractor is incompetent. He testified, however, to nothing said to be contained in the record, but simply to the negative—that there was no record of any other mortgage existent at the time. We think the objection is not well taken: See 2 Wigmore on Evidence, secs. 1230, 1244.

There was substantial evidence to sustain the finding of the court on this point, and we cannot disturb it.

The evidence is undisputed that Tate, who accepted the deed from Collins and thereby assumed and agreed to pay the mortgage debt, left the state of Kansas before the maturity of the debt and has been ever since absent from the state. Therefore, if there ever was any cause of action against Tate in favor of the mortgagee or his assignee, the running of the statute was suspended by Tate's absence, and such action was not barred: Civ. Code, sec. 21.

⁵ It was, in substance, decided in *Schmucker v. Sibert*, 18 Kan. 104, 26 Am. Rep. 765, that if the cause of action upon a note is barred by limitation, any suit upon the mortgage given to secure the note is also barred, and, vice versa, if an action upon the note is not barred, a suit upon the mortgage is not barred. This decision has many times been cited with approval in this court. The indebtedness of Tate to the holder of the mortgage did not originate in the execution of the note and mortgage by Collins to Frahm, but in the contract to assume the indebtedness embodied in the deed from Collins to Tate. And so long as a suit by the holder of the mortgage could be maintained against Tate on that contract, so long survived the lien of the mortgage upon the land conveyed by Tate to Hendricks. This question and practically all the remaining questions in this case may be answered from the following excerpt from the opinion of Mr. Justice Brewer in *Schmucker v. Sibert*, 18 Kan. 104, 26 Am. Rep. 765: "The acceptance of the deed makes it a contract in writing bind-

ing upon the grantee, just as the acceptance by a lessee of a lease in writing signed by only the lessor makes it a written contract binding upon such lessee; and suit can be instituted upon it, and the same rights maintained, as though it were also signed by the grantee. And it is not to be considered as a mere promise or acknowledgment, as named in the exceptions to the statute of limitations, and therefore to be signed by the party to be charged. Those exceptions apply to debts already existing against the parties sought to be held, and aim to continue in force prior liabilities. But the grantee in such a deed was not liable before its execution. His liability dates from that. That is the first contract he has made, the first obligation he has assumed. At that time, therefore, as to him, the statute first commences to run. Nor is he discharged by the fact that the debt as to the original debtor has since his promise become barred by the statute of limitations. For his contract is an original, absolute promise to pay the debt, and not a mere contract of indemnity, and to save the original debtor harmless. The creditor may ignore the original debtor ⁶ entirely, and proceed directly and solely upon this promise. The grantee is not simply a surety. His promise is not to see that the original debtor pays, or to pay if he does not. But it is a direct, absolute and unconditional promise to pay the debt to the creditor": Page 112.

It cannot be said that Tate did not accept this deed or the contract therein contained to pay the mortgage, although he testified that he did not think he assumed and agreed to pay the mortgage. The deed itself, produced in evidence, is conclusive of the contract therein, and the fact that he conveyed to Hendricks the title to the land which he derived through this deed is conclusive evidence that he accepted the deed with its obligations: 27 Cyc. 1345.

We conclude that the evidence was sufficient to sustain the finding of the court that the mortgage which Tate assumed and agreed to pay by the acceptance of the deed from Collins and wife is the identical mortgage sued on; that by the acceptance of the deed from Collins and wife, with the contract therein contained, the contract inured to the benefit of the holder of the mortgage, who could, with personal service, have obtained a money judgment against Tate; that an action by the holder of the mortgage against Tate was not barred by limitation at the time of the commencement of this suit, the running of the statute having been suspended by the absence of Tate from the state of Kansas; that Hendricks took the land subject to all liens thereon which existed at the time of the conveyance from Tate to him, and that a suit to enforce the mortgage lien on the land was not barred by limitation until the debt which it secured was so barred.

The judgment is therefore affirmed.

If a Deed Specifies That It is Subject to a Mortgage (designating it), and that the grantee assumes its payment, this amounts to a covenant that he will pay the note for the security of which the mortgage was given: *Daniels v. Johnson*, 129 Cal. 415, 79 Am. St. Rep. 123. One who, by the terms of his conveyance from a mortgagor, agrees to pay a mortgage on the land as part of the purchase price, makes it his own as effectually as if he had executed it himself: *Farmers' Nat. Bank v. Gates*, 33 Or. 388, 72 Am. St. Rep. 724. The mortgagee may foreclose in the event of nonpayment of the mortgage when due, and hold such grantee liable for any deficiency for which the original mortgagor was liable: *Daniels v. Johnson*, 129 Cal. 415, 79 Am. St. Rep. 123.

An Agreement in a Deed to Assume and Pay an Existing Mortgage has been held not to create a covenant running with the land, although inserted in connection with the covenants of seisin and against encumbrances: *Clement v. Willett*, 105 Minn. 267, 127 Am. St. Rep. 562.

The Bar of the Statute of Limitations against an action on a note secured by mortgage as a bar to an action to foreclose the mortgage, and vice versa, is discussed in the note to *Menzel v. Hinton*, 95 Am. St. Rep. 664-671; and in the subsequent case of *Colonial & U. S. Mtg. Co. v. Northwest Thresher Co.*, 14 N. D. 147, 116 Am. St. Rep. 642.

JONES v. HICKEY.

[80 Kan. 109, 102 Pac. 247.]

CONSTITUTIONAL LAW—Retroactive Operation of Statute Altering Rules of Evidence.—By the enactment of chapter 373 of the Laws of 1907, the legislature altered the rule of evidence as it then existed forbidding the introduction of parol or other proof to amend or correct the sheriff's return in proceedings to forfeit school land, and provided that if the return shows that the notice was posted in the office of the county clerk, it shall be prima facie evidence of legal service notwithstanding the omission therein of recitals required by law. Held, that it was competent for the legislature to provide what shall be prima facie evidence of legal service, and that this provision of the act is not objectionable on the ground that it disturbs vested rights. (p. 194.)

SCHOOL LANDS, Parol Evidence Showing Valid Forfeiture of.—In an action to recover possession of school land, where the defendants claimed rights as new purchasers, the plaintiff, after proving a prima facie case for himself, offered in evidence the records of the county clerk showing an attempted forfeiture of his interest. The sheriff's return was defective in failing to state that no one was in possession of the land. The plaintiff supplied the omission in the recitals of the return by offering oral proof that the land had never been occupied by anyone. Held, that the provisions of chapter 373 of the Laws of 1907 apply, and that the plaintiff thereby established a prima facie showing of a valid forfeiture, which defeated his right to recover, and a demurrer to the evidence was rightly sustained. (p. 194.)

(Syllabi by the court.)

George F. Beatty and D. R. Hite, for the plaintiff in error.

Thomas A. Scates and Albert Watkins, for the defendants in error.

110 PORTER, J. These are actions in ejectment, brought by E. T. Jones to recover two quarter sections of land in Seward county. The petitions were in statutory form. The answers admitted the possession of the defendants and denied the other averments. The actions were consolidated and tried as one. At the close of plaintiff's evidence the court sustained a demurrer thereto, and gave judgment against him in favor of defendants. He brings error.

The land was school land which was sold by the state in 1885 under regular school land contracts. The plaintiff by assignment of the contracts became the owner of the land. He paid the annual installments of interest and taxes until 1893, when he made default, and no payments were made thereafter. At the trial he offered proof that he was the owner of the certificates and had paid some of the installments of interest and taxes, and that in July, 1907, he tendered to the county treasurer the amount due on the contracts, which the treasurer refused to accept. Plaintiff testified that he had never been in Seward county from the time the contracts were assigned to him in 1886 until 1907; that the land was unoccupied at the time he purchased it, and had never been occupied since. He then offered in evidence the records of the office of the county clerk showing an attempt to forfeit his interest in the land. This evidence was offered on the theory that it showed defective and void proceedings. It consisted of copies of notices of default issued by the county clerk and served by the sheriff as a basis for forfeiture. The return showing the manner of service on each notice reads as follows:

"Received this notice this 13th day of June, 1899, and served the same by going upon the land within described and finding no person in possession, and the premises having the appearance of being wholly ¹¹¹ abandoned. I posted a copy of said notice in a conspicuous place in the county clerk's office at Liberal, Kan., June 18, 1899; the within named C. W. Kuri and E. T. Jones cannot be found in my county."

After the introduction of this evidence the plaintiff rested. The demurrer was sustained, not because of lack of proof, but on the theory that the plaintiff had destroyed his prima facie title by showing that his contract had been forfeited; in other words, that he had proved too much.

The determination of the question involves a consideration of the effect of chapter 373 of the Laws of 1907. At the time the act was passed it had been settled by numerous decisions of this court that where the notice issued by the clerk and the sheriff's return failed to show legal service in

one of the ways provided by the statute no forfeiture of school lands based thereon was valid. If the notice itself was defective in a material matter, or the officer's return failed to state facts showing a legal service, the proceedings were held void, and it was not competent to amend the notice or return by oral evidence or other proof: *Knott v. Tade*, 58 Kan. 94, 48 Pac. 561; *Abernathy Furniture Co. v. Spencer*, 59 Kan. 168, 52 Pac. 425; *True v. Brandt*, 72 Kan. 502, 83 Pac. 826; *Phares v. Gleason*, 73 Kan. 604, 85 Pac. 572; *Spencer v. Smith*, 74 Kan. 142, 85 Pac. 573. In the last-named case Mr. Chief Justice Johnston, speaking for the court, said: "The basis of a forfeiture is the notice and the return of service. It rests upon written evidence of official action, and is not left to the uncertain recollection of officers who may be asked eight years afterward what steps toward a forfeiture were in fact taken. As was said in *Knott v. Tade*, 58 Kan. 94, 48 Pac. 561, jurisdiction must affirmatively appear, and 'the notice and the return . . . are jurisdictional': Page 96. These are to be found in the county clerk's office, and to them any interested party may look to determine the status of the land. An examination of the notices issued in this case, and the returns of service made thereon, would have disclosed to the purchaser as well as to the ¹¹² officers or a proposed purchaser that the proceedings were invalid. The jurisdiction cannot be supplied by oral proof or an attempt in this proceeding to amend the returns made in the forfeiture proceedings": Page 146.

Here the notice was in proper form, except that in addition to stating the amount of interest in default it stated that the principal itself was due. This defect was not material, for the statement with respect to the principal was mere surplusage. The return of the officer, however, was defective under the rule declared in *Knott v. Tade*, 58 Kan. 94, 48 Pac. 561, and *True v. Brandt*, 72 Kan. 502, 83 Pac. 826, for the reason that it failed to state as a fact that no person was in possession. The statement that the premises appeared to be wholly abandoned added nothing to the return. The statute prescribes that where no one is in possession of the land, the notice may be posted in the office of the county clerk, but there is no provision for such posting of the notice when the premises merely have the appearance of being abandoned. It is obvious that the forfeiture proceedings under the decisions referred to would have been held void. It is contended by defendants that plaintiff cured the defective return by offering proof that in fact the land was unoccupied; that the provisions of the law of 1907 render such proof competent and, further, that under that act the notice and return themselves were *prima facie* evidence of legal service.

By the enactment of chapter 373 of the Laws of 1907 the legislature altered the rule of evidence as it stood at the time

the decisions to which we have referred were made. The title to the act in question reads: "An act relating to the forfeiture of the right and interest of certain purchasers in and to school lands, prescribing the manner in which such forfeiture may be shown, and limiting the time within which actions may be brought by such purchasers to recover such lands, or for the determination of their interest therein."

¹¹³ The preamble recites that school lands in various counties were sold to purchasers whose interests were subsequently declared forfeited and the lands afterward sold to new purchasers; that in many cases full and correct records have not been made by the county clerk and sheriff showing the proceedings upon which the forfeitures were based, and that these things prejudiced the rights of the new purchasers. Section 2 of the act provides: "The return of the sheriff on any notice issued by the county clerk to the purchaser of school lands of his default shall not be held to show an insufficient or invalid service because of the omission of any recitals required by law to show legal service; but if, notwithstanding such omissions, such return shows that service of such notice was made by posting a copy thereof in the office of the county clerk, such return shall be prima facie evidence, in any action or proceeding in any court in this state, that the persons upon whom such notice was to be served could not be found in the county, that no person was in possession of the land described in the notice, and that a copy of such notice was posted in a conspicuous place in the office of the county clerk. Any statement in such return, other than that the notice was posted in the office of the county clerk, shall not destroy the prima facie effect as evidence of so much of the return as shows a posting of the notice in the office of the county clerk, unless such additional matter affirmatively shows that legal service was not made; and in that case, or in any case where the sheriff's return fails to show legal service, parol and other evidence may be introduced to prove that in fact legal service of the notice was made."

A consideration of the entire chapter makes it apparent that it was intended to apply only in cases where there had been an attempt to forfeit the rights of the original purchaser and the land had been sold to a new purchaser. There is nothing in the pleadings or the evidence in this case from which it can be inferred that the defendants claim such rights. The answer simply admits that they are in possession. The provisions of ¹¹⁴ the new law, therefore, would not affect the case but for the fact that the plaintiff in his brief admits that defendants are in possession, claiming rights as new purchasers. The effect of the admission is to make the act of 1907 controlling. Section 2 of the act provides

that if the sheriff's return shows that the notice was posted in the office of the county clerk, it shall be prima facie evidence of legal service, notwithstanding the omission of recitals required by law. Besides, plaintiff's evidence supplied the omission by proof of the existence of the very facts required to make the service valid. He had made out a prima facie case for himself when he proved the original contracts, that they were assigned to him, that he paid interest and taxes, and had tendered to the county treasurer the amount remaining due. When he went further and showed the proceedings purporting to forfeit his interests, that the notice, properly issued, was posted in the office of the county clerk, that the land was unoccupied and therefore no one was in possession, he established a prima facie showing of a valid forfeiture, which defeated his right to recover. The demurrer was, therefore, rightly sustained.

The plaintiff contends, however, that it was not competent for the legislature, by the enactment of this later law, to change or alter his vested rights. He insists that the law as it stood at the time the original contracts were made became a part of the contracts. The answer is that nothing has been changed except a rule of evidence, and a vested right in that is something which the law refuses to recognize: *Sanders v. Greenstreet*, 23 Kan. 425; *Wheelock v. Myers*, 64 Kan. 47, 67 Pac. 632; 6 Am. & Eng. Ency. of Law, 950; *Cooley's Constitutional Limitations*, 7th ed., pp. 405, 524. The principle underlying the former decisions is that, as forfeitures are not favored, the original purchaser cannot be deprived of his vested rights in the land except upon a showing of strict compliance with all the statutory requirements: therefore, ¹¹⁵ no presumption of regularity in the acts of the officers should be indulged for the purpose of establishing a forfeiture, and the written returns and records could not be amended by parol proof. It cannot be doubted that it was within the power of the legislature to change the rule of evidence and declare what should constitute a prima facie showing of legal service of the notice: *Missouri Pac. Ry. Co. v. Merrill*, 40 Kan. 404, 19 Pac. 793; *State v. Sheppard*, 64 Kan. 451, 67 Pac. 870.

The wisdom or expediency of the change allowing the vested rights of the land owner to be forfeited on the naked presumption that the officers have performed their official duty, or upon amendments made to the written return resting on the uncertain recollection of witnesses years after the event, is a question with which the courts have no concern. The judgment is affirmed.

Rules of Evidence are Subject to Modification and control by the legislature, whether affecting proof of existing rights or rights subsequently acquired, and changes in them may be made applicable to existing causes of action. No one has any vested right in them, for

they pertain to the remedy: Chicago etc. R. R. Co. v. Jones, 149 Ill. 361, 41 Am. St. Rep. 278; Meadowcroft v. People, 163 Ill. 56, 54 Am. St. Rep. 47; Burk v. Putnam, 113 Iowa, 232, 86 Am. St. Rep. 372. And no one has a vested right in any particular remedy or form of procedure: Miners' etc. Bank v. Snyder, 100 Md. 57, 108 Am. St. Rep. 390; Welch v. Cross, 146 Cal. 621, 106 Am. St. Rep. 63.

The Admissibility in Evidence of an Officer's Return is discussed in the note to Driggers v. United States, 129 Am. St. Rep. 848; its conclusiveness in the note to Reiger v. Williams, 124 Am. St. Rep. 756; and its amendment in the note to Malone v. Samuel, 13 Am. Dec. 179.

CITY OF CHERRYVALE v. HAWMAN.

[80 Kan. 170, 101 Pac. 994.]

MUNICIPAL CORPORATIONS, Mobs for Which Liable—Definition.—In an action under the statute making cities liable for injuries done by mobs, an instruction that "a mob is an unorganized assemblage of many persons intent on unlawful violence, either to persons or property," is not erroneous because it makes no reference to a determination on the part of those composing the assemblage to resist opposition. (p. 197.)

MOBS, Unlawful Violence by, What Amounts to.—Where the members of a charivari party forcibly place a bride and groom in a wagon against their will, and draw them up and down the streets, they are engaged in an act of unlawful violence within the meaning of such definition. The fact that they are good natured and intend no serious harm to anyone does not absolve the corporation from liability. (p. 198.)

(Syllabi by the court.)

L. P. Brooks, for the plaintiff in error.

A. B. Clark, for the defendants in error.

170 MASON, J. Shortly after a marriage had taken place in the city of Cherryvale a number of men gathered at the house where the bride and groom were staying, placed them in a wagon, and drew them by hand up ¹⁷¹ and down the streets making proclamation of their nuptials and introducing them to passers-by in burlesque speeches, attracting a large crowd and occasioning some disorder and tumult. Frank Hawman, nine years of age, was run over by the wagon, his leg being thereby broken. He and his mother each sued the city under the statute making municipalities liable for all damages accruing in consequence of the action of mobs within their corporate limits: Gen. Stats. 1901. sec. 2501. The cases were tried together, the plaintiff recovering in each. The defendant prosecutes error.

The most serious question presented is whether the evidence justified a finding that the gathering constituted a mob within the meaning of the statute. The court instructed the

jury that "a mob is an unorganized assemblage of many persons intent on unlawful violence, either to persons or property." This definition, which appears to have originated in Abbott's Law Dictionary, is substantially that usually given by the courts and text-writers: 27 Cyc. 812; 20 Am. & Eng. Ency. of Law, 835; 5 Words and Phrases Judicially Defined, 4548. Its substance was incorporated without objection in the charge in *City of Atchison v. Twine*, 9 Kan. 350. It differs but little from the one asked by the defendant, which reads: "A mob consists of an assemblage of many people acting in a violent manner, defying the law, and committing or threatening to commit depredations upon property or violence to persons." Perhaps, however, this requested instruction suggests an element held in New York to be essential, namely, a determination on the part of the persons composing the assemblage to carry out their purpose notwithstanding any resistance encountered. The statute of that state makes municipalities liable for injuries done by "a mob or riot," and the court of last resort, holding that the two words indicate the same kind of disturbance, excepting as to the numbers taking part, has definitely adopted this definition of the latter: "A tumultuous disturbance of the peace by three ¹⁷² persons or more assembling of their own authority with an intent mutually to assist one another against anyone who shall oppose them in the execution of some enterprise of a private nature and afterward actually executing the same in a violent and turbulent manner, to the terror of the people, whether the act intended were of itself lawful or unlawful": *Adamson v. City of New York*, 188 N. Y. 255, 117 Am. St. Rep. 863, 80 N. E. 937, 10 L. R. A., N. S., 925, 11 Ann. Cas. 183.

The word "riot" has often been defined, however, without referring either to a purpose to resist opposition or to the inspiring of terror: 24 Am. & Eng. Ency. of Law, 971; 7 Words and Phrases Judicially Defined, 6240. And the statutory definition in New York omits both these elements, reading thus: "Whenever three or more persons, having assembled for any purpose, disturb the public peace by using force or violence to any other person, or to property, or threaten or attempt to commit such disturbance, or to do an unlawful act by the use of force or violence, accompanied with the power of immediate execution of such threat or attempt, they are guilty of riot": N. Y. Pen. Code, sec. 449.

In *Marshall v. City of Buffalo*, 50 App. Div. 149, 64 N. Y. Supp. 411, it was said: "This statute [making the city liable for injuries done by a mob or riot] is now substantially the same . . . as the original enactment of 1855. . . . At that time riot was not a statutory crime, and it may, therefore, be presumed that the legislature had the common-law definition in mind": Page 152.

In Kansas there is, and was when the law here invoked against the city was enacted, a statute in effect defining a riot, for it provides that "if three or more persons shall assemble together with intent to do any unlawful act with force and violence against the person or property of another, or to do any unlawful act against the peace, . . . the person so offending on conviction thereof shall be fined in the sum not exceeding two hundred dollars": Gen. Stats. 1901, sec. 2269. The next section makes it the duty of any peace officer, ¹⁷³ when such an unlawful assembly takes place, "to make proclamation in the hearing of such offenders, commanding them in the name of the state of Kansas to disperse and to depart to their several homes or lawful employments," and if such command is not obeyed, to summon aid and enforce it. The Kansas legislature, in passing an act the obvious purpose of which is to make municipal officers more vigilant in suppressing unlawful assemblies, must be deemed to have had in mind the language of its own statute in that regard, rather than any one of the several definitions recognized by the common law. We think the instruction given by the court was sufficient for the purposes of the case.

The question therefore narrows down to this: Was there any evidence of a purpose on the part of those engaged in the demonstration which occasioned the injury to employ force in an unlawful undertaking? There was testimony that several of the ringleaders entered the room where the bride was, and taking hold of her made her go with them; that she, seeing that they were going to use force, said that rather than submit to this she would accompany them, and did so. This was some evidence of the use of unlawful violence. If the purpose of the visitors had been to inflict punishment in revenge for some real or fancied wrong no one would doubt the illegal character of their act. The fact that nothing worse was intended than to subject the victim to embarrassment, annoyance and humiliation in order to provide amusement for the spectators does not change its aspect in the eye of the law. True, the testimony of the bride showed that she cherished no resentment against the perpetrators of the prank, but whether she consented to it at the time was a fair matter under all the evidence for the determination of the jury, and they must be deemed to have found that she did not. They also made a special finding, which was not wholly without support in the evidence, answering ¹⁷⁴ in the affirmative the question whether those who caused the injury disturbed the peace of anyone on the streets or along the streets over which the wagon was drawn.

There was clearly some evidence that the persons responsible for the injury to the boy constituted a mob, unless they can escape that designation by the plea that they were acting with perfect good nature and intended no real harm to any-

one. It is hardly necessary to combat that plea with authorities, and yet cases in point are not wanting. In *Bankus v. State*, 4 Ind. 114, it proved unavailing in a prosecution for a riot, the court saying: "It is said the rioters were in good humor. Very likely, as they were permitted to carry on their operations without interruption. But with what motive were they performing these good-humored acts? Not, certainly, for the gratification of Wise and his family. They were giving them what is called a charivari, which Webster defines and explains as follows: 'A mock serenade of discordant music, kettles, tin pans, etc., designed to annoy and insult'": Page 116.

In *Gilmore v. Fuller*, 198 Ill. 130, 65 N. E. 84, 60 L. R. A. 286, one member of a charivari party was accidentally shot by another. He sought to recover damages, but was denied relief on grounds thus stated: "The enterprise in which they were both engaged at the time of the injury was an unlawful one. The fact that it is called a 'charivari' does not make it any the less unlawful. The assemblage around the house of Daniel Hirsch in the night-time, there engaged in disturbing a family in which a wedding had occurred, was an unlawful and illegal assemblage, and not only so, but a gathering of illegal trespassers. They were all, including both plaintiff in error and defendant in error, engaged in the same unlawful enterprise": Page 136.

In *Higgins v. Minaghan*, 78 Wis. 602, 23 Am. St. Rep. 428, 47 N. W. 941, 11 L. R. A. 138, damages were sought against the subject of the charivari for having shot one of its perpetrators. The plaintiff's counsel was permitted in the examination of jurymen as to ¹⁷⁵ their qualifications to ask whether they had any prejudice against that form of amusement. In expressing its view that such question should not have been allowed the court said: "Every good, law-abiding citizen must and does condemn such unlawful and riotous assemblies. They are wholly indefensible in law and morals, and are reprobated by every well-disposed person. With the same propriety a juror called upon to try a man charged with a criminal act might be asked if he had or entertained any bias or prejudice for or against crime or criminals": Page 603.

In *State v. Adams*, 78 Iowa. 292, 43 N. W. 194, in reversing a conviction of manslaughter, the court used this language: "The party assembled in the night when the tragic affair took place is called a 'charivari.' Its object is about as barbarous as the pronunciation of its name. Whatever toleration it once had has long since passed away. Even when in vogue it was often attended with violence and bloodshed. If it ever was allowable to direct a jury that such an assemblage, with all its tumult and confusion, was not a great provocation to

those annoyed and insulted by it, that time has passed away": Page 297.

Complaint is made of the denial of a motion directed against a defective summons, but as a sufficient summons was afterward issued and served the ruling became immaterial. Testimony that the mother of the injured boy was a widow was competent in her own case, and therefore the objection made to it is unfounded. The court struck out a portion of each of several interrogatories to the jury prepared by the defendant, but no material error was thereby committed, for the reason, among others, that the questions as they stood were compound. An instruction refused with regard to the extent of the injury was sufficiently covered in the general charge.

No error is discovered in the rulings complained of, and the judgment is affirmed.

As to What Constitutes a Mob or Riot, and as to the Liability of the municipality for injuries due thereto, see Adamson v. New York, 188 N. Y. 255, 117 Am. St. Rep. 863; Chicago v. Chicago League Ball Club, 196 Ill. 54, 89 Am. St. Rep. 243; Chicago v. Manhattan Cement Co., 178 Ill. 372, 69 Am. St. Rep. 321; Board of Commrs. v. Church, 62 Ohio St. 318, 78 Am. St. Rep. 718.

The Right to Resist a Charivari Party to the extent of using a deadly weapon is considered in Patten v. People, 18 Mich. 314, 100 Am. Dec. 173; Higgins v. Minaghan, 73 Wis. 602, 23 Am. St. Rep. 428.

DOYLE v. HAYS LAND AND INVESTMENT COMPANY.

[80 Kan. 209, 102 Pac. 496.]

MORTGAGE, Recording Assignment of, When Sufficient to Impart Notice.—A record of the assignment of a mortgage which states the names of the mortgagor and the mortgagee and the book and place of the record of the mortgage is sufficient to impart notice. (By the editor.) (p. 202.)

JUDGMENT to Quiet Title, When Binds Persons not Named.—A judgment in a suit to quiet title brought by the holder of a tax deed, where there is no one in possession, is conclusive against persons holding unrecorded conveyances and encumbrances from the original owner of which the party named had no notice. (By the editor.) (p. 202.)

JUDGMENT Against Widow Where the Published Summons Gives the Christian Name of Her Husband Instead of Her Own Given Name.—An assignment of a mortgage was made to "Jessie L. Williams, wife of Edward H. Williams," and was duly recorded. In a suit to quiet title, brought afterward by the holder of a tax deed to the mortgaged lands, this assignee of the mortgage was made a party by the designation "Mrs. Edward H. Williams," and by that name was given notice by publication. She had assigned the mortgage to another party (under whom the plaintiff in this suit claims)

before the judgment in the suit to quiet title, but this assignment was not recorded until afterward. Mrs. Williams was a widow at the date of the publication, and resided in Massachusetts. Judgment was rendered in that suit by default against the defendants therein, including Mrs. Edward H. Williams, quieting title and barring the defendants named from any interest in the land. The plaintiff in that suit then sold and conveyed the land to another, under whom Doyle holds through mesne conveyances by warranty deed for a valuable consideration, and Doyle was in possession claiming such title when this suit was brought by the investment company to foreclose the mortgage which it so held by assignment. Held, that under the facts stated in the opinion the designation of Jessie L. Williams as "Mrs. Edward H. Williams" in the petition and notice published was sufficient to permit an adjudication of the interest and claims of the plaintiff, holding under her by an assignment not recorded when the publication was made, the title to the mortgage appearing at that time by the records to be in her. (pp. 202, 208.)

APPEAL AND ERROR—Transfer of Interest Before Suit.—

Where the records show a title in one who is made a defendant in a foreclosure suit in order to bar his interest in the land, and he pleads title to the land in fee, and the issues arising upon such pleading are fully tried and adjudicated against him, he may maintain a petition in error upon such judgment, although it was shown upon the trial that a conveyance from him to another person, not a party to the suit, had been made before the suit was brought, it being also shown that such conveyance was not recorded until afterward, and that no motion was made for substitution. In this situation the plaintiff who made him a party and obtained a judgment against him can make no valid objection to his presenting the judgment to this court for review. (p. 209.)

(Syllabi by the court except where stated to be by the editor.)

C. T. Clark and William Easton Hutchinson, for the plaintiff in error.

Lee Monroe and George A. Kline, for the defendant in error.

210 BENSON, J. The Hays Land and Investment Company commenced this suit July 7, 1906, to foreclose a mortgage made by William U. Miller on March 30, 1887. Joseph F. Doyle was made a defendant. The prayer was for personal judgment against Miller on the promissory note given with the mortgage, and for foreclosure against all the defendants. The mortgage was made to the Equitable Trust and Investment Company, and was assigned May 26, 1887, to Jessie L. Williams, wife of Edward H. Williams, and the assignment was recorded in Hamilton county at a time when Kearny county was attached to it for judicial purposes. On June 12, 1903, Jessie L. Williams assigned the mortgage to Edward E. Parker, which assignment was recorded October 17, 1904, and Edward E. Parker assigned the mortgage to the plaintiff June 6, 1905.

Defendant Miller answered pleading the statute of limitations. Defendant Doyle in his answer alleged that he was the owner of the land in fee simple and in peaceable posses-

sion thereof, denied the plaintiff's title, and pleaded a judgment of the district court of Kearny county in a suit brought therein by F. C. Puckett against the Equitable Trust and Investment Company, Mrs. Edward H. Williams, and others, wherein ²¹¹ it was adjudged that the title of F. C. Puckett in the real estate which is the subject of this suit should be quieted and all the defendants named in the action should be barred from any right, title, estate or equity of redemption in or to the land. The answer further alleged that defendant Doyle held the property through mesne conveyances from Puckett, relying upon that judgment, and further alleged that the mortgage had not been recorded in Kearny county, as required by chapter 107 of the Laws of 1899.

On the trial the plaintiff dismissed its suit against William U. Miller, and the suit proceeded for foreclosure only. Defendant Doyle offered in evidence the tax deed to the land in question, dated October 31, 1902, recorded November 31, 1902, in Kearny county, and the judgment entered June 23, 1903, pleaded in his answer. It was admitted that Puckett conveyed the land after this judgment had been rendered, that Doyle held under Puckett's grantee by warranty deed for a valuable consideration, and that the land was unoccupied at the time the judgment was rendered.

The petition in the suit brought by Puckett was in the usual form to quiet title. Service was made by publication, and the notice was directed, among others, to Edward H. Williams and Mrs. Edward H. Williams, his wife, and was in the usual form. The court allowed the judgment in the Puckett case to be read in evidence, reserving its ruling upon an objection made thereto, which it afterward sustained. Thereupon defendant Doyle offered in evidence the petition, affidavit for publication and publication notice in that case, to which the plaintiff objected, and the objection was sustained. Judgment was rendered finding the amount due on the Miller mortgage to be six hundred and eight dollars, that Doyle had the first lien for taxes by virtue of the tax deed for seventy dollars and ninety cents, and barring and foreclosing him from any other estate, title or interest in the land.

Defendant Doyle contended that his title to the land ²¹² was perfect, and should have been sustained, because the mortgage made by Miller was never recorded in Kearny county, as required by the act of 1899, and because the title of Puckett, under whom he held through mesne conveyances, had been adjudged valid and his title quieted against the Equitable Trust and Investment Company and Mrs. Edward H. Williams, under whom the plaintiff claimed by assignment of the mortgage.

The suit of Puckett was commenced April 18, 1903. Before that time the Equitable Trust and Investment Company had assigned the mortgage, which assignment was recorded Octo-

ber 25, 1890. Thus it appears that the Equitable Trust and Investment Company had no interest in the mortgage when the Puckett suit was brought. To avoid this result defendant Doyle insists that the record of the assignment was insufficient to impart notice, and hence the owner was barred. The objection made to the assignment is that it does not sufficiently describe the mortgage, the description being that of a mortgage made by William U. Miller to the Equitable Trust and Investment Company, and referring to the book and page of the record. This was sufficient to impart notice.

A more important question is the effect of the judgment quieting title against Mrs. Edward H. Williams. While the assignment by Jessie L. Williams was made before the judgment in the Puckett suit, it was not recorded until more than a year afterward. It was held in *Utley v. Fee*, 33 Kan. 683, 7 Pac. 555, in a suit brought by the holder of a tax title to quiet title, where he had no knowledge or notice of any other claim and no one was in the possession of the property holding adversely to him, that the decree in his favor quieted his title against all persons holding under the original owners by deeds previously executed but not recorded. Following this rule, if the publication was sufficient it bound the plaintiff, who held under assignments made ²¹³ before, but not recorded until after, the decree was entered. It is true that in the assignment made by her she is described as Jessie L. Williams, and signed the instrument by that name, but the assignment had not been recorded when the suit was brought nor when the decree was entered, and in the assignment made to her, which was on record at these dates, she was described as "Jessie L. Williams, wife of Edward H. Williams." The mortgage then appeared of record to be owned by Jessie L. Williams, wife of Edward H. Williams. In all the proceedings, including the publication notice in the Puckett suit, she was designated only as "Mrs. Edward H. Williams." The vital question here is whether the notice was sufficient to bind the plaintiff, holding under Jessie L. Williams by an assignment recorded after the decree. It was admitted that Edward H. Williams died in 1899. Although Mrs. Williams was described as the wife of Edward H. Williams, she was in fact his widow.

Notice to nonresidents is required to be published in the county where the land is situated. This gives notoriety to the proceedings, from which it may be presumed that a party, if he do not in fact see the notice, will learn of it, because of his interests in the locality. It may be presumed that the plaintiff in the suit to quiet title, claiming to own this land under the tax deed, consulted the records to ascertain who were necessary parties to be made defendants in the suit, and finding, among others, that Jessie L. Williams, wife of Edward H. Williams, appeared by the record to own this

mortgage, he made her a party by the name "Mrs. Edward H. Williams." The notice contained a description of the land, and named the party with sufficient precision fairly to indicate her identity and challenged her attention and inquiry. It cannot be said that Mrs. Williams and the parties holding under her or otherwise interested in the land would be misled by the name by which she was designated.

²¹⁴ "Notice is all that is required to confer jurisdiction. To obtain complete and definite information the parties served must follow up the suggestions contained in the notice by due investigation and inquiry": *Sharp v. McCole*, 79 Kan. 772, 101 Pac. 659.

In *Fanning v. Krapfl*, 61 Iowa, 417, 14 N. W. 727, 16 N. W. 293, it was held upon a demurrer to a petition that service by publication of a notice directed to P. T. B. Hopkins, wife of John C. Hopkins, did not give the court jurisdiction of T. Phelia Boyd Hopkins or T. P. B. Hopkins. After the cause was remanded to the district court a pleading was filed in which it was alleged that T. P. B. Hopkins was in fact the wife of John C. Hopkins when the notice was published and when the judgment was rendered, and that she was better known in the county as the wife of John C. Hopkins than by her Christian name or by the initial letters of that name. The district court struck out this averment, holding that the publication of the notice as it had been made did not give the court jurisdiction of T. P. B. Hopkins. In a review of this second judgment the apparent effect of the former opinion was very greatly changed. The court said:

"The office of the notice is in part to give the pendency of the action notoriety. It should be such that others than the defendant, seeing it, and knowing the defendant, or knowing of him, would not probably be misled by it as to the person for whom it was intended.' . . . The notice should describe the party to whom it is directed with such certainty as that neither he nor other persons acquainted with or knowing him could reasonably be misled by it as to the person for whom it was intended; and it seems to us that, conceding the truth of the allegations stricken from the answer, the notice in question was sufficient to give the court jurisdiction of T. P. B. Hopkins. . . . If the same notice had been served personally upon her, there could be no question, we think, but that the court would have acquired jurisdiction of her by the service, and any notice which would give jurisdiction if personally served upon the party is good when served by publication, if that publicity of the pendency of the action ²¹⁵ which the law intends is thereby given. That is, a description in the notice of the person intended, which would be sufficient if the service was personal, is also sufficient when the service is by publication, if those who know the person

intended would naturally recognize him by that description": *Fanning v. Krapfl*, 68 Iowa, 244, 26 N. W. 123.

In *Schee v. La Grange*, 78 Iowa, 101, 42 N. W. 616, the effect of a decree quieting title entered by default upon a publication notice was considered. One of the defendants had been designated as Charles A. Luckenbough, assignee of Benjamin G. Unangst. His name in fact was Charles A. Luckenbach. An objection being made to this decree, the court said: "Absolute accuracy in names in such cases is not required. The proceeding as against Luckenbach and Chapman is in their representative capacity, and they are thus described in both notice and petition. Where parties are thus relatively designated, there is less reason for a technical adherence or exactness as to names than in other cases. In *Fanning v. Krapfl*, 68 Iowa, 244, 26 N. W. 123, this court gave a rule which we think is authorized by precedent and reason, and guides to a proper conclusion in this case": Page 106.

In *Cruzen v. Stephens*, 123 Mo. 337, 45 Am. St. Rep. 549, 27 S. W. 557, it was held that a service by publication of notice addressed to "Etta R. Fisher and ——— Fisher, her husband" (p. 344), was valid as against a collateral attack. The action was in ejectment. The defendants claimed title under a sheriff's sale in a tax suit, wherein judgment had been rendered by publication. The court said:

"The object of giving notice by publication is to advise the parties, to whom the notice is directed, of the proceedings mentioned.

"If the notice effectively does that, it should be held sufficient against any collateral attack.

"Judge Van Fleet thus summarizes the rule deducible from principle and well-considered cases: 'That the omission of the name of a defendant from the process makes the judgment void in respect to him is plain; but where he is so described that he would not be ²¹⁶ misled, it is not void': Van Fleet's Collateral Attack, secs. 356, 361.

"It certainly seems to accord with just principles of law and of common sense that where the notice names the parties defendant with sufficient definiteness to plainly indicate their identity, it should be held good and not void, when questioned in this collateral way.

"Here the notice in effect was directed to Etta R. Fisher and Mr. Fisher, her husband. It would have been practically no more informative of the identity of John Fisher, her husband, had the blank in the order and in the petition in that case been filled with his first name": Page 345.

In the assignment of the mortgage under which the plaintiff in this suit claims title, the descriptive words "wife of Edward H. Williams" were added to the name "Jessie L. Williams." This designation, by the registry of the assign-

ment, became a part of the recorded title, imparting notice not only to third persons but to the assignee, Parker, and the plaintiff holding under him, of the fact that Jessie L. Williams was the wife of Edward H. Williams. They would have been bound by notice duly published against Jessie L. Williams; ought they not to be equally bound by notice to Mrs. Edward H. Williams, which is only another way of designating the wife of Edward H. Williams, the very person named in the assignment through which they derive title?

In *Blinn v. Chessman*, 49 Minn. 140, 32 Am. St. Rep. 536, 51 N. W. 666, it appeared that a conveyance had been made to the defendant and recorded under the name "George Cheeseman." Chessman left the state and became a non-resident. An action was commenced by one Leonard, who claimed to own the property, against Chessman to determine adverse claims. The service was by publication against "George Cheeseman," and judgment was rendered by default excluding him from any interest in the land. In another action to recover the land this judgment ²¹⁷ was offered in evidence. The trial court held the judgment valid. On review it was said: "The court was right in treating the judgment as binding upon this defendant, so far as concerned his interest in this land. This conclusion is not based upon the ground of the likeness of the two names, either in spelling or in sound; but upon the ground—upon which also the decision of the court below was placed—that the defendant is to be deemed to have adopted the name of Cheeseman for the purpose of acquiring and holding the title to this land, and he can have no reason to complain that he is so designated in legal proceedings calling in question the validity of the title so acquired and held. From the fact that this was not his true name it does not follow that the court did not acquire jurisdiction. If he had assumed this name, or any other, generally, and for all purposes, and especially if he had come to be known by the name assumed, there would be no doubt that legal proceedings against him in such name would, in general, be sustained. The name is not the person, but only a means of designating the person intended; and where one assumes and comes to be known by another name than that which he properly bears, that name may be effectually employed for the purpose of designating him. If such a name is employed in legal process or notices, whether served personally or by publication—where such service is authorized, the notice is effectual; the person who has assumed the name is presumed to understand that the process or notice addressed in that name is addressed to him. . . . He not only accepted the conveyance made to himself by that name, but he placed it on record, for the purpose, and with the effect, presumably, of giving notice to the world that the title had been so conveyed and was so held. He must be

deemed to have understood that thereafter persons becoming interested in the land would consult the record, and might be expected to act upon the notice thus communicated to them": Pages 145, 146.

In *Thompson v. McCorkle*, 136 Ind. 484, 43 Am. St. Rep. 334, 34 N. E. 813, 36 N. E. 211, the publication against "John McCorkle, and ———— McCorkle, his wife," was held to be insufficient, and in the opinion the court used the language quoted by Mr. Justice Greene in *Whitney v. Mase-more*, 75 Kan. 522, 121 Am. St. Rep. 442, 89 Pac. 914, 11 L. R. A., N. S., 676, to the ²¹⁸ effect that in a suit to quiet title after the death of John McCorkle the notice was not sufficient to bring his widow within the jurisdiction of the court. The Indiana case was an action to set aside a judgment entered upon publication notice for fraud in obtaining it. In the opinion that court said:

"The complaint shows that plaintiff resided in Shelby county, Indiana, for seventy years continuously, and that the only service, as to her, was by publication addressed to ———— McCorkle, wife of John McCorkle; that the husband had died May 20, 1880.

"We recognize the rule that even on constructive service the question of the jurisdiction of a court of record over the parties to any domestic judgment must, in all collateral proceedings where fraud is not shown, be determined by the record, where the jurisdiction affirmatively appears from the record. In such case it would import absolute credit and verity and parties could not be heard to impeach it. In other words, it will be conclusively presumed that the court acted upon ample evidence and with due deliberation before making such statement; and the judgment will be impregnable to any collateral assault by proof aliunde.

"In *Muncie v. Joest*, 74 Ind. 409, the court says: 'There is a clear distinction between cases in which there is no notice whatever, and those in which there is a mere defective or irregular notice. The general rule upon the subject, deducible from the authorities, may be thus stated: If there is no notice whatever, and this affirmatively appears upon the face of the proceedings, the judgment will be void, and may be overthrown by a collateral attack. If a court, having jurisdiction, . . . and required to determine all jurisdictional questions, either expressly or impliedly, adjudges that notice was given, its decision will repel a collateral attack, unless the record of the court affirmatively show that no notice was given; and this is so although the record show a defective and irregular notice'": Page 490.

Thus it appears that the statement in the opinion that the judgment against Mrs. McCorkle was void was made concerning a direct proceeding to set aside that judgment, and not in a collateral action, as in this case. ²¹⁹ The distinction

between the effect of judgments when directly assailed and when attacked in a collateral action is well known, and is stated in *Sharp v. McColm*, 79 Kan. 772, 101 Pac. 659, and in the cases cited.

It is urged that the designation of the party as the wife of Edward H. Williams was incorrect, because she was at that time a widow. It must be remembered, however, that this designation was taken from the record. It appears that she was a resident of Massachusetts, and it cannot be presumed that Puckett, when he commenced his suit, had knowledge of the death of her husband.

In *Jones v. Kohler*, 137 Ind. 528, 45 Am. St. Rep. 215, 37 N. E. 399, it was held that where a married woman interested in land shifted about from place to place, and her whereabouts had been unknown for many years, notice by publication in a suit to quiet title against her by her former name was sufficient, although her husband had died and she had since married. The court said: "In this instance the notice was given to the interested party in the only name by which she was known within the jurisdiction of this state, the only name by which, as she well knew, she would be dealt with in this state, that name in which she would necessarily be notified of the pendency of legal proceedings, and that name which, when reading the notice, she would, of course, understand to apply to herself": Page 531.

The decisions upon this subject are numerous and not harmonious. Many of them are reviewed in Van Fleet's *Collateral Attack*, sections 355 to 367, inclusive, and later decisions are cited in volume 40 of the *American Digest*, Century edition, columns 2673, 2674. Van Fleet, at section 367, calls attention to the fact that the distinction between direct and collateral proceedings has not always been kept in view, which fact may account for some of the apparent conflict. The author concludes that the notice is sufficient as against collateral attack if the defendant is so designated or described that after reading it he could not be misled.

²²⁰ In *Whitney v. Masemore*, 75 Kan. 522, 121 Am. St. Rep. 442, 89 Pac. 914, 11 L. R. A., N. S., 676, the publication was against "—— Whitney, and —— Whitney, his wife." The Christian name of neither was given, and there was nothing to distinguish the Whitneys so sued from other persons bearing that surname. The case is easily distinguishable from the one now under consideration. The name used in this publication would attract the attention of the widow, and this designation, appearing in the record, would give notice to the assignees. The important question is the effect of this notice upon them, for Mrs. Williams had parted with her interest before the publication was made. The notice must be held sufficient as against collateral attack.

The judgment in the Puckett suit should have been received in evidence, together with the papers offered in connection therewith. Defendant Doyle being a purchaser for value, after that judgment had been rendered, appeared to hold the land free from the claims of the plaintiff under the mortgage: *Howard v. Entreken*, 24 Kan. 428.

The case-made does not contain copies of the petition, publication notice and printer's affidavit, but does contain a statement that these papers were offered in evidence, and that the petition was in the usual and regular form, praying that title to the lands in question be quieted, and that the defendants, whose names were stated, be barred of any right, title, interest or equity in the land. The case-made also states that the affidavit for publication was in the usual form to obtain service on nonresident defendants, and that it named the same defendants as the petition. It is also stated that the notice of publication was in the usual, regular form, and included the names of the same defendants and described the land in the petition. The case-made also states that the printer's affidavit of publication was in the usual, regular form, showing that the publication had been made as required by law. The ²²¹ plaintiff contends that as the case-made does not contain copies of these papers, this court cannot determine whether the petition stated a cause of action, whether the affidavit for publication was a sufficient basis therefor, whether the publication imparted notice, or whether the printer's affidavit proved the publication; and that, in the absence of such proof, it must be presumed that the district court decided correctly in rejecting the judgment. The statute requires that the case-made shall contain: "A statement of so much of the proceedings and evidence, or other matters in the action, as may be necessary to present the errors complained of to the supreme court": Civ. Code, sec. 547.

The case-made may be very brief, and was devised mainly for the purpose of abridging the record and lessening the expenses of review: *Neiswender v. James*, 41 Kan. 463, 21 Pac. 573. This beneficent purpose has not always been kept in view. It is not necessary to set out copies of lengthy documents; a brief summary of their contents, including all that is material, is sufficient. If upon the service of the case this summary is deemed insufficient, amendments may be suggested. Proof of the proper publication must be presumed from the fact that a judgment was rendered upon it. The record appears to be sufficient fairly to present the errors complained of for the consideration of this court.

After defendant Doyle had rested the plaintiff in rebuttal offered in evidence the record of a conveyance of the land in question from Doyle to John F. Walthei, dated June 18, 1906, and recorded July 18, 1906, and it is now insisted that

Doyle has no right to a review here. The plaintiff alleged in its petition that Doyle claimed an estate or interest in the land which was inferior to the lien of the plaintiff's mortgage, and prayed that Doyle, with the other defendants, be foreclosed. Issues were made and the trial proceeded throughout upon the theory that Doyle did claim such interest, and ²²² that interest was adjudicated. The judgment being against Doyle, he instituted proceedings in error to this court as any other litigant. Section 40 of the Civil Code provides that upon the transfer of an interest during the pendency of an action it may be continued in the name of the original party, or the court may allow substitution to be made. The conveyance was not recorded until after this suit had been commenced; hence the defendant Dayle was a proper party, and, if he and his grantee were content to have it proceed to judgment against him, it is not perceived why the plaintiff should complain.

It is not necessary to consider the effect of the statute of 1899, relative to the recording of mortgages in Kearny county.

The effect of the tax deed as a muniment of title was not open to consideration in this case: *Brenholts v. Miller*, 80 Kan. 185, 101 Pac. 998.

The judgment is reversed, and the cause remanded for a new trial.

A Judgment Against a Married Woman by her maiden name, though based on constructive service of process, declaring her to have no title or interest in land claimed by her, is held conclusive on her, especially when she acquired the property in her maiden name and there is nothing of record to show the subsequent change in her name by marriage: *Emery v. Kipp*, 154 Cal. 83, 129 Am. St. Rep. 141. As supporting this decision, see *Jones v. Kohler*, 137 Ind. 528, 45 Am. St. Rep. 215; *Blinn v. Chessman*, 49 Minn. 140, 32 Am. St. Rep. 536; and as opposed to it, see *Freeman v. Hawkins*, 77 Tex. 498, 19 Am. St. Rep. 769. Consult, also, *Whitney v. Masemore*, 75 Kan. 442, 121 Am. St. Rep. 442.

DUGAN v. HARMAN.

[80 Kan. 302, 102 Pac. 465.]

EXECUTION on Separate Judgments, When Sufficiently Identifies Them and is not Void.—An execution which recites that "whereas, on the thirteenth day of April, 1898, in an action pending before George I. Robinson, a justice of the peace of Elkhorn township, Lincoln county, in the state of Kansas, John H. Dugan recovered two judgments against W. P. Harman and Lucy A. Harman for the sum of three hundred and sixty-eight dollars and seven cents, and the further sum of six dollars and twenty-three cents as costs of suit, with interest at the rate of ten per cent per annum from the ninth day of April, 1898, and afterward the said John H.

Dugan duly filed his abstract of said judgment in the district court of Lincoln county, Kansas," is not void. And such execution, issued less than five years after the thirteenth day of April, 1898, is sufficient to prevent two judgments rendered on that date by the same court in favor of the same plaintiff and against the same defendants, for separate sums aggregating three hundred and sixty-eight dollars and seven cents, and six dollars and twenty-three cents costs, from becoming dormant for a period of five years from the date of such execution. (p. 211.)

(Syllabus by the court.)

Motion to quash executions. The plaintiff Dugan on the 13th of April, 1898, recovered two judgments in a justice's court in separate actions against W. P. Harman and wife, one for two hundred and ninety-one dollars and fifty-five cents and two dollars and twenty-six cents costs, and the other for seventy-six dollars and fifty-two cents and two dollars and twenty-seven cents costs. Abstracts of such judgments were filed August 4, 1900, in the office of the clerk of the district court, who, on June 20, 1902, issued an execution as follows:

"EXECUTION.

"State of Kansas, Lincoln County,—ss.

"The state of Kansas, to the sheriff of Lincoln county, greeting: Whereas, on the 13th day of April, 1898, in an action pending before George I. Robinson, a justice of the peace of Elkhorn township, Lincoln county, in the state of Kansas, John H. Dugan recovered two judgments against W. P. Harman and Lucy A. Harman for the sum of \$368.07, and the further sum of \$6.23 as costs of suit, with interest at the rate of 10 per cent. per annum from the 9th day of April, 1898, and afterward the said John H. Dugan duly filed his abstract of said judgment in the district court of Lincoln county, Kansas; and, whereas, there remains unpaid on said judgment the sum of \$368.07, with interest: Now, therefore, you are hereby commanded that of the goods and chattels of said debtors you cause the moneys above specified to be made, and for want of goods and chattels you cause the same to be made of the lands and tenements of said debtors, and make return of this execution, with your certificate thereon, showing the manner you have executed the same, within sixty days from the date hereof.

"In witness whereof I have hereunto set my hand and affixed the seal of said court, at my office in Lincoln, Kan., in said county, this 20th day of June, A. D. 1902.

"[SEAL]

S. D. KISTLER,

"Clerk."

This execution was returned August 20, 1902, unsatisfied. May 27, 1907, the same clerk issued another execution in the same form as that issued before. Such execution was also returned unsatisfied. August 12, 1907, separate executions

were issued on each judgment directed to the sheriff of Trego county under which he levied upon and sold certain real property. The motions as to the first and second executions were denied on the ground that no levies had been made thereunder, but as to the last executions, they were quashed on the ground that before they were issued the judgment had become dormant. Plaintiff prosecuted error.

S. C. Miller and E. A. McFarland, for the plaintiff in error.

Ira E. Lloyd and John J. McCurdy, for the defendants in error.

304 SMITH, J. The only question presented in this case is whether the first two executions issued were void. If these executions were void, the judgments, upon which the two following executions were issued were dormant, and the executions neither received life from the judgments nor imparted life thereto: *Denny v. Ross*, 70 Kan. 720, 79 Pac. 502. If, however, the first two executions were only voidable, they were sufficient to prevent the judgments from becoming dormant.

While the issuing of one execution upon two separate judgments is irregular, it is the opinion of the court, but not of the writer, that if the execution is sufficient ³⁰⁵ to identify the two judgments, or if it contains sufficient recitals to indicate where the records of the judgments can be found and such records fully identify each judgment, the execution is not void. The first two executions recite that Dugan recovered two judgments against W. P. Harman and Lucy A. Harman, on a certain day, and before a certain justice of the peace, for the sum of three hundred and sixty-eight dollars and seven cents, and the further sum of six dollars and twenty-three cents as costs of the suit, with interest at the rate of ten per cent from April 9, 1898; that afterward Dugan duly filed an abstract of the judgment in the district court, and that there remained unpaid thereon the sum of three hundred and sixty-eight dollars and seven cents, with interest. These recitals are sufficient to direct anyone seeking information about the judgments to the records of the clerk of the district court, as well as to the records of the justice of the peace, which, of course, would give him knowledge of all facts pertaining thereto.

The district court held that the first two executions did not sufficiently identify the two judgments upon which jointly the executions were successively issued, and in this the court erred. The order of the court quashing the two executions issued to the sheriff of Trego county is therefore reversed, and the case is remanded, with instructions to deny

such motion and to make an order confirming the sale, if the sale is otherwise found to be regular.

MASON, J., Concurring Specially. I concur in the result stated, but think it pertinent that further reference be made to the authorities. Two objections are made to the execution which the trial court held void. One is that it did not distinctly refer to the judgments on which it was based; the other is that it was a single execution issued upon two separate judgments. So far as relates to the failure of the execution to recite the judgments with accuracy, the weight of authority supports the view, which is in harmony with modern tendencies,³⁰⁶ that the defect amounts only to an irregularity, and does not render the execution void. In volume 1 of the third edition of Freeman on Executions, section 43, this language is used, which was originally employed by the author in a note to *Graham v. Price* (3 A. K. Marsh. *522), in 13 Am. Dec. 199, and the substance of which has been quoted with approval in *Anderson v. Gray*, 134 Ill. 550, 23 Am. St. Rep. 696, 25 N. E. 843, and in *De Loach v. Robbins*, 102 Ala. 288, 48 Am. St. Rep. 46, 14 South. 777: "There is a just distinction between executions issued without authority, and executions issued under an authority which is erroneously pursued. . . . The former class is void; the latter may, with equal propriety, be termed either irregular or erroneous. When an execution can properly issue, a mistake made by the officer in performing the duty of issuing it is necessarily a mere error or irregularity. . . . If, from the whole writ, taken in connection with other facts, the court feels assured that the execution offered in evidence was intended, issued and enforced as an execution upon the judgment shown to the court, then we apprehend that the writ ought to be received and respected."

The question presented by the other objection is in effect whether the act of a clerk in combining what should be two separate executions—using one piece of paper where he ought to use two—renders the resulting instrument an absolute nullity. By the test proposed in the foregoing quotation it would seem not. Authority to issue two executions exists; that they are issued in combination instead of separately is due to a mistake of the clerk, and therefore, by the criterion suggested, should rank as an irregularity only. In *Bigham v. Dover*, 86 Ark. 323, 126 Am. St. Rep. 1096, 110 S. W. 217, it was held, following two cases cited in 17 Cyc. 932, that a single execution based upon two judgments in favor of different plaintiffs against the same defendant was void. The trial court decided otherwise, and two of the five members of the supreme court dissented. The³⁰⁷ result was effected by earlier Arkansas cases holding that an execution defective in substance is not susceptible of amendment. The three cases

referred to appear to be the only ones holding that an execution is void because based on separate judgments in favor of different persons. Those cited in 17 Cyc. 1013, in support of the proposition that joint executions cannot issue on separate or several judgments, decided merely that such executions were vulnerable to a direct attack.

Judge Smith Dissented, on the ground that the execution first issued failed to identify the judgments for separate amounts in separate actions, and that the issuing of one execution upon two independent judgments rendered in separate actions is void; and finally, that "The execution in question is an anomaly—a twin born into separate families at the same time, without brother or sister. I think that it derived no life from either of the judgments, and that it was incapable of imparting life to either of them, that the judgments were dormant at the time the executions were issued upon which the land was sold, and that the judgment of the trial court should be affirmed."

Clerical Errors in an Execution and Variances Between It and the Judgment, as invalidating the execution, are considered in *Anderson v. Gray*, 134 Ill. 550, 23 Am. St. Rep. 696; *De Loach v. Robbins*, 102 Ala. 288, 48 Am. St. Rep. 46; *Friedlander v. Fenton*, 180 Ill. 312, 72 Am. St. Rep. 207; *Bernhardt v. Brown*, 122 N. C. 587, 65 Am. St. Rep. 725. Generally speaking, an execution must conform to and follow the judgment. Hence it has been held error, where default has been entered in assumpsit brought against several defendants jointly, to issue execution against only two of them: *Merrifield v. Western etc. Organ Co.*, 238 Ill. 526, 128 Am. St. Rep. 148; and a joint execution upon two separate judgments in favor of two plaintiffs has been held void: *Bigham v. Dover*, 86 Ark. 323, 126 Am. St. Rep. 1096.

The Amendment of Writs of Execution is the subject of a note to *Kipp v. Burton*, 101 Am. St. Rep. 550.

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY v. BROWN.

[80 Kan. 312, 102 Pac. 459.]

CONSTITUTIONAL LAW—Statute Requiring Employers to Give Their Employés Certificates Showing the Cause of Discharge. A statute which requires an employer of labor, upon request of a discharged employé, to furnish in writing the true cause or reason for such discharge is repugnant to section 11 of the Bill of Rights of this state, and is invalid. (pp. 215, 216.)

MASTER AND SERVANT—Police Regulations—Statute Requiring Certificates to be Given Showing the Cause of Discharge of Employés.—The duty imposed upon employers by section 2422 of the General Statutes of 1901 is not a police regulation, and is an interference with the personal liberty guaranteed to every citizen by the state and federal constitution. (pp. 215, 216.)

(Syllabi by the court.)

William R. Smith, O. J. Wood and Alfred A. Scott, for the plaintiff in error.

J. Jay Buck, S. S. Spencer, L. B. Kellogg and C. M. Kellogg, for the defendant in error.

313 SMITH, J. It is not contended that the judgment is excessive or that it is not supported by sufficient evidence, if the law (chapter 144 of the Laws of 1897) is valid. The statute requires the employer, upon the request of a discharged employé, to furnish in writing the true cause or reason for such discharge. The railway company did not meet this requirement. Its "service **314** letter," as it is called, stated only that Brown was discharged "for cause." This is not a statement of "the cause" or of any cause.

It is also alleged that the service letter was issued in furtherance of a conspiracy existing between the defendant and other railroad companies to prevent employés of one company from getting employment in another company without the consent of the former employer. This claim is not supported by any evidence.

"To constitute a conspiracy the purpose to be effected by it must be unlawful, either in respect of its nature or in respect of the means to be employed for its accomplishment: *People v. Willis*, 24 Misc. Rep. 537, 54 N. Y. Supp. 129, 133; *People v. Olson*, 15 N. Y. Supp. 778; *Payne v. Western & Atlantic R. Co.*, 13 Lea, 507, 49 Am. Rep. 666"; 2 Words and Phrases Judicially Defined, 1460.

There was nothing in the evidence to show that there was an unlawful purpose contemplated or that unlawful means were to be used. All that is shown is that upon Brown's application to two other railroad companies request was made for his service letter, when he informed the employment agent that he had worked for the defendant company, and that upon the presentation of his letter employment was refused him. Probably he could have secured employment only upon the presentation of a letter recommending him as a desirable employé, and a letter stating the true cause of his discharge, which appears to have been sufficient in the mind of the employment agent of the defendant company to remove him from its employment, would not have availed him. If so, he was not damaged by the failure of the defendant to state the true cause of his discharge.

It may be said that if the law is valid, the company need have no concern as to the effect of its compliance with the letter of the law. This leads us to the principal contention of the company—that the law is unconstitutional; **315** that it is repugnant to section 11 of the Bill of Rights of the state of Kansas, which provides: "All persons may freely speak, write or publish their sentiments on all subjects, being responsible for the abuse of such right."

It is also contended that the law is repugnant to the fourteenth amendment to the constitution of the United States, which provides: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law."

It has been conceded in argument that in the absence of a contract of employment for a definite term the master may discharge the servant for any reason or for no reason, and that the servant may quit his employment for any reason or for no reason. Such action on the part of the employer or the employé, where no obligation is violated, is an essential element of liberty in action. Can one, then, be compelled to give a reason or cause for an action for which he may have no specific reason or cause, except, perhaps, a mere whim or prejudice? Again, is not the freedom to remain silent—neither to write nor publish anything on a certain subject—involved as an element in the guaranty that "all persons may freely speak, write or publish their sentiments on all subjects, being responsible for the abuse of such right"? It would seem that the liberty to remain silent is correlative with the freedom to speak. If one must speak, he cannot be said freely to speak.

The statute in question, like its companion statute, chapter 120 of the Laws of 1897, was the outgrowth of the financial and business depression preceding that session of the legislature. Employers sought to recoup their loss of incomes by scaling the wages of the employés, and laborers sought to resist the decrease in wages or to compel an advance by uniting in labor ³¹⁶ organizations. The remarks of the late Mr. Justice Greene in holding the provisions of chapter 120 of the Laws of 1897 unconstitutional are equally applicable to the provisions of the law in question. An excerpt from the opinion in Coffeyville V. Brick & T. Co. v. Perry, 69 Kan. 297, 76 Pac. 848, 66 L. R. A. 185, 1 Ann. Cas. 936, reads: "Before approaching a discussion of the question let us exclude any notion that the act in question is a police regulation. It will be observed that it does not affect the public welfare, health, safety or morals of the community, or prevent the commission of any offense or other manifest evil. Where the object of the act cannot be traced to the accomplishment of some one of these purposes, it is not a police regulation. Besides, the legislature has no power to impair or limit the reasonable and lawful exercise of a right guaranteed by the constitution, under the guise of a police regulation. It must also be remembered that the right which the plaintiff claimed was violated did not originate in contract, but was purely statutory; therefore, the determination of the question whether he has any remedy depends entirely upon the validity of this statute"; Page 299.

When the relation of employer and employé has ceased by discharge or by quitting the employment, if the employé has been efficient and trustworthy, the employer may be under a moral obligation to benefit the employé by giving him a statement to that effect. On the other hand, if the employé has been inefficient or untrustworthy, it may be the employer's moral duty to furnish a prospective employer, upon request or perhaps without request, a statement of these facts. But the former employer is under no legal obligation so to do, either to his ex-employé or to the prospective employer. The public has no interest in the matter, and in neither case can such a duty be imposed as a police regulation, and the attempt by statute to impose the furnishing of such a statement is an interference with personal liberty.

The mere matter of time requisite to comply with the requirements of the statute is perhaps a matter of trifling consideration, yet if the state may compel the ³¹⁷ sacrifice of a few minutes of the time of one person for another, may it not compel the sacrifice of a few days of time? Where and upon what principle shall the limit be placed? Again, if the employer can be compelled to state the true cause of discharge, it implies that he should state the facts as he understands them, and the facts may be in dispute and may be regarded by the employé as libelous. Litigation may result therefrom which might be a great burden to the employer, although successfully defended. We think the state can impose no such possible burden. As in many other relations in life, the employer may be silent and be safe, or, at his option, he may be courteous and fulfill his moral obligation. It is a personal privilege.

The judgment is reversed, with instructions to set aside the judgment and to enter judgment for the defendant.

An Employer is not Bound to Give a Discharged Employé, in the absence of a statute or custom, a clearance card or letter showing that his conduct or service has been satisfactory, although it is necessary to enable him to obtain employment elsewhere: Cleveland etc. Ry. Co. v. Jenkins, 174 Ill. 398, 66 Am. St. Rep. 296; New York etc. R. R. Co. v. Schaffer, 65 Ohio St. 414, 87 Am. St. Rep. 628.

SCOTT v. SCOTT.

[80 Kan. 489, 103 Pac. 1005.]

JUDGMENT for Alimony in Installments, Lien of.—Notwithstanding the statute making judgments liens on the real estate of the debtor within the county, an allowance of permanent alimony payable in installments does not create a lien on any property of the husband unless the record affirmatively discloses that the court intended it to have that effect. (p. 218.)

(Syllabus by the court.)

Jackson & Darby and S. F. Wicker, for the plaintiffs in error.

Howard J. Hodgson, for the defendant in error.

⁴⁸⁹ MASON, J. Eva G. Scott obtained a divorce from Chasteen F. Scott. In her petition she had asked to be allowed as alimony a tract of land situated in the county. The parties stipulated, however, that the husband should pay the wife two hundred and fifty dollars, which he did, and that she should also be allowed twenty dollars a month for the maintenance of their two children, if she should be awarded their custody. The decree so far as here important read: "That the property rights of said parties be settled as per the terms of said stipulation; that plaintiff be barred from any further alimony in or to defendant's real or personal property; that she have no right in the real estate set out in the petition; that plaintiff shall have the care and custody and education of the two children, Esther Scott and Fay F. Scott; that the defendant be required to pay plaintiff as a part of the permanent alimony provided in the said stipulation, for plaintiff the sum of twenty dollars per month, on the first day of each month, for maintenance of said children, and that defendant pay the costs of this suit, herein taxed at twelve dollars and thirty-one cents, and hereof let execution issue."

⁴⁹⁰ After several years Scott ceased to pay the installments of alimony. Mrs. Scott then caused execution to be levied upon the land referred to, which he had owned when the decree was rendered, but which he had in the meantime deeded to his brother, Louis Scott. The land was sold under the execution and bid in by Mrs. Scott. Louis Scott then brought suit against her to quiet his title—in effect, to determine the validity of the execution sale—and, being denied relief, prosecutes error. The sole question involved is whether the decree created a lien on the real estate for the payment of the alimony.

Cases relating to similar questions are collected in volume 2 of the American and English Encyclopedia of Law, at page 133, and volume 14 of the Cyclopedia of Law and Procedure.

at page 783, but for the most part they are so affected by local statutes as to be of little value as precedents here. In Kansas the law (Civ. Code, sec. 419) makes judgments of courts of record liens on the real estate of the debtor within the county, and a judgment is defined to be the final determination of the rights of the parties in an action: Civ. Code, sec. 395. A decree for alimony fits this definition and is within the letter of the statute. Its precise character and effect, however, must be decided in view of this language of the section of the code which authorizes it: "When a divorce shall be granted by reason of the fault or aggression of the husband, the wife shall . . . be allowed such alimony out of the husband's real and personal property as the court shall think reasonable, . . . which alimony may be allowed to her in real or personal property, or both, or by decreeing to her such sum of money, payable either in gross or in installments, as the court may deem just and equitable": Civ. Code, sec. 646.

The court is thus given absolute control of the matter. It may, within reasonable limits, dispose of the husband's property as it sees fit. It may take from him anything he has and give it to the wife. And this necessarily implies that it may create a lien for her benefit ⁴⁹¹ upon any real estate he possesses: *Blankenship v. Blankenship*, 19 Kan. 159. Obviously it also has the power to free any particular tract from all lien, so as to enable the husband to pass a title clear of any claim on the part of the wife. Probably by the use of language indicating such purpose it may give its decree awarding a fixed sum as alimony the precise effect of an ordinary money judgment, collectible by execution and operating as a lien on the husband's real estate. But the question of present moment is, What was the intention of the court in this case. Where alimony is ordered to be paid in installments, and nothing is said as to the manner of its collection, we think the fair inference is that the court intends the order to be enforced, not by lien and execution—a remedy manifestly ill-adapted to the purpose, but by attachment for contempt if payment is not made—a remedy always available (14 Cyc. 799), and ordinarily efficacious. In the language of the decree above quoted there is nothing to indicate an intention to give the wife a lien upon the husband's land. The words "that she have no right in the real estate set out in the petition" have a contrary tendency. Although the phrase "and hereof let execution issue" may consistently with good usage be deemed to relate to the allowance of alimony, it may with equal propriety be regarded as having reference solely to the judgment for costs. It results from these considerations that the decree for alimony did not create a lien on the land, and Louis Scott was entitled to have his title quieted.

In *Conrad v. Everich*, 50 Ohio St. 476, 40 Am. St. Rep. 679, 35 N. E. 58, under substantially the same statutory provisions, it was held that a decree for alimony in money payable in gross operated as a lien on the husband's lands within the county. There, however, the trial court expressly authorized the collection of the alimony by execution, thus indicating a purpose to give the decree the qualities of an ordinary judgment. That case was followed in *Goff* ⁴⁹ v. *Goff*, 60 W. Va. 9, 53 S. E. 769, 9 Ann. Cas. 1083, where the same rule was applied to a decree requiring the payment of alimony in installments, but the decision was affected by the fact that the decree itself declared the alimony a lien.

The judgment is reversed, and the cause remanded for further proceedings in accordance herewith.

Graves, J., not sitting.

The Power of Courts to Make a Decree for Alimony, when payable in installments, a lien on the land of the husband, is considered in the note to *Harding v. Harding*, 102 Am. St. Rep. 704. That ar-rears in installments of alimony may be allowed as a claim against the estate of a deceased husband, see *Martin v. Thison's Estate*, 153 Mich. 516, 126 Am. St. Rep. 537; that a decree payable in installments is final so that, if made without reserve, it cannot be changed after enrollment, see *Mayer v. Mayer*, 154 Mich. 386, 129 Am. St. Rep. 477; and that a homestead may be charged with a lien for alimony, see *Schultz v. Schultz*, 133 Wis. 125, 126 Am. St. Rep. 934. According to *Conrad v. Everich*, 50 Ohio St. 476, 40 Am. St. Rep. 679, an award of a gross sum as alimony in a final decree of divorce is a lien upon the real estate of the husband, if by the statute every judgment is a lien upon the lands of the defendant.

LESLIE v. GIBSON.

[80 Kan. 504, 103 Pac. 115.]

JUDGMENT, Effect of Against Assignee of an Unrecorded Mortgage not a Party Thereto.—A judgment quieting title to real property binds the assignee of an unrecorded mortgage who is not a party thereto. (By the editor.) (p. 221.)

JUDGMENT, Vacating of, Right of One Bound by, but not a Party to the Record, to Move for.—A person whose interest in real estate has been barred by a judgment quieting title rendered against his grantor in an action to which he was not a party, wherein service was made by publication only, has the same right to have the judgment opened and to make his defense that the party from whom he obtained such interest has under section 77 of the Civil Code. (p. 222.)

JUDGMENT, Vacating of at the Instance of a Person Acquiring Title After Its Entry.—This rule should be applied to a person who holds title under a conveyance or assignment made after the judgment in such a proceeding has been entered, if there is no imputation of bad faith and no intervening equities are affected. (p. 223.)

(Symbols by the court except where stated to be by the editor.)

Motion by Charles E. Gibson to open a judgment and for leave to defend in a suit commenced by Leo N. Leslie to quiet title against various persons, including Archibald J. Berry and the Showalter Mortgage Company. The judgment was entered upon default after the service of summons by publication. Within two years after such entry the present motion was made. Gibson was not a party to the action, but was the assignee of a mortgage given by Berry to the Snowalter Mortgage Company and by it assigned to Celia C. Prentiss, and by her to Gibson. An affidavit by her was filed setting forth the making of the assignment of the mortgage, and that she had no actual notice of the commencement or pendency of the proceedings. Though notice of the motion was given to the plaintiff, he made no appearance at its hearing. The motion was sustained, the judgment opened, and the case subsequently tried, resulting in a judgment of foreclosure and sale, under which the lands were subsequently sold, as provided in the judgment, and the plaintiff given a lien for taxes. Nearly two years after the entry of such judgment, the plaintiff filed a notice of a judgment to vacate and set aside the order, judgment and decree so rendered in favor of Gibson. This motion having been heard and denied, the plaintiff prosecuted error.

V. H. Grinstead, for the plaintiff in error.

Thomas A. Scates and Albert Watkins, for the defendant in error.

506 BENSON, J. The contention of the plaintiff is that the order vacating the original judgment quieting title, and the subsequent judgment of foreclosure and sale thereunder, are void. It is argued that as Gibson was not a party and had no interest in the subject matter of the action at the time the judgment was rendered, having, as his petition showed, taken an assignment of the mortgage after that date, he had no right to make the motion.

It appears that Celia C. Prentiss owned the mortgage at the time of the judgment, but as her assignment from the mortgage company had been recorded, she was bound by the judgment: *Utley v. Fee*, 33 Kan. 683, 7 Pac. 555; *Doyle v. Hays, L. & I. Co.*, 80 Kan. 209, ante, p. 199, 102 Pac. 496. At the time the action was commenced the mortgage company, although made a party, had no interest in the subject matter. Celia C. Prentiss, although the owner of the outstanding mortgage, was not made a party, and Gibson derived his title to the mortgage after the judgment had been rendered. The Civil Code provides: "A party against whom a judgment or order has been rendered, without other service than by publication in a newspaper, may, at any time within

three years after the date of the judgment or order, have the same opened, and be let in to defend": Sec. 77.

Does the word "party" as here used include only those named as such in the record, or does it embrace also those whose property rights are directly affected by the judgment? As this court has held in the cases cited above that a decree against the person in whom the records show the title to be vested is effectual against persons holding under him by conveyance previously ⁵⁰⁷ made but not then recorded, it follows that persons so situated may incur the risk of losing their property without having been brought into court as parties. This may happen where there has been a neglect to record title deeds or assignments of mortgages or the like. In commenting on the statute in question this court has said: "Indeed, in order to do justice to both parties, the provisions of that section should be construed in no technical way, but fairly and reasonably. Every party ought to have his day in court; and while service by publication, which in fact imparts no actual notice, must be sustained, yet a party thus served, and who has in fact no knowledge of the proceedings, ought to be granted a hearing if it can be possibly done consistent with the rights of other parties. The section provides ample protection to third parties dealing with property on the faith of the judgment, and the plaintiff certainly has no right to complain if within a reasonable time, which by statute is fixed at three years, the defendant demands an opportunity of litigating with him the justice of the claim. In fact, a judgment upon service by publication is as between the parties in the nature of a conditional judgment, one which becomes final and absolute only at the expiration of three years, and liable in the meantime to be opened whenever the defendant brings himself within the provisions of the section": *Albright v. Warkentin*, 31 Kan. 442, 2 Pac. 614.

The manifest justice of allowing a person so situated an opportunity to be heard was thus referred to in *Erving v. Phelps & Bigelow Windmill Co.*, 52 Kan. 787, 35 Pac. 800: "We are at a loss to understand why the court refused to open the judgment and give the plaintiff in error an opportunity to set up his rights. The only service in the case was by publication, notifying his assignor, Robertson, of the pendency of the action. Whether the plaintiff in error had a right to open the judgment under section 77 of the code, or brought himself strictly within the position contemplated by that section or not, it is hardly necessary to decide": Page 789.

In that case the application to open the judgment had ⁵⁰⁸ been made by one who was technically a party, and it was held that another person not so designated but whose interests had been barred by the decree should be allowed to interplead.

The propriety of allowing a person bound by a judgment, without having had notice of the proceedings, an opportunity to make his defense where it cannot prejudice the rights of third persons is so evident that the statute will be construed to afford such right if the construction is not precluded by the language used. The expression "a party against whom a judgment or order has been rendered" may, without doing violence to its terms, be held to include anyone who, as assignee or grantee of a party expressly named, is bound by such judgment. Such a construction is in harmony with the evident legislative purpose to give persons whose property rights are affected by a decree, based upon notice by publication only, a reasonable opportunity to be heard. It was held in New York that persons bound by a judgment, although not parties to the record, might maintain proceedings to set the judgment aside. The court said: "Persons thus situated bear such a relation to the action that they could not only claim to be made parties during the pendency of the action, but they can also move the court and be heard in reference to any judgment rendered therein affecting their rights": *Ladd v. Stevenson*, 112 N. Y. 325, 8 Am. St. Rep. 748, 19 N. E. 842.

But it is urged that these principles apply only to the person who own the mortgage at the time the judgment was rendered, and that Gibson, having purchased it afterward, was a mere intermeddler, not being a party to the action nor in any manner interested in the subject matter while it was pending, but taking the assignment subject to the decree. Some general expressions of text-writers and several decisions support this view. Under a statute containing the same ⁵⁰⁹ provisions as our own the supreme court of Nebraska, in considering the same question, said: "The statute above referred to provides that 'a party against whom a judgment or order has been rendered' may, under certain circumstances, be permitted to set aside the decree and make his defense, but we know of no rule which permits a person to buy into a suit, after judgment, with full knowledge, either actual or constructive, of all the proceedings, and then reopen the case in order that litigation may be indefinitely prolonged in the settlement of supposed defenses": *Powell v. McDowell*, 16 Neb. 424, 20 N. W. 271.

The same result was declared in Iowa under a similar statute (*Parsons v. Johnson*, 66 Iowa, 455, 23 N. W. 931), and there are other decisions to the same effect. A contrary view was taken in *Plummer v. Brown*, 64 Cal. 429, 1 Pac. 703, in a brief opinion, based upon the peculiar language of the code of that state, and also in *Brown v. Massey*, 13 Okl. 670, 76 Pac. 226. The latter decision appears to hold that the action is in a sense pending during the three year period in which any interested party who has had no actual notice

may appear and make his defense. Other authorities bearing upon the question are collected in a note appended to the report of *Furman v. Furman* (153 N. Y. 309) in 60 Am. St. Rep. 633. In a note to the report of *Tyler v. Aspinwall* (73 Conn. 493) in 54 L. R. A. 758, various decisions are cited and reviewed, and the opinion of the annotator is given that the right of a grantee, not a party to the record, to move to set aside the judgment in such a case does not exist, in the absence of statutory authority. While the precise question has not been decided in this court, the decisions in the *Albright* and *Erving* cases, cited above, and in *Green v. McMurtry*, 20 Kan. 189, tend to support the action of the district court. In the case last cited it was said: "Any person interested in a suit may make a motion with reference to his interest, whether he is legally and technically a party thereto or not": Page 193. See, also, Civ. Code, sec. 532.

⁵¹⁰ The judgment quieting title did not finally determine that the mortgage was not a lien. That decree would not be beyond question until the expiration of three years. The owner of the mortgage was not absolutely deprived of all rights thereunder. She had the right within that time to have the judgment set aside and her lien established, upon the conditions named in the statute. It is not perceived why, having this valuable right, she could not transfer it to another, nor why such assignee should not have the same right to enforce it upon the same terms. To permit this does not affect the rights of the plaintiff in such a judgment. If the right to have it vacated exists, it is of no consequence to him in whose name it is enforced, and this should be allowed where there is no imputation of bad faith and no intervening equities are affected.

It must be remembered that the mortgage interest was not absolutely barred by the decree; if it had been the bar could not have been removed by assignment. Not being barred, if the judgment had been opened by proceedings in the name of the mortgage company or of *Celia C. Prentiss*, the name of *Gibson* might have been substituted: *Malone v. Big Flat Gravel M. Co.*, 93 Cal. 384, 28 Pac. 1063; *Thomas v. Morris*, 8 Utah, 284, 31 Pac. 446; Civ. Code, sec. 40. The same result was reached by a direct proceeding in his own name. Even if it should be held that this was an erroneous proceeding, it was not void.

It is urged that *Gibson* should at least have obtained leave to answer and an order of substitution, but the court made an order opening the judgment and allowing him to defend, tried the issues presented upon his answer, referred to in the entry as being on file, and rendered judgment thereon. This was a sufficient approval of his appearance.

Finally, it is contended that the order opening the judgment was void because there was no proof that the mortgage

company did not have notice of the pendency of the action in time to appear and defend. To make ⁵¹¹ the order without such proof may have been erroneous, but did not oust the court of jurisdiction, and the judgment was not void. A judgment may be erroneous but not void merely because of a defect in the proof, if the court has jurisdiction of the parties and the subject matter: *Brenholts v. Miller*, 80 Kan. 185, 101 Pac. 998; *Clevenger v. Figley*, 68 Kan. 699, 75 Pac. 1001.

The order and judgment presented for review are affirmed.

An Assignee of a Mortgage Who Neglects to Record the assignment may be estopped to assert the mortgage against persons without notice of the assignment: Bantz v. Adams, 131 Wis. 152, 120 Am. St. Rep. 1030; Marling v. Jones, 138 Wis. 82, 131 Am. St. Rep. 996.

Vacation of Judgment.—The Right of the Grantee or Assignee of a party to an action to move for the vacation of the judgment is discussed in the note to Furman v. Furman, 60 Am. St. Rep. 637.

RICHARDSON v. PAINTER.

[80 Kan. 574, 102 Pac. 1099.]

JUDGMENTS, Joint and Several, Nature of.—A personal judgment against two defendants is a joint and several obligation, which the plaintiff may enforce against either of them at his option. (p. 226.)

JUDGMENT, Revivor of Against One Defendant After the Death of the Other.—The fact that one of two judgment debtors dies and there is no revivor or proceeding had to keep the judgment alive as to his estate does not extinguish the liability of the other, nor bar a proceeding to revive the judgment as against such surviving defendant. (p. 226.)

(Syllabi by the court.)

M. B. Nicholson and W. J. Pirtle, for the plaintiff in error.

Dennis Madden and John Maloy, for the defendant in error.

575 JOHNSTON, C. J. A judgment for money was recovered against D. H. Painter and Bettie C. Painter in 1893, on which executions were issued from time to time and returned unsatisfied. D. H. Painter died in 1904, and on December 2, 1907, a motion to revive the judgment as to Bettie C. Painter was made and denied. It was admitted that the judgment had never been revived against the estate of D. H. Painter, and it is contended here, as it was in the district court, that the failure to revive the judgment as against the administratrix of the estate of D. H. Painter within one year after he died absolutely ended its life. On the other hand, it is contended that a judgment is a joint and several obliga-

tion, and that as a judgment creditor may proceed against each judgment debtor separately, the dormancy of the judgment as against the one does not affect the status or liability of the other.

The rules of the common law invoked by the defendant in error have been greatly modified by our statutes. Contracts which were joint have been made joint and several, and specific authority has been given to proceed against one or more of those liable on a joint obligation: Gen. Stats. 1901, secs. 1190, 1193. It has therefore been determined that a judgment against two or more defendants is a several obligation, and that the property of each is liable to execution for the whole judgment debt. In *Read v. Jeffries*, 16 Kan. 534, it was expressly determined that "a personal judgment against two parties is a joint and several obligation, and an action can be maintained upon it against either of the judgment debtors separately, and it can in like manner be used as a setoff against either": See, also, *Stout v. Baker*, 32 Kan. 113, 4 Pac. 141. There is nothing in the code provisions relating to revivor indicating that judgment defendants individually liable may not be proceeded against separately or that the failure to ⁵⁷⁶ revive the judgment as to one will bar a proceeding to keep the judgment alive as to others. It is argued that revivor proceedings are designed to protect the relationships and rights of parties to actions and judgments; that a joint debtor is entitled to contribution if he pays the debt, and likewise a surety has a right to indemnity if he pays the obligation of his principal; and that if a judgment creditor is allowed to ignore revivor proceedings, and by his nonaction permit a judgment to become dormant as to one, he practically defeats contribution and indemnity. In the absence of a statutory provision the rights and relations of judgment debtors is not a matter of concern to the judgment creditor. Having a judgment upon which each is severally liable for the whole, he is entitled to enforce it against either at his option. To require him to institute legal proceedings and become liable for costs and expenses for the protection of judgment debtors as against each other would take away a valuable element of the judgment and greatly impair his rights under it: *Palmer v. Stacy*, 44 Iowa, 340.

The question we have now was directly involved in *Ray v. Brenner*, 12 Kan. 105, where a motion was made to revive a judgment rendered against two parties, one as principal and the other as surety. The principal had died and no steps had been taken to keep the judgment alive or enforce it against his estate. It was contended that as the judgment was not enforceable against the deceased principal it could not be revived or enforced against the surety. In deciding the case attention was mainly given to the relations of prin-

cipal and surety, but it was held that the judgment might be enforced against the surety notwithstanding the death of the principal, and the order of the trial court refusing to revive the judgment as against the surety was reversed. In a proceeding in the federal court for the district of Kansas our statutory provisions relating to joint obligations and the ⁵⁷⁷revivor of them were considered, and it was held that a Kansas judgment might be revived and enforced as against one of two judgment debtors without bringing in or giving any attention to the other: *United States v. Houston*, 48 Fed. 207.

The cases of *Ballinger v. Redhead*, 1 Kan. App. 434, 440, 40 Pac. 828, and *Newhouse v. Heilbrun*, 74 Kan. 282, 86 Pac. 145, 10 Ann. Cas. 955, have been cited as opposing the theory of proceeding separately as against judgment debtors. In each of these cases, however, one of the joint plaintiffs had died, and it was held that, the judgment being dormant as to one, it could not be enforced at the instance of the other plaintiff. The distinction between joint judgment plaintiffs and joint judgment defendants is manifest. There the interest and rights of the plaintiffs were joint, not several. No one of them was entitled to the entire demand or right. Each held jointly with his coplaintiffs, and had no right which he could separately assert or enforce. Joint judgment debtors, on the other hand, are severally liable for the entire demand, and the property of each is subject to execution for the whole. For instance, two persons hold a promissory note, executed jointly by two makers. Neither of the holders could separately maintain an action against the makers on the note, but both together might maintain an action against either of the makers alone and enforce the collection of the judgment obtained from his property. As the liability of *Bettie C. Painter* was distinctly several, and enforceable against her at the option of plaintiff, the judgment may be revived against her although there can be no revivor as against her codefendant.

The order denying the motion to revive is reversed, and the cause remanded for a new trial.

The Abatement and Revivor of Actions in the event of the death of one of two defendants is considered in Hess v. Lowrey, 122 Ind. 225, 17 Am. St. Rep. 355; *Van Kleeck v. Hammell*, 87 Mich. 599, 24 Am. St. Rep. 182.

STATE v. CITY OF PITTSBURG.

[80 Kan. 710, 104 Pac. 847.]

CONTEMPT OF COURT by Attempting to Evade Its Judgment or Order.—The court rendered a final judgment ousting a city from the exercise of the unwarranted power of in effect licensing the sale of intoxicating liquors under the guise of collecting fines by simulated prosecutions for the violation of the prohibitory law. To evade the effect of the judgment a number of saloon-keepers raised a fund from which they for a time paid the salaries of some of the city's officers and employés. Held, that all concerned in the carrying out of this arrangement, whether or not they are to be regarded as having violated an injunction directed against them, are guilty of contempt of court in virtue of their having attempted to defeat the purpose of the judgment. (p. 228.)

(Syllabus by the court.)

Fred S. Jackson, attorney general, John Marshall, assistant attorney general, and Charles D. Shukers, special assistant attorney general, for the state.

710 MASON, J. In 1906 an action was brought in this court in the name of the state on the relation of the attorney general against the city of Pittsburg to put an end to the unlawful practice alleged to exist there of in effect licensing the sale of intoxicating liquors, under the guise of collecting at regular intervals fines for the infraction of the prohibitory law. A commissioner was appointed, who filed a report May 13, 1907, sustaining the allegations of the petition. A final judgment was rendered July 5, 1907, ousting the city from the exercise of the unwarranted power of deriving a revenue from the liquor traffic, and forbidding all municipal officers and agents from engaging in the practice ⁷¹¹ referred to: State v. Pittsburg, 77 Kan. 848, 91 Pac. 1132. In November, 1907, the attorney general filed affidavits stating that certain officers of the city and others were engaged in conduct the purpose and effect of which was to nullify or evade the force of such judgment. Citations were issued against and served upon the persons named, and formal accusations were filed charging them with contempt of court. They answered denying the charges, and a commissioner was appointed to take evidence and make findings upon the issues so joined. The report of the commissioner shows these facts, among others:

The city council appropriated no money for the payment of policemen or firemen for the months of June, July, August, September, October and November, 1907. By the contributions of a number of saloon-keepers during these months a fund was raised which was placed in the control of one Frank Linski, a resident of Pittsburg who was engaged in the wholesale liquor business in Missouri. The contributors referred to themselves as the members of a lodge, and to Linski as its treasurer, but such organization as existed had

no other purpose than the collection and disbursement of this fund. Linski paid the salary of the police judge and of the policemen and firemen out of this fund for several months, taking from them in some instances purported assignments of their claims against the city; at other times taking mere receipts.

Even this bare outline sufficiently establishes what the detailed evidence confirms—that all the parties to the transactions referred to were engaged in an attempt to evade the court's order and to render its judgment ineffectual. That they are liable to punishment for contempt is too clear to require extended discussion.

“Where the mandate of the court has been violated in spirit as well as in letter, the court will not permit the general terms of the writ to be controlled or restricted by reference to the particular nature of the grievance. Nor will the court permit defendants to evade responsibility ⁷¹² for violating an injunction by doing through subterfuge that which, while not in terms a violation, yet produces the same effect by accomplishing substantially that which they were enjoined from doing”: 2 High on Injunctions, 3d ed., sec. 1433.

True, the contemnors were not parties to the original action, but this is not necessary: 22 Cyc. 1012; *State v. Cutler*, 13 Kan. 131. The order against the city necessarily operated upon individuals. It ran in terms against any officers or agents. Unofficial persons who acted in behalf of the city were none the less its agents in this respect because they were not formally employed for this purpose: *Hamilton v. Diamond Drill & Machine Co.*, 137 Fed. 417, 69 C. C. A. 532. No official notice of the order was necessary. If actual notice was not inferable from the publicity of the proceedings, knowledge of the rendition of the judgment follows from the efforts made to evade it, which had no other possible purpose. Whether or not all who participated in these efforts are to be regarded as having violated an injunction directed against them, they are guilty of contempt of court in virtue of their having attempted by artifice and evasion to render the judgment nugatory, an act as plainly contemptuous toward the court as an interference with its process would be: 9 Cyc. 20; *United States v. Shipp*, 203 U. S. 563, 27 Sup. Ct. Rep. 165. 51 L. ed. 319, 8 Ann. Cas. 265.

“It is entirely consonant with reason, and necessary to maintain the dignity, usefulness and respect of a court, that any person, whether a party to a suit or not, having knowledge that a court of competent jurisdiction has ordered certain persons to do or to abstain from doing certain acts, cannot intentionally interfere to thwart the purposes of the court in making such order. Such an act, independent of its effect upon the rights of the suitors in the case, is a flagrant disrespect to the court which issues it, and an unwarrantable

interference with and obstruction to the orderly and effective administration of justice, and as such is and ought to be treated as a contempt of the court which issued the order": In re Reese, 107 Fed. 942, 47 C. C. A. 87.

⁷¹³ This proposition was thus applied in *Garrigan v. United States*, 163 Fed. 16, 89 C. C. A. 494: "As it is neither charged nor proven that the plaintiff in error was one of the parties enjoined, he is not chargeable for breach or violation of the injunction, in the well-recognized sense of those terms applicable to parties. He was bound, alike with other members of the public, to observe its restrictions when known, to the extent that he must not aid or abet its violation by others, nor set the known command of the court at defiance, by interference with or obstruction of the administration of justice; and the power of the court to proceed against one so offending and punish for contemptuous conduct is inherent and indisputable": Page 498.

It remains to consider the penalty to be assessed against each of the persons found guilty of contempt. Of those now before the court who were engaged in carrying out the device to evade its mandate Frank Linski bore the chief responsibility, and it is natural and proper that he should bear the largest measure of punishment. Of him the commissioner pertinently says: "By reason of the fact that the defendant Frank Linski was an honest man and could be trusted with the money, he had the unsolicited honor of being chosen as custodian and disbursing agent of the funds collected under the aforesaid arrangement; and it may be added that he was very reluctant to perform the service, and only consented when assured by the very first men of the city that everything had been fixed up and there would be no trouble, and this last assurance, while it should be considered in palliation of Linski's offense, at the same time seems to bring home to him the matter of notice and knowledge of the judgment and order of the court, as that was the very thing, and the only thing, that was in the minds of all who talked about having been in Topeka, or were going to Topeka to fix things. There was nothing else to fix: people who told Linski that they had fixed things, or would fix things, at Topeka, knew that there was nothing that they or anyone else could fix, and all that kind of talk by men who did know better to men who did not know better ⁷¹⁴ was all a part of the general scheme to keep the money coming in in utter violation of the judgment and order of the court."

A fine of one thousand dollars will be imposed upon him. Next to him the other contributors to the fund are deemed the most serious offenders, and a fine of five hundred dollars will be assessed against each of them. They are: Adam Kazmierski, Peter Barani, W. S. Stroud, John Simion, Joseph Valentine, John Welch, Pete Comiskey, Simon Wiresberger,

A. N. Stroud, John Tangye, B. W. Brown, and W. H. Conlon. The police judge, J. E. Holden, was not shown to have taken part in the objectionable transaction further than by receiving his own salary from the saloon-keepers. His fine will be fixed at one hundred dollars. The policemen, being specially charged with the enforcement of the law, should properly incur a greater penalty for its violation than the firemen. Their fine will be made fifty dollars each, and that of the firemen twenty-five dollars each. The policemen concerned are: S. M. Lawler, E. T. Carter, E. M. King, J. E. Walker, J. J. Leemaster, Charles M. Fisher, and Charles Phillips. The firemen are: T. W. Howe, J. T. Atkinson, Marion Robertson, George White, William Doss, F. O. Robinson, Peter Cor-dray, and Walter Stanfill. Payment of these fines will be enforced by commitment to the county jail of Shawnee county.

One is Guilty of Contempt in violating an injunction, though it was erroneously or improvidently granted: *Ex parte Cash*, 50 Tex. Cr. 623, 123 Am. St. Rep. 865; *Barnes v. Chicago Typ. Union*, 232 Ill. 402, 122 Am. St. Rep. 129; *Saginaw L. & S. v. Griffore*, 145 Mich. 287, 116 Am. St. Rep. 297. And if a claimant to an office brings quo warranto to oust the incumbent, and upon judgment against him takes an appeal, and pending the appeal takes possession of the office and proceeds to act as such officer, he is guilty of contempt of the supreme court: *People v. Horan*, 34 Colo. 336, 114 Am. St. Rep. 163.

CASES

IN THE

COURT OF APPEALS

OF

KENTUCKY.

ANTHONY v. HUDSON.

[131 Ky. 185, 114 S. W. 782.]

VENDOR AND PURCHASER—Acreage Sold Per Acre—Absolute Right for Shortage.—In a sale of land by the acre, the purchaser is entitled to recover the amount paid under his contract for such acres as the vendor could not convey owing to discrepancies between the conveyance and the actual survey. (p. 234.)

VENDOR AND PURCHASER—Acreage—Price on Sale in Gross—Qualified Right for Shortage.—When a specific tract of land is sold for a sum certain, it is called a sale in gross, and the parties are taken to have intended that any slight overplus or deficit of acres shall not be corrected, and relief will not be granted unless the discrepancy is so large as to be beyond the range of ordinary contingency. (p. 234.)

VENDOR AND PURCHASER—Expressed Acreage—Sale in Gross.—In gross sales of land, the idea that the parties did not intend to have every slight discrepancy accounted for is not repelled by the fact that the estimated number of acres is given. (p. 234.)

VENDOR AND PURCHASER—Sale in Gross—Discrepancy in Acreage—What will Warrant Interference by Court.—In a sale in gross of five hundred and sixty acres, a shortage of nine and seventeen hundredths acres, and in a sale in gross of four hundred and eighty-one acres, a shortage of fifty-six acres, have been held not to warrant the interference of the chancellor to correct the mistake. (p. 234.)

VENDOR AND PURCHASER—Sales in Gross—Different Kinds of.—Sales in gross are of three kinds: 1. Sales strictly by the tract without reference to acreage; 2. Sales strictly by the tract where the acreage is mentioned by way of description, tending to show an intention to risk the contingency of more or less; and 3. Sales in which extraneous circumstances show the intention not to risk more than the usual rates of excess or deficiency. (p. 235.)

EVIDENCE—Parol to Vary Contract.—A contract for the sale of land must be gathered from the writing; no outside conversation or oral statement can modify it except to impeach it for previous fraud or mistake. (p. 236.)

Benjamin F. Washer and Forcht & Field, for the appellant.

George du Relle, Bodley & Baskin and Helm Bruce, for the appellee.

187 BARKER, J. In 1902 Homer Hudson entered into a contract for the sale to Charles Anthony of two tracts of land, estimated to contain in the aggregate five hundred and sixty acres, situated in Illinois, for the sum of \$58,800. Afterward he executed a deed for the land, and the deed was placed in escrow until the purchase money should be paid. When the money was paid the deed was delivered, and the transaction apparently closed. Subsequently the vendee, Anthony, sold the land to different parties, and it was ascertained that there were nine and seventy-one hundredths acres short of five hundred and sixty acres as was supposed. As the sale was at the rate of \$105 per acre, this action was instituted to recover of the vendor's estate (he having since died) \$1,019.55, it being claimed by the plaintiff that this sum was paid under mistake of fact, he supposing there were five hundred and sixty acres in the land purchased by him.

The petition of plaintiff is bottomed on the theory that the purchase by him from Hudson was by the acre, and there being nine and seventeen hundredths acres less than was supposed by the parties, to that extent there was a failure of consideration, and he was entitled to recover the overpayment mentioned. The defense was based upon the theory that the transaction between the parties was a sale, not by the acre, but in gross, and that the purchaser agreed to pay, and did pay, \$58,800 for a given tract of land. The answer also **188** pleaded that the sale was an Illinois contract, and governed by the laws of that state, and that by the law of that state the transaction was one in gross, and not by the acre.

The contract and deed, in so far as they are necessary to illustrate the questions we have in hand, are as follows:

"CONTRACT.

"This agreement entered into this the 29th day of July, 1902, between Homer Hudson, of Covington, Ky., and Charles W. Anthony, of Tuscola, Ill., witnesseth: That the said Homer Hudson has sold to said Charles W. Anthony for \$58,800.00, being at the rate of \$105.00 per acre, the following described real estate, situated in the state of Illinois, described as follows:

"First: The northwest quarter, and the northwest quarter of the southeast quarter of section thirty-four (34) in township fifteen (15) north of range eight (8), east of third principal meridian, containing according to the United States survey two hundred (200) acres.

"Second. The northeast quarter, the northeast quarter of the southeast quarter and the southwest quarter of section thirty-four (34) in township fifteen (15) north of range eight (8) east of the third principal meridian, containing according to the United States survey, three hundred and sixty

(360) acres reserving from both above described tracts the right of way to the Illinois Central Railroad Company, two hundred (200) feet wide, where the track of said railroad has been laid over said land."

189 "DEED.

"Know all men by these presents: That Homer Hudson, widower, of Covington, Kentucky, for and in consideration of fifty-eight thousand eight hundred (\$58,800.00) dollars, to him paid by Charles W. Anthony, of Tuscola, Ill., the receipt whereof is hereby acknowledged, do hereby bargain, sell and convey to the said Charles W. Anthony, his heirs and assigns forever, the following described real estate, to-wit:

"Situated and being in the state of Illinois, and being the northwest quarter and the northwest quarter of the southeast quarter of section thirty-four (34) township fifteen (15), north of range eight (8), east of the third principal meridian, containing according to United States survey, two hundred (200) acres, being the property conveyed to the grantor by deed from the Illinois Central Railroad Company, record in book 14, page 196, of the records of the county of Douglas, state of Illinois. Situated in the state of Illinois, and described as follows: The northeast quarter of the southeast quarter and the southwest quarter of section thirty-four (34) in township fifteen (15) north of range eight (8) of the third principal meridian, containing, according to the United States survey, three hundred and sixty (360) acres; reserving, however, from both of said described tracts the right of way to the Illinois Central Railroad Company, two hundred (200) feet wide, where the track of said railroad has been laid over said land."

The chancellor held that the action was transitory and governed by the law of the forum, and the view we have taken of the remaining question precludes the necessity of examining the soundness of that view, although we do not mean to intimate that we disagree thereto, but merely that it is not necessary to consider it.

¹⁹⁰ We think the contract and deed made in consummation thereof both show clearly that the contract was for a sale and conveyance of tracts of land in gross, and not by the acre. The land is situated in Illinois, which state is laid off into townships, sections and quarter sections by the United States government survey, and the language used in both of the instruments of conveyance involved herein shows plainly that the vendor did not intend to sell the property by the acre; nor is there any statement that the tracts of land consisting of quarter sections, and parts of quarter sections, contained any given number of acres. The language is uniform throughout the writing, "containing according to United States survey" so many acres. This expression is used twice

in the contract and twice in the deed, and is invariably the same. Nowhere is it said, or intimated, that the vendor had any other knowledge of the number of acres than what appeared from the United States survey. And it is not disputed that according to the government survey there should have been five hundred and sixty acres in the tract sold, although it clearly appears that according to a correct survey there were nine and seventeen hundredths acres less than five hundred and sixty acres. Undoubtedly, if the transaction under consideration had been a sale by the acre, the vendee would be entitled to the relief he seeks; but a very different rule prevails on this point if the transaction be one for the sale of a specific tract of land, or, as it is called, a "sale in gross." In the latter class of sales the courts conclude that the parties did not intend to have slight variations, either of overplus or deficits, corrected, but that the contracts are made with a view to transfer a specific tract without reference to the particular number of acres; and relief will not be granted unless the difference between ¹⁹¹ the quantity believed to exist and that which is actually transferred is so gross as to be beyond the range of ordinary contingency.

This question arose in the case of *Young v. Craig*, 2 Bibb, 270, where, in the opinion of the court. Chief Justice Boyle set forth the distinction we have above stated. In the opinion it is said: "Contracts for the sale of land may be considered of two descriptions: First, where the sale is of a specific quantity, which is usually denominated 'a sale by the acre'; and, second, where the sale is of a specific tract, by name or description, each party risking the quantity. The latter, for the sake of brevity, is sometimes called 'a sale in gross.' It is evident that in a sale per acre much less variation from the quantity intended to be conveyed would afford evidence of a mistake which would justify the interposition of a court to correct it than would be sufficient for that purpose in a sale of the other description." The court then proceeds to say that in gross sales of land the idea that the parties did not intend to have every slight discrepancy accounted for is not repelled by the fact that the estimated number of acres is given. The exact language of the court upon this point is: "This idea is not repelled by the expression of the quantity of acres. On the contrary, it rather derives strength from the manner in which the quantity is mentioned; for it plainly indicates that the expression of quantity was used as matter of description only, and that it was the intention of the parties not to be confined to a precise and specific quantity." In the case above cited it was held that the sale was in gross, and that a difference between four hundred and eighty-one acres and four hundred and twenty-five acres did not warrant the interposition of the chancellor to correct the mistake.

In *Harrison v. Talbot*, 2 Dana, 258, Chief Justice ¹⁹² Robertson, in delivering the opinion of the court, said: "As was truly observed in *Young v. Craig*, 2 Bibb, 270, the equity of each case must depend on its own peculiar circumstances. The relative extent of the surplus or deficit cannot, per se, furnish an infallible criterion. The conduct of the parties, the date of the contract, the value and extent and locality of the land, the price, and other nameless circumstances are always important and generally decisive. Sales in gross may be subdivided into various subordinate classifications: First, sales strictly and essentially by the tract, without reference in the negotiation or in the consideration to any estimated or designated quantity of acres; second, sales of the like kind, in which, though a supposed quantity by estimation is mentioned or referred to in the contract, the reference was made only for the purpose of description, and under such circumstances or in such manner as to show that the parties intended to risk the contingency of quantity, whatever it might be, or how much soever it might exceed or fall short of that which was mentioned in the contract; third, sales in which it is evident from extraneous circumstances of locality, value, price, time and the conduct and conversations of the parties, that they did not contemplate or intend to risk more than the usual rates of excess or deficit in similar cases, or than such as might be reasonably calculated on as within the range of ordinary contingency; fourth, sales which, though technically deemed and denominated 'sales in gross,' are, in fact, sales by the acre, and so understood by the parties. Contracts belonging to either of the two first-mentioned classes, whether executed or executory, should not be modified by the chancellor when there has been no fraud. Such was the contract in the case of *Brown v. Parish*, lately decided by this court: 2 ¹⁹³ Dana, 6. But in sales of either of the latter kinds an unreasonable surplus or deficit may entitle the injured party to equitable relief, unless he has by his conduct waived or forfeited his equity." In the above case, although the sale was one in gross, a deficiency of ninety acres was held to be a deficit beyond the range of ordinary contingency.

In *Russell v. Phillips*, 15 Ky. Law Rep. 76, 22 S. W. 220, there was involved the right to a correction for deficiency in a sale of land in gross, and in the opinion the following excerpt from Warvelle on Vendors is quoted with approval: "Mere enumeration of quantity at the end of a particular description of the premises, where there has been no fraud or gross mistake, has ever been regarded as matter of description only, and not of the essence of the contract; and in such cases the purchaser is not entitled to an abatement of price because, on survey, the tract is found to contain a less number of acres than that specified: 2 Warvelle on Vendors, p. 925."

In Illinois, where the land involved is situated, the rule on the question in hand is thus stated in *Wadhams v. Swan*, 109 Ill. 46: "The general rule unquestionably is that, where a tract of land is sold for a sum in gross, by its proper numbers as indicated by government survey, or by any other specific description by which its exact boundaries are or may be determined, the boundaries to be thus ascertained, in case of a discrepancy, will control the description as to the quantity or number of acres, and in such case neither the purchaser nor the vendor will have a remedy against the other for any excess or deficiency in the quantity stated, unless such excess or deficiency is so great as to raise a presumption of fraud. It may be stated as a limitation on the above proposition that, ¹⁹⁴ assuming the parties to be acting in good faith, and that there has been no fraudulent misrepresentation of any kind, upon a sale of an entire tract of land by metes and bounds for a gross sum neither party will be bound by a statement as to the quantity or number of acres contained in the tract, except where such statement is expressly, or by necessary implication, made the essence of the contract. Of course, where the seller warrants the tract, either expressly or by necessary implication, to contain a certain number of acres, or, which amounts to the same thing, where the sale is by the acre and the seller makes a misrepresentation as to the number, the latter will, as in any other case of a breach of contract, be liable, and in an action by him for the purchase money, the amount of the deficit at the contract price may be recovered."

Applying the principle enunciated in the foregoing authority to the facts of this case, there cannot be a reasonable doubt that the chancellor decided the question before him correctly. The contract must be gathered from the writing. No outside conversation, or oral statement, which is not directed to the end of impeaching a writing for fraud or mistake, which takes place before the writing is executed, can explain, modify or change it. When the parties reduce their contract to writing, and there is no fraud or mistake in the words which express it, oral evidence is incompetent to change or modify it. Taking the writing as it stands, we have no doubt that the vendor did not intend to sell the land by the acre, but contemplated selling it by the government survey. The recitation that the gross amount of the purchase money was at the rate of \$105 per acre is a mere matter of description, and in nowise militates against the theory that it was the intention to sell in gross. So far as the practical ¹⁹⁵ situation was concerned, it was as if one should contract for a square of ground in a city, bounded by four named streets, with the recitation that the square was shown to contain ten acres of land by the city maps. In the case supposed no one would think that the parties intended, by the reference to the

city maps, to warrant that the square contained ten acres of land. No more is it to be concluded that where land is sold by reference to United States survey, calling in the description for the township, section, quarter section, and then reciting that the boundary is said to contain so many acres by the United States survey, will it be presumed that it was the intention to warrant that the boundary contains the number of acres shown by the government survey. The reference to the number of acres in the government survey is matter of description, and unless the discrepancy is so gross as to be beyond the range of ordinary contingency, the chancellor will refuse to interpose for the purpose of correction.

The cases cited by the appellant are applicable to a state of case where the sales were by the acre, or the amount of the land was expressly warranted, and they are inapposite to the question before us.

For these reasons the judgment of the chancellor in dismissing the petition is affirmed.

Where a Contract of Purchase Calls for a Certain Number of Acres out of a larger tract, without other description, the vendee may assume that his deed, which describes an irregular tract by metes and bounds, conveys the quantity of land specified in the contract, and if there proves to be a deficiency in the area, he is entitled to damages although he has accepted the deed: Woody v. Benton Water Co., 54 Wash. 124, 132 Am. St. Rep. 1102.

The Employment of the Words "More or Less," in a Contract to Convey Land, does not relieve the vendor or the vendee, as the case may be, from the obligation to make compensation for an excess or deficiency beyond what may be reasonably attributed to small errors from variations of instrument or otherwise, unless there is evidence to show that a contract of hazard was intended: Epes v. Saunders, 109 Va. 99, 132 Am. St. Rep. 904. See, also, Frenche v. Chancellor of New Jersey, 51 N. J. Eq. 624, 40 Am. St. Rep. 548; Oakes v. De Lancey, 133 N. Y. 227, 28 Am. St. Rep. 628.

PALMER TRANSFER COMPANY v. ANDERSON.

[131 Ky. 217, 115 S. W. 182.]

CARRIERS—Unauthorized Grant of Cab, Bus, and Transfer Monopoly.—A regulation of a railroad that discriminates by driving from its depot those who are engaged in a public employment and whose duty it is to provide for the traveling public, resulting in a monopoly of the particular business, is unauthorized by the charter of the company and in violation of the rights of others. (p. 240.)

Wheeler, Hughes & Berry, for the appellant.

Bradshaw & Bradshaw, for the appellee.

219 CLAY, C. Plaintiff, Harry Anderson, the owner of a line of cabs, busses and baggage wagons in the city of Pa-

ducah, instituted this action against the defendant, Palmer Transfer Company, a corporation engaged in a similar business, to enjoin the latter from interfering with him in the use of a certain plot of ground adjoining the approach to the Union Depot in Paducah, and also to recover damages for being deprived of the right to use the plot of ground. Defendant's demurrer to the petition being overruled, it then filed answer, denying the allegations of the petition and claiming that it had the right to use the plot of ground in question under and by virtue of a contract which it made with the Illinois Central Railroad Company, by the terms of which it agreed to meet all incoming and outgoing trains with its cabs and busses, and serve the traveling public in an orderly manner, and further bound itself to transport passengers and baggage from all parts of the city of Paducah at the rate of twenty-five cents for each passenger and twenty-five cents for each piece of baggage, and also to perform certain other covenants mentioned in the contract, all of which defendant alleged it had fully and faithfully performed. By reply plaintiff alleged that the contract between the defendant and the railroad company gave to the defendant the exclusive use of a large part of the approach lying nearest to the depot and best equipped with improved walks, and thereby gave to the defendant a monopoly of the passenger and baggage carrying business to and from the depot, that on this account the contract relied upon by the defendant ²²⁰ was against public policy, and therefore null and void. By amended petition, the plaintiff also charged that it was the duty of the railroad company to provide comfortable and convenient accommodations for the traveling public, and that it had failed to perform that duty to the public by granting the contract in controversy which created a practical monopoly of the passenger and baggage carrying business. Depositions were taken, and the case submitted to the chancellor, who granted the injunction prayed for by plaintiff, but declined to give him any damages. From that judgment the Palmer Transfer Company prosecutes this appeal.

The facts in this case are as follows: The Illinois Central Railroad Company and the Nashville, Chattanooga and St. Louis Railway Company have a union station in the city of Paducah. Leading southward from Caldwell street toward the depot building there is a roadway or approach sixty-four feet wide and three hundred and fifteen feet long. A platform or walkway extends along the south end of the roadway its entire width—sixty-four feet. A sidewalk or platform of gravel or crushed stone, fifteen feet in width, with concrete or stone curb, extends along the west side of the roadway its entire length of three hundred and fifteen feet. The roadway and the depot are between the main tracks of the two railroad companies. The passengers board or alight from the

Illinois Central trains on the west side of the depot and roadway, and from the Nashville, Chattanooga and St. Louis trains on the east side thereof. The space occupied by the Palmer Transfer Company is on the west side of the roadway. This space is thirty-two feet wide, and extends from the south end of the roadway toward Caldwell street one hundred and fifty feet. The space being taken out of the driveway leaves thirty-two feet on the east side and one hundred and fifteen feet on the west ²²¹ side that is open to public use. Out of the thirty-two feet, however, about eight feet is occupied by the street-car line, and, taking into consideration the danger of being near the street-car line or the railroad tracks, the space left next to the depot building is about twenty feet. This twenty feet is fairly convenient of access and approach to the Nashville, Chattanooga and St. Louis trains, but by far the larger portion of the traffic to and from the union depot is over the tracks of the Illinois Central. In order for passengers from the Illinois Central to reach the cabs or busses of those transfer men who are not permitted to occupy the space in question, they must proceed down the platform and pass by the cabs or busses of the Palmer Transfer Company for a space of one hundred and fifty feet.

Plaintiff Anderson testified that he had on an average three cabs to meet trains at the union station, and that the Palmer Transfer Company had four; that it was much more convenient for passengers leaving the union station to use the carriages of the Palmer Transfer Company because these carriages were closer, and a portion of the approach set aside for that company had a gravel walkway along its entire length, from which passengers could step into its carriages; that this walkway was not constructed by the Palmer Transfer Company for its own convenience, but was a part of the general depot improvements and conveniences provided by the railroad company for the public; that, in order for a passenger to get to the carriages of the appellee or any other cabmen except the Palmer Transfer Company, they would have to walk a distance of one hundred and fifty feet past a long line of carriages of appellant; and that, under ordinary circumstances, no passenger would do this. He further stated that he had been in the transfer business since ²²² May, 1902, during all of which time the Palmer Transfer Company had excluded him from the use of that portion of the approach in controversy, and that his loss on this account amounted to at least two dollars per day up to the day of filing the suit. The witness further testified to the fact that the Palmer Transfer Company had changed the post dividing the space occupied by it from the rest of the roadway, and he was denied admittance to the space so occupied by it, and upon one occasion when he had entered this space a warrant was issued against him by the officers of the Palmer Transfer Company.

For the defendant, R. L. Palmer testified that his company had transfer agents on the various trains, and that the principal part of his business consisted in carrying passengers and the baggage of passengers who had previously contracted with its train agents. Witness produced the contracts between his company and the railroad companies, and made them a part of his deposition. He stated that there was plenty of room for the busses and wagons of other transfer agents to occupy. Witness further testified that his company might secure more business by having the contracts giving the company the right to occupy the place in dispute.

In the case of *McConnell v. Pedigo & Hays*, 92 Ky. 465, 13 Ky. Law Rep. 689, 18 S. W. 15, this court had under consideration a question similar to the one involved in the case at bar. In that case the railroad company granted to McConnell, to the exclusion of all other persons engaged in a like business, the right to come upon its depot grounds in Glasgow, Kentucky, with his vehicles for the purpose of receiving and depositing passengers and freight. The contract was being carried out by McConnell when the firm of Pedigo & ²²³ Hays undertook to transfer passengers to and from the depot, and claimed the right to stand their hacks upon the grounds near and at the depot, when in so doing they did not interfere with the business of the railroad company. McConnell sought an injunction against Pedigo & Hays, and, his petition being dismissed, he appealed to this court. It was here held that a regulation of a railroad that discriminates by driving from its depot those who are engaged in a public employment and whose duty it is to provide for their guests and the traveling public, resulting in a monopoly of the particular business, is unauthorized by the charter of a railroad company, and in palpable violation of the rights of others. While it may be admitted that the English rule and the rule of several other states is different from that announced above (*Barker v. Midland Ry. Co.*, 86 Eng. Com. L. 46; *Old Colony R. R. Co. v. Tripp*, 147 Mass. 35, 9 Am. St. Rep. 661, 17 N. E. 89; *Hedding v. Gallagher*, 72 N. H. 377, 57 Atl. 225, 64 L. R. A. 811), yet the courts of several states hold to the view adopted by this court (*Montana Union Ry. Co. v. Langlois*, 9 Mont. 419, 18 Am. St. Rep. 745, 24 Pac. 209, 8 L. R. A. 753; *Kalamazoo Cab & Buss Co. v. Sootsma*, 84 Mich. 194, 22 Am. St. Rep. 693, 47 N. W. 667, 10 L. R. A. 819), and in the recent case of *Indianapolis Ry. Co. v. Dohn*, 153 Ind. 10, 74 Am. St. Rep. 274, 53 N. E. 937, 45 L. R. A. 427, the case of *McConnell v. Pedigo & Hays*, 92 Ky. 465, 13 Ky. Law Rep. 689, 18 S. W. 15, was cited with approval. That being the case, we see no reason for changing the rule announced by this court.

Counsel for appellant, however, insist that the rule laid down in the case of *McConnell v. Pedigo & Hays*, has no ap-

plication to this case, because abundant space is left for Anderson and other hackmen, and ²²⁴ that the contracts between appellant and the railroad companies do not create a monopoly. We confess, however, that we are unable to differentiate this case from that cited. While there is some space still left for Anderson and the other hackmen to occupy, it is so inconveniently located with reference to the larger part of the business of carrying passengers and baggage that the giving to appellant of the space occupied by it constitutes such a preference over other transfer men as to afford it a practical monopoly of the business. There is, in effect, no difference between giving a transfer company the exclusive right to occupy the depot grounds and the right to occupy that portion thereof which necessarily results in its securing by far the larger share of the business. We therefore conclude that appellant's contracts, operating as they do to give it a practical monopoly, are null and void, and that appellant has no right to occupy the space in question to the exclusion of appellee and other hackmen.

We are inclined to the opinion that the chancellor did not err in refusing to allow the plaintiff damages.

For the reasons given, the judgment is affirmed.

The Right of a Railroad Company to Grant an Exclusive Privilege to certain hackmen to enter its premises in order to ply their vocation is discussed in the note to Kalamazoo Hack & Bus Co. v. Sootsma, 22 Am. St. Rep. 699. Some authorities take the view that a railway company has such right or authority: Union Depot & Ry. Co. v. Meeking, 42 Colo. 89, 126 Am. St. Rep. 145; New York etc. R. R. Co. v. Scovill, 71 Conn. 136, 71 Am. St. Rep. 159; other authorities, however, appear to take a contrary view: State v. Reed, 76 Miss. 211, 71 Am. St. Rep. 528; Hedding v. Gallagher, 69 N. H. 650, 76 Am. St. Rep. 204.

SOUTHERN EXPRESS COMPANY v. FOX & LOGAN.

[131 Ky. 257, 115 S. W. 184, 117 S. W. 270.]

CARRIERS—Limitation of Liability for Goods.—The Constitution, section 196, provides that no common carrier shall contract for relief from his common-law liability, and therefore a contract fixing the freight and the carrier's liability according to a sliding scale on the declared value of the goods to be shipped is void, and the common-law liability remains. (pp. 243, 244.)

FRAUD—Action for Deceit.—To Maintain an action for deceit, the statement relied on must be false, and be made with actual or constructive knowledge of its falsity, and it must also be shown that it actually did mislead or deceive. (p. 243.)

CARRIERS—Measure of Damages—Deceit by Shipper.—If a transportation contract is illegal by statute, the common-law liability

of the contractor arises, unless the shipper deceives him or the facts constitute an estoppel. (p. 244.)

CARRIERS—Animals.—The Rule is that a carrier is liable for animals just as he is for goods carried, except that he is not liable for loss or injury resulting from the inherent nature, propensity, or proper vices of the animals themselves. (p. 246.)

CARRIER—Animals—Safe Transportation.—A stall provided by a carrier of horses is reasonably safe when it is such as a person of ordinary prudence would provide. (p. 246.)

CARRIER—Animals—Safe Transportation—Evidence of Care. A carrier of horses may show, by persons qualified to know, that a stall built to hold a horse during transportation was put up in the usual and customary method of erecting stalls for the shipment of horses, and that it was reasonably safe for that purpose. (p. 246.)

PRINCIPAL AND AGENT—Admissions of Agent.—What a shipping agent says while shipping goods is competent against his principal as part of the *res gestae*; his statements after they have left his possession are not. (p. 247.)

Shelby & Shelby, for the appellant.

Robert Harding, E. V. Puryear and Allen & Duncan, for the appellee.

259 **HOBSON, J.** On February 21, 1905, Fox & Logan delivered to the Southern Express Company at Donerail, Kentucky, sixteen horses to be carried to Memphis, Tennessee, in a car. Among the horses was one called Emily Letcher, valued at several thousand dollars. During the shipment the stall in which she was placed fell down, and she was seriously injured. They then brought this suit against the express company to recover \$2,000, which they alleged was the amount she was damaged. Upon a trial of the case the jury found for the plaintiffs the amount sued for, and the defendant appeals.

The defendant, by the third paragraph of its answer, alleged that the shipper, before the contract of shipment was made, demanded to be advised of the rates to be charged for the carriage of the animals, and was thereupon offered by the defendant alternative rates proportioned to the value of the animals; that the defendant offered to transport the animals for \$254.50 if their value did not exceed \$75 each, and informed the shipper that, if the animals were worth more than \$75 each, an addition of ten per cent of the excess valuation over \$75 would be made; that the shipper, being asked to value the property for the purpose of enabling the defendant to fix the freight ²⁶⁰ charges, declared that the sixteen animals were of value \$75 each; that the defendant did not know and had no means of estimating the actual value of the animals, and was compelled to rely, and did rely, in fixing its freight charges upon the valuation fixed by the shipper; that the actual value of the mare was known to the shipper, and was unknown to it; that to procure the reduced rate, the shipper stated the mare was not worth over \$75; and that, rely-

ing upon this statement, it undertook to transport the animal for \$15, or one-sixteenth of the entire charge. The circuit court sustained a demurrer to this paragraph of the answer. The defendant thereupon filed an amended answer, in which it alleged that the shipper's statement that the sixteen animals were of value \$75 each was falsely and fraudulently made by him for the purpose of enabling him to obtain from the defendant the low rate; that the shipper knew the value of the animals, and knew that the defendant did not know, and had no means of estimating, their actual value, and that it was compelled to rely, and did rely, in fixing its freight charges upon the valuation as given by him; that, by reason of the false and fraudulent statements of the shipper, it was induced to assume, and did assume, the risks involved in the transportation of the mare for much less than it was reasonably entitled to charge and would have charged if the truth had been made known to it. It pleaded that, by reason of these facts, the plaintiffs were estopped to claim that the mare was worth more than \$75 at the time of the shipment, or to recover more than \$75 on account of her injuries. The court sustained a demurrer to the answer as amended; and the propriety of this ruling is the first question to be determined on the appeal.

²⁶¹ The constitution provides: "No common carrier shall be permitted to contract for relief from its common-law liability": Const., sec. 196. In *Adams Express Co. v. Walker*, 119 Ky. 121, 26 Ky. Law Rep. 1025, 83 S. W. 106, 67 L. R. A. 412, this court held that under our constitution contracts limiting the common-law liability of a carrier in this state are void. In concluding the opinion, the court said: "In the absence of a special contract, it would not be maintained that the defendant is not liable for the value of the dog lost. But our constitution declares the contract limiting this liability void. So the contract is as though it had not been made, and the defendant is liable, unless sufficient facts are shown independently of the special contract to avoid the contract for fraud or to create an estoppel at common law." The court adheres to the rule thus laid down. The special contract is void. It is as though it had not been made, but it does not follow that the shipper may recover the value of the animal if he deceived the defendant as to the value of the animal or practiced a fraud upon him. Estoppels apply in this class of actions as in all others. The question then is: Do the allegations of the answer show facts sufficient to make out a case of deceit or to create an estoppel at common law? In the *Walker* case the answer did not show that the defendant relied upon the statements of the shipper, or that it was deceived by any statements that the shipper made. It is well settled that, to maintain a cause of action for deceit, the statement relied on must be false, and must

be made with actual or constructive knowledge of its falsity, and that it must also be shown that it actually did mislead or deceive: 14 Am. & Eng. Ency. of Law, 86, 106; 20 Cyc. 14, 32. There can be no relief for deceit unless the party complaining ²⁶² was deceived: See 2 Chitty on Pleading, Common-law Forms, side pp. 683-687. The answer in the Walker case did not show that the express company was in fact deceived by any statement made by Walker. The essentials of an estoppel are thus stated in Pomeroy's Equity, section 805: "1. There must be conduct—acts, language, or silence—amounting to a representation or a concealment of material facts. 2. These facts must be known to the party estopped at the time of his said conduct, or, at least, the circumstances must be such that knowledge of them is necessarily imputed to him. 3. The truth concerning these facts must be unknown to the other party claiming the benefit of the estoppel at the time when such conduct was done, and at the time when it was acted upon by him. 4. The conduct must be done with the intention, or at least with the expectation, that it will be acted upon by the other party, or under such circumstances that it is both natural and probable that it will be so acted upon." The answer in the Walker case did not show that the statement of the shipper was relied on by the express company. In that case, though the dog was valued at \$50, the carrier's liability was limited to \$25 by the contract relied on. There was no allegation that the carrier did not know the dog was worth over \$50. In fact, taking the answer as a whole, it was a plea of the special contract simply and of the estoppel arising from the contract. A shipper who makes a contract for the carriage of his goods at a reduced rate, upon a low valuation fixed by himself stipulating that such valuation shall be the limit of the carrier's liability, is bound by the contract where such a contract is legal; but, where the contract is illegal, the carrier's common-law liability remains, unless the shipper deceives him or the facts ²⁶³ shown constitute an estoppel as above defined. If the carrier in the case at bar was not deceived as to the value of the horses, if he knew that they were worth more than \$75, and yet took them to carry at the low rate, to permit him to avoid his common-law liability by pleading the contract would be in effect to treat the contract as valid. Although the carrier did not know the actual value of the horses, still, if he in fact knew that they were worth more than \$75, it cannot be said that he was deceived by the statement of the shipper, and no estoppel would in that event arise in his favor; for an estoppel never arises where the party pleading the estoppel knew the statement to be untrue. The answer in the case at bar does show that the carrier relied upon the statement of the shipper, and that it did not know the actual value of the animals; that the

statement was made for the purpose of influencing its conduct and was fraudulently made for that purpose. But it does not show that the carrier did not know that the animals were of value more than \$75, or that it was deceived or misled as to the value of the animals by the statement which the shipper made. An estoppel must be pleaded strictly. If a carrier, where he knows the property is worth more, may carry it at a reduced rate in consideration of a low valuation by the owner, and thus escape liability beyond the value, so fixed, the constitutional provision might in all cases be evaded. This is not the case of a sealed package or closed box. It was a shipment of sixteen racehorses. Racehorses are not ordinarily sold at \$75 each. A man might not know the actual value of a racehorse, and yet very well know that it was worth over \$75. The answer is not sufficient, but on the return of the case to the circuit court the defendant may be allowed to amend its ²⁶⁴ answer, if it desires to do so.

The defendant asked the court to give the jury this instruction: "If the jury believe from the evidence that the injury to the mare, Emily Letcher, complained of was directly and proximately caused, not by a defect in the stalling, but by her becoming frightened and in consequence of such fright, kicking loose the stalls and other appliances, they should find for the defendant." The court refused to give the instruction, and gave the jury these instructions:

"If the jury believe from the evidence that the stall in which the mare Emily Letcher was shipped was defective in its material, or in its construction, or both, and that by reason of such defectiveness in construction or material, or both, said stall fell and by such falling caused said mare to be injured, the jury should find for the plaintiff, unless the jury believe from the evidence that said stall was caused to fall by reason of some unusually vicious or unruly propensity of said mare, and that but for such unruly or vicious propensity said stall would not have fallen.

"If the stall in which the mare, Emily Letcher, was shipped, was defective in its material or construction, but was such a stall as was reasonably safe for the shipment of horses, yet the jury should find for the defendant if the jury believe from the evidence that said mare possessed some unusually vicious or unruly propensity, and that through said propensity said stall was caused to fall when but for such propensity said stall would not have fallen."

If the stall was reasonably safe for the shipment of horses, the defendant is not responsible if the mare became frightened, and in consequence of such fright kicked loose the stall, and thus caused her injury. It was incumbent on the carrier to furnish a stall that ²⁶⁵ was reasonably safe for the shipment of horses, and, if it did this, it is not liable for an injury to the mare brought about by the act of the mare in

kicking down a reasonably safe stall from fright, although the mare was not unusually vicious or of an unruly propensity. The rule is that the carrier is liable for animals just as he is for goods carried, except that he is not liable for loss or injury "resulting from the inherent nature, propensity, or proper vices of the animals themselves": *Louisville & N. R. R. Co. v. Pedigo*, 129 Ky. 661, 113 S. W. 116, and cases cited. If the mare was injured by reason of the fall of the stall, the defendant is liable, unless the fall of the stall was due to the act of the mare; and, if it was due to her act, the defendant is not liable unless it furnished a stall that was not reasonably safe. A horse that is ordinarily quiet and well disposed will sometimes, when frantic from fright, injure himself or break down barriers reasonably sufficient. For the consequences of the act of the horse the defendant is not liable unless it failed to furnish a stall that was reasonably safe. The court on another trial will instruct the jury as above indicated. Instruction 5 is as follows: "If the jury find for the plaintiffs, they should find for them in such sum in damages, not exceeding \$2,000, as is the difference between the market value of the mare, Emily Letcher, before she was injured and the market value of said mare immediately after she was injured." The court will add to this instruction these words: "The condition of the mare immediately after she was injured will be determined in the light of the testimony as to her condition after the extent of her injury was ascertained."

Judgment reversed, and cause remanded for a new trial.

266 EXTENDED OPINION—JANUARY 8, 1909.

1. A stall is reasonably safe when it is such as a person of ordinary prudence would provide. The defendant may show, by persons qualified to know, that the stall in question was put up in the usual and customary method of erecting stalls for the shipment of horses, and that it was reasonably safe for that purpose.

2. The defendant offered to prove by J. W. Bondurant that, after the horses had been at Memphis some days, he met Benyon, who was then in charge of the horses, and Benyon then told him they were all right. It is insisted that this testimony of Bondurant was binding upon the plaintiffs as an admission, and was competent for this purpose as substantive evidence. In *Greenleaf on Evidence*, section 113, the rule is thus stated: "The party's own admission, whenever made, may be given in evidence against him; but the admission or declaration of his agent binds him only when it is made during the continuance of the agency in regard to a transaction then depending, *et dum fervet opus*. It is because it is a verbal act, and part of the *res gestae*, that it is admissible at all, and therefore it is not necessary to call

the agent himself to prove it; but, wherever what he did is admissible in evidence, then it is competent to prove what he said about the act while he was doing it, and it follows that, where his right to act in the particular matter in question has ceased, the principal can no longer be affected by his declarations, they being merely hearsay."

The same rule has often been announced by this court. Thus, in *Reed v. Brooks*, 13 Ky. (3 Litt.) 127, the court ²⁶⁷ said: "The confessions of an agent cannot be admitted as proof either of his agency or of acts done by him as agent. Where what an agent says is part of the *res gestae*, it may be proved as any other act of his agency may be; but the confessions offered to be proved in this case were evidently not of that character." In *Roberts v. Burks*, 16 Ky. (Litt. Sel. Cas.) 411, 12 Am. Dec. 325, the court said: "The principle that the declarations or confessions of an agent, except they be made at the time and compose a part of acts done by him for his principal, within the scope of his authority, cannot be given in evidence to charge the principal, is too well settled to need authority to support it. The confessions of the agents in this case do not appear to have been made at the time of doing the acts, nor does it appear that they were executing any authority given them, except by their own declarations." These principles have been often since applied by the court.

Benyon was an agent of the plaintiffs to ship the horses. What he said in shipping them is competent against the plaintiffs; but what he said in Memphis, after the horses reached their destination, is no more competent against the plaintiffs as substantive evidence than the declarations of a livery-stable keeper would be to whose keeping the horses had been intrusted after they reached Memphis. In talking to Bondurant as to how the horses were, Benyon did not represent the plaintiffs, and what he said is only competent to contradict him as a witness.

3. For the same reason, the statement of McManus, offered to be proved by J. W. Gartrell, to the effect that Emily Letcher always gave him trouble, and that if she became unmanageable he would jump out of the car to get out of her way, if it was going forty miles an ²⁶⁸ hour, was incompetent. This statement of McManus was in no sense a part of the *res gestae*.

The opinion is extended as above indicated.

The Liability of Carriers of Livestock for loss or injury to the animals is the subject of a note to *Stiles v. Louisville etc. R. R. Co.*, 130 Am. St. Rep. 432. The question is further discussed in the notes to *Heller v. Chicago etc. Ry. Co.*, 63 Am. St. Rep. 548; *Clarke v. Rochester etc. R. R. Co.*, 67 Am. Dec. 208; and in the recent case of *Summerlin v. Seaboard Air Line Ry.*, 56 Fla. 687, 131 Am. St. Rep. 164.

The Limitation of Carriers' Liability in Bills of Lading is the subject of a note to *Chicago etc. Ry. Co. v. Calumet etc. Farm*, 88 Am. St. Rep. 74. A common carrier may, by agreement, limit its common-law liability, but not its liability for the consequences of its own negligence: *Baker v. Boston etc. R. R.*, 74 N. H. 100, 124 Am. St. Rep. 937; *Eckert v. Pennsylvania R. R. Co.*, 211 Pa. 267, 107 Am. St. Rep. 571; *Fisher v. Boston etc. R. R. Co.*, 99 Me. 338, 105 Am. St. Rep. 283.

A Common Carrier may Make a Valid Agreement With a Shipper as to the value of property to be transported, and thus limit his liability for loss to the amount agreed upon: *Central of Georgia Ry. Co. v. Hall*, 124 Ga. 322, 110 Am. St. Rep. 170. But the limitation must be reasonable and the value agreed upon must bear some proportion to the actual value: *Southern Express Co. v. Owens*, 146 Ala. 412, 119 Am. St. Rep. 41; *Southern Express Co. v. Marks*, 87 Miss. 656, 112 Am. St. Rep. 466; *Nashville etc. Ry. Co. v. Stone*, 112 Tenn. 348, 105 Am. St. Rep. 955.

HARDIMAN'S ADMINISTRATOR v. CRICK.

[131 Ky. 358, 115 S. W. 236.]

WORK AND LABOR—Gratuitous Services—Degree of Relationship.—The relationship of stepson in law and stepmother in law is too remote to create the presumption that services rendered were gratuitous, and the rule requiring stricter proof of a contract between them than in ordinary cases does not apply. (p. 249.)

HUSBAND AND WIFE—Wife's Contract.—Kentucky Statutes of 1903, section 2128, authorize married women to contract as though single, except as to real property; section 2137 makes her estate liable for debts contracted by her after marriage. Her liability on a contract for services to be rendered is unaffected by section 2130, which provides for the husband's liability for necessities furnished to the wife after marriage. (p. 249.)

Gordon, Gordon & Cox, for the appellant.

Waddell & Dempsey, for the appellee.

360 CLAY, C. Plaintiff. William Crick, brought this suit to recover from the estate of Martha S. Hardiman, deceased, the sum of \$500 for services which he claims to have performed under a contract with Mrs. Hardiman, from November, 1901, to April, 1902. These services consisted in moving Mrs. Hardiman from her home to plaintiff's home, and taking care of and nursing her and feeding certain stock. The petition states that the estate of M. S. Hardiman is justly indebted to plaintiff in the sum of \$500 under contract entered into between M. S. Hardiman and plaintiff for certain services, setting them forth. It then says that said services were rendered to said M. S. Hardiman by plaintiff within five years last past, at her special instance and request, and for which she expressly promised to pay plaintiff the reasonable value thereof, which was not less than \$500. There

were two trials of this case. The first resulted in a verdict in favor of plaintiff for \$352, which was set aside by the trial judge. The second trial resulted in a verdict and judgment for plaintiff in the sum of \$287.50. From this last judgment this appeal is prosecuted.

Mrs. Hardiman, whose estate is sought to be ³⁶¹ charged in this action, was the second wife of George W. Hardiman, and a stepmother of plaintiff's wife. The claim, therefore, is one by plaintiff against his stepmother in law. According to the testimony of three or four witnesses, Mrs. Hardiman told the plaintiff that, if he would come and move them from Barnsley to his home, and keep them, she would pay plaintiff well for it. Plaintiff filed an itemized statement showing the character and kind of services rendered by him in conformity with the agreement alleged to have been made between him and Mrs. Hardiman.

Appellant contends that the demurrer to the petition should have been sustained. We are of the opinion, however, that any defect in the petition was cured by the answer and verdict.

It is next insisted that this case falls under the rule laid down in *Price v. Price's Exr.*, 101 Ky. 28, 19 Ky. Law Rep. 211, 39 S. W. 429, and other cases of this court, holding that, where the relationship between the parties is such as to raise the legal presumption that they lived together as a matter of mutual convenience, the law will not imply a promise of compensation, but that much stricter proof will be required to establish a contract to pay than would be required between strangers; that under this rule the proof in this case is not sufficient, and the jury should have been peremptorily instructed to find for the defendant. The relationship in this case was that of stepson in law and stepmother in law. In our opinion this relationship is entirely too remote to create the presumption that the services rendered by plaintiff were a mere gratuity. That being the case, the rule requiring stricter proof of the contract than in ordinary cases does not apply. We think there was sufficient proof of an express promise on the part of ³⁶² Mrs. Hardiman to pay the plaintiff, and we are confirmed in this view by the verdicts of two juries who reached the same conclusion.

Nor do we think there is anything in appellant's contention to the effect that Mrs. Hardiman's contract was invalid because, under section 2130 of the Kentucky Statutes of 1903, the husband is made liable for necessities furnished to the wife after marriage. This may be true, but it does not deprive the wife of the power to make a contract to pay for such necessities. By section 2128 of the Kentucky Statutes of 1903, she is empowered to make contracts and sue and be sued, as a single woman, except that she may not make

any executory contract to sell or convey or mortgage her real estate, unless her husband join in such contract. By section 2137, her estate is made liable for her debts and responsibilities contracted after marriage. Having the power to contract, and having made the contract to pay for the services rendered by plaintiff, her liability to him is not in any wise affected by the fact that the law imposes upon her husband as between him and his wife the primary obligation to pay for necessities furnished her.

The instructions to the jury fairly embodied the issues involved, and, upon a consideration of the whole case, we are unable to find any error prejudicial to the substantial rights of appellant.

Wherefore the judgment is affirmed.

THE PRESUMPTION OF GRATUITOUS SERVICES BY RELATIONS.

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- a. Adopted Children, 256.
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I. Introductory.

The proposition that for services rendered by one to another the law implies a promise to pay has several exceptions, among which are those cases falling within the limits of services rendered by members of a family and near and certain distant relations, connected either by consanguinity or affinity, who are residing under the one roof. The reason for these exceptions is founded on a legal presumption that where parties, who are related, live together as a matter of mutual convenience, the law will not imply a promise of compensation for services rendered. And although that presumption exists in the cases referred to, and which are to be the subject matter of this note, it must be borne in mind such presumption is not peculiar to that relationship. It all goes back to the contractual intention. If one renders a service to another without intending to charge for it—to ask for compensation—or to lay the foundation for a legal liability, resting merely in the satisfaction which the performance of a kindly gratuitous act entails, then, no matter what construction is put upon the other's expressions of gratitude—whether they are mistakenly regarded in the light of “a lively sense of favors

to come" or not—whether in the hope of some proportionate or disproportionate return—the doer of the act is not legally entitled to any compensation, if his expectations are not realized: *Castle v. Edwards*, 63 Mo. App. 564; *Swires v. Parsons*, 5 Watts & S. (Pa.) 357.

Such being the law between strangers, a fortiori the claims of members of a family for compensation for services rendered, the one to the other, must be established on a still wider and firmer basis, and we shall demonstrate that the presumption that the services rendered by or between those near and sometimes those distantly related, who are living together, are gratuitous is so strong, that no chance of rebuttal can be discerned save by the crystal light of an express contract, the power of which must be raised still higher if the claim is made after the death of the alleged debtor. In the case of adult children, a contract may be inferred from surrounding circumstances. We do not propose to illustrate the axiom of such nudum pactum claims as those of husband or wife against each other, or the claims of those who intended to marry and did not, although there are cases extant on both points. The case of *Lapworth v. Leach*, 79 Mich. 16, 44 N. W. 338, lays down that as between husband and wife the presumption exists that their mutual services are gratuitous, and that the mother cannot recover for the support, care or education of the family by her without proving an express contract to that effect; and *La Fontain v. Hayhurst*, 89 Me. 388, 56 Am. St. Rep. 430, 36 Atl. 623, and *Clary v. Clary*, 93 Me. 220, 44 Atl. 921, decide that a person who renders services to another under promise and in expectation of marriage with the latter, but without promise or expectation of compensation in money or money's worth, cannot, upon the breach of the promise, recover the value of such services in *assumpsit*, the only remedy, if any, being an action for the breach of the contract to marry.

"The presumption is rebuttable, and it has been held error when evidence has been introduced to show that there was an understanding for compensation to charge that there was a presumption of law against such claim. The force of the presumption has been held to depend upon the relationship of the parties, the presumption becoming 'weaker and therefore more easily rebutted as the relationship recedes.' It is for the person alleging that such mutual services were not gratuitous to prove the fact": 2 Page on Contracts, sec. 784.

II. Services Rendered by Blood Relations.

a. **Parent and Infant Child.**—It cannot be alleged that such household services as are rendered by members of the same family are so rendered in the expectation of reward. In *Birch v. Birch*, 112 Mo. App. 157, 86 S. W. 1106, "family" is defined as a collective body of persons, who live in one home under one head or management. The services are performed for the most part from motives of affection, and for the rest from motives of mutual convenience. The child waits upon and performs services for the parent from the affection inspired by the relation, and the parent naturally performs services for the progeny. The motives that inspire these displays need not be inquired into; they are beyond the scope of this inquiry, and it matters not whether they are suggested by affection, convenience or the desire to educate the child or relieve the parent, the rendering of such service brings in its train no liability pecuniarily

for its performance. The services rendered were so rendered without any implied condition of reward, and were so accepted, and therefore could not possibly create a contract. The law is clear that when the relation of the parties negatives the idea that payment was to be expected for the services rendered, no compensation can be recovered: *Morris v. Simpson*, 3 Houst. 568; *Poole v. Baggett*, 110 Ga. 822, 36 S. E. 86; *McNemar v. McNemar*, 137 Ill. App. 504; *Finch v. Green*, 225 Ill. 304, 80 N. E. 318; *Reeve's Estate v. Moore*, 4 Ind. App. 492, 31 N. E. 44; *Collins v. Williams*, 21 Ind. App. 227, 52 N. E. 92; *Tank v. Rohweder*, 98 Iowa, 154, 67 N. W. 106; *In re Bishop's Estate*, 130 Iowa, 250, 106 N. W. 637; *Coleman v. Simpson*, 2 Dana (Ky.), 166; *Turner's Admr. v. Turner* (Ky.), 38 S. W. 506; *Conway v. Conway*, 130 Ky. 218, 113 S. W. 94; *Bixler v. Sellman*, 77 Md. 494, 27 Atl. 137; *Lowe v. Lowe*, 111 Md. 113, 73 Atl. 878; *Harris v. Harris*, 106 Mich. 246, 64 N. W. 15; *Baxter v. Gale*, 74 Minn. 36, 76 N. W. 954; *Louder v. Hart*, 52 Mo. App. 377; *Birch v. Birch*, 112 Mo. App. 157, 86 S. W. 1106; *Moore v. Moore*, 58 Neb. 268, 78 N. W. 495; *Page v. Page*, 73 N. H. 305, 61 Atl. 356, 6 Ann. Cas. 510; *In re Cooper*, 6 Misc. Rep. 501, 27 N. Y. Supp. 425; *In re Sworthout's Estate*, 38 Misc. Rep. 56, 76 N. Y. Supp. 961; *Barhite's Appeal*, 126 Pa. 404, 17 Atl. 617; *Dash v. Inabniet*, 53 S. C. 382, 31 S. E. 297; *Gorrell v. Taylor*, 107 Tenn. 568, 64 S. W. 888; *Beale v. Hall*, 97 Va. 383, 34 S. E. 53; *Coons v. Coons*, 106 Va. 572, 56 S. E. 576; *Pelton v. Smith*, 50 Wash. 459, 97 Pac. 460; *Ellis v. Cary*, 74 Wis. 176, 17 Am. St. Rep. 125, 42 N. W. 252, 4 L. R. A. 55.

The doctrine is applicable only when the members of the family live in the same house: *Williams v. Williams*, 114 Wis. 79, 89 N. W. 835.

b. Parent and Adult Child.—So far, the references may be taken as applying only to infant children and their parents, but the law is the same as to adults where the child continues after minority to live with them, i. e., to board and reside with them, and renders and receives services. There is no implied pecuniary liability on either side. If there has been no agreement or understanding, and no circumstances to warrant the inference that a money return was to be made, there is no legal liability to pay: *Friermuth v. Friermuth*, 46 Cal. 42; *Wall v. Wall*, 69 Ill. App. 389; *Neish v. Gannon*, 98 Ill. App. 248, 198 Ill. 219, 64 N. E. 1000; *Adams v. Adams' Admr.*, 23 Ind. 50; *Hill v. Hill* (Ind. App.), 90 N. E. 331; *Donovan v. Driscoll*, 116 Iowa, 339, 90 N. W. 60; *Wise v. Outtrim*, 139 Iowa, 192, 130 Am. St. Rep. 301, 117 N. W. 264; *Dowell v. Dowell's Admr.* (Ky.), 125 S. W. 283; *Saunders v. Saunders*, 90 Me. 284, 38 Atl. 172; *Hiale v. Hiale's Estate*, 157 Mich. 45, 121 N. W. 465; *Ronsiek v. Boverschmidt's Admr.*, 63 Mo. App. 421; *Carrell v. McDonnell*, 139 Mo. App. 450, 122 S. W. 1129; *Moore v. Moore*, 58 Neb. 268, 78 N. W. 495; *Munger v. Munger*, 33 N. H. 581; *Page v. Page*, 73 N. H. 305, 61 Atl. 356, 6 Ann. Cas. 510; *Smith v. Smith's Admr.*, 30 N. J. Eq. 564; *Haberman v. Kaufer*, 70 N. J. Eq. 381, 61 Atl. 976; *In re Hughey*, 7 N. Y. St. Rep. 732; *More v. Shepard*, 133 App. Div. 471, 117 N. Y. Supp. 1095; *Grant v. Grant*, 109 N. C. 710, 14 S. E. 90; *Wilkes v. Cornelius*, 21 Or. 348, 28 Pac. 135; *Burgess v. Burgess*, 109 Pa. 312, 1 Atl. 167; *Newell v. Lawton*, 20 R. I. 307, 38 Atl. 946; *Harris v. Currier*, 44 Vt. 468; *Westcott v. Westcott's Estate*, 69 Vt. 234, 39 Atl. 199; *Cann v. Cann*, 40 W. Va. 138, 20

S. E. 910; Wells v. Perkins, 43 Wis. 160; Voss v. Voss, 134 Wis. 52, 113 N. W. 1097.

The rule has been well expressed to be that "as between parents and an adult child, whenever compensation is claimed in any case by either against the other for services rendered, it must be determined from the particular circumstances of that case whether the claim should be allowed or not. There can be no fixed rule governing all cases alike. In the absence of direct proof of any express contract, the question always is, Can it be reasonably inferred that pecuniary compensation was in view of the parties at the time when the services were rendered? and that depends upon the circumstances of the case, the relation of the parties being one of the circumstances": Harshberger's Admr. v. Alger, 31 Gratt. 52; Stansbury v. Stansbury's Admr., 20 W. Va. 23.

On the other hand, whenever the contractual relation is established—that services rendered should be paid for—the parties stand on the footing of strangers, and the contract will be given effect. The circumstances vary with each case. A son, not residing with his parents, was held entitled to payment for looking after the father's property: Parker's Heirs v. Parker's Admr., 33 Ala. 459; and also where the son worked for the father and "found" himself and his horse; Kinnibrew's Distributees v. Kinnibrew's Admr., 35 Ala. 628. A daughter over age who was working away from home and returned to work at her father's request was entitled to recover wages: Robnett v. Robnett, 43 Ill. App. 191. A daughter over age who remained working at home in consideration of a sum to be paid her on her marriage was entitled to it on the happening of that event: Stock v. Stoltz, 137 Ill. 349, 27 N. E. 604. It is not necessary that an express contract be proved where the child is over age, if it can be inferred from the surrounding circumstances: Story v. Story, 1 Ind. App. 284, 27 N. E. 573. And in Hardy v. Hardy, 79 Md. 9, 28 Atl. 887, a son was held entitled to compensation where his father, who had need of help on his farm, induced the son, who was over age, to work for him and the son gave valuable assistance in working the farm, and received during the period of his service one thousand dollars from his father. And where a daughter left her own children to nurse a sick mother at the mother's request, it was held that the circumstances warranted the inference that she was to be paid: Markey v. Brewster, 10 Hun, 16; Wilsey v. Franklin, 57 Hun, 382, 10 N. Y. Supp. 833; Marion v. Farnan, 68 Hun, 383, 22 N. Y. Supp. 946. And where a natural son and his father dealt as strangers, and the son performed services for the father, he was entitled to receive compensation for them: Broderick v. Broderick, 28 W. Va. 378.

c. Brothers and Sisters.—The same rules apply to claims by members of the same family, and therefore include claims by brothers or sisters for mutual services rendered: State v. Conmoway, 2 Houst. 206; Chapman v. Chapman, 87 Ill. App. 427; Fuller v. Fuller's Estate, 21 Ind. App. 42, 51 N. E. 373; Keegan v. Malone's Estate, 62 Iowa, 208, 17 N. W. 461; Cochran v. Zachery, 137 Iowa, 585, 126 Am. St. Rep. 307, 115 N. W. 486, 16 L. R. A., N. S., 235, 15 Ann. Cas. 297; Price v. Price's Exr., 101 Ky. 28, 39 S. W. 429; Spencer v. Spencer, 181 Mass. 471, 63 N. E. 947; Martin v. Sheridan, 46 Mich. 93, 8 N. W. 722; Callahan v. Riggins, 43 Mo. App. 130; Moore v. Renick, 95 Mo. App. 202, 68 S. W. 936; Carpenter v. Weller, 15 Hun,

134; *Taylor v. Taylor*, 1 Lea, 83; *Key v. Harris*, 116 Tenn. 161, 92 S. W. 235, 8 Ann. Cas. 200; *Morrissey v. Faucett*, 28 Wash. 52, 68 Pac. 352.

And the rules are subject to the same modifications either when the circumstances negative the gratuitousness of the service or there is evidence of a contract: *In re Shubart's Estate*, 154 Pa. 230, 26 Atl. 202; *Stafford v. Devereux*, 166 Pa. 277, 31 Atl. 87; *Fuller v. Mowry*, 18 R. I. 424, 28 Atl. 606.

d. Grandparents and Grandchildren.—When grandparents reside with their children's children, the presumption that services rendered were never intended to form the subject of claim is equally strong, and will require rebuttal by proof of agreement, or such circumstances as will establish an intention to remunerate for the services rendered: *Murrell v. Studstill*, 104 Ga. 604, 30 S. E. 750; *Teeter v. Poe*, 48 Ill. App. 158; *In re Wells*, 4 N. Y. St. Rep. 878; *Dodson v. McAdams*, 96 N. C. 149, 60 Am. Rep. 408, 2 S. E. 453; *Barhite's Appeal*, 126 Pa. 404, 17 Atl. 617; *Davis v. Goodenow*, 27 Vt. 715.

e. Cousins.—In the case of cousins, however, the courts are inclined to relax the rigor of the rule; *Gallaher v. Vought*, 8 Hun, 87. *In Neal's Exrs. v. Gilmore*, 79 Pa. 421, the court said: "It is true that their relation as first cousins was not such as of itself to rebut the legal presumption of an implied contract arising from services rendered and accepted. . . . If the boys lived with them as their children and members of the family, the jury ought to have been instructed that the plaintiffs could not recover. Nothing is better settled than that while the performance of labor by one for another raises an implied assumpsit to compensate it, yet this implication may be rebutted by proof of circumstances showing such a relation between the parties as repels the idea of contract."

f. Uncle or Aunt and Nephew or Niece.—These relations are subject to the same rules and exceptions as govern claims between parent and child: *Hurst v. Lane*, 105 Ga. 506, 31 S. E. 135; *Collar v. Patterson*, 137 Ill. 403, 27 N. E. 604; *Hays v. McConnell*, 42 Ind. 285; *Weir v. Weir's Admr.*, 9 B. Mon. 645, 39 Am. Dec. 487; *Sloan v. Dale*, 90 Mo. App. 87; *Robinson v. McAfee*, 59 Mich. 375, 26 N. W. 643; *Hayden v. Parsons*, 70 Mo. App. 493; *In re Galway's Estate*, 19 Misc. Rep. 92, 43 N. Y. Supp. 970; *Hicks v. Barnes*, 132 N. C. 146, 43 S. E. 604; *Defrance v. Austin*, 9 Pa. 309; *Glenn v. Gerald*, 64 S. C. 236, 42 S. E. 155; *Andrus v. Foster*, 17 Vt. 556; *Riley v. Riley*, 38 W. Va. 283, 18 S. E. 569.

III. Services Rendered by Persons Related by Affinity.

a. Parent and Son in Law or Daughter in Law.—All these cases have been held to fall within the rule that in the absence of a contract, the services will be deemed to have been rendered without hope or expectation of reward. At the same time, as has been pointed out in subdivision I, the presumption is more easily rebutted as the degree of relationship diminishes, and very slight evidence has been considered sufficient to replace the presumption of gratuitous service by that of intended payment for work and labor done and services rendered: *Mariner v. Collins*, 5 Harr. (Del.) 290; *Poole v. Baggett*, 110 Ga. 822, 36 S. E. 86; *Oxford v. McFarland*, 3 Ind. 156; *Rogers v. Millard*, 44 Iowa, 466; *Coe v. Wager*, 42 Mich. 49, 3 N. W. 248; *Ramsey v. Hicks*, 53 Mo. App. 190; *Bonney v. Haydock*, 40 N. J.

Eq. 513, 4 Atl. 766; *Heinz v. Jacobi*, 76 N. J. L. 189, 68 Atl. 1069; *McConnell v. McConnell* (N. H.), 74 Atl. 875; *Conger v. Van Aernum*, 43 Barb. 602; *Reid v. Farrar*, 6 N. Y. St. Rep. 199; *Koebel v. Beetson*, 112 App. Div. 639, 98 N. Y. Supp. 408; *Callahan v. Wood*, 118 N. C. 752, 24 S. E. 542; *Lovet v. Price, Wright*, 89; *In re Young's Estate*, 148 Pa. 573, 575, 24 Atl. 124; *Gerz v. Weber*, 151 Pa. 396, 25 Atl. 82; *Sprague v. Waldo*, 38 Vt. 139; *Williams v. Stonestreet*, 3 Rand. 559; *Thompson v. Halstead*, 44 W. Va. 390, 29 S. E. 991; *In re Schmidt's Estate*, 93 Wis. 120, 67 N. W. 37.

In Texas a case to the contrary is *Wright's Admx. v. Donnell*, 34 Tex. 291. In that case the court said: "We cannot adopt the doctrine claimed. It is true that a rule has been maintained in many courts of high authority, that amongst near relatives, as between father and son, uncle and nephew, suits shall not be maintained for services which are rendered on the ground of natural love and affection, or in expectancy of a future legacy, inheritance or devise; and the reason of the rule is that the party rendering the services is generally more liberally rewarded for his services than he would be under an express contract or an implied assumpsit. But we do not think the relationship between father in law and son in law comes within this rule, and, when the reason of the rule fails, the rule itself should cease."

b. Brothers in Law or Sisters in Law.—The rule has been applied in Illinois where the brother in law or sister in law reside in the same house, but is subject to the same exceptions when there is any evidence in support of the contractual intention: *Broughton v. Smart*, 59 Ill. 440. But in Pennsylvania there are two old cases deciding that that degree of relationship does not raise the presumption of gratuitous service: *In re Russell's Estate*, 7 Phila. 64; *In re McCarty's Estate*, 9 Phila. 318.

c. Parent and Stepchild.—These cases are governed by the law relating to parent and child: *Murdock v. Murdock*, 7 Cal. 511; *Kirchgassner v. Rodick*, 170 Mass. 543, 49 N. E. 1015; *Harris v. Smith*, 79 Mich. 54, 44 N. W. 169, 6 L. R. A. 702; *Baxter v. Gall*, 74 Minn. 36, 76 N. W. 954; *Guenther v. Birkicht's Admr.*, 22 Mo. 439; *Williams v. Hutchinson*, 5 Barb. 122, 53 Am. Dec. 301; *Satterly v. Dewick*, 129 App. Div. 701, 114 N. Y. Supp. 354; *Lantz v. Frey*, 14 Pa. 201, 19 Pa. 366; *Brown v. Cummings*, 27 R. I. 369, 62 Atl. 378; *Nicholls v. McCormick* (Tex. Civ. App.), 35 S. W. 530; *Wells v. Perkins*, 43 Wis. 160; *Ellis v. Cary*, 74 Wis. 176, 17 Am. St. Rep. 125, 42 N. W. 252, 4 L. R. A. 55.

In Louisiana, however, it has been held that a stepdaughter was entitled to compensation for acting as nurse and attendant to a decrepit stepfather, on the ground of special nursing being an extraordinary service: *Succession of Stuart*, 48 La. Ann. 1484, 21 South. 29.

d. Parent and Stepson in Law or Stepdaughter in Law.—This degree of relationship marks the limit to the application of the rule, in that it is too remote to create the presumption of gratuitous service; and consequently the stricter proof called for by an alleged contract between those more nearly related is not called for in its instance: *Hardiman's Admr. v. Crick*, 131 Ky. 358, ante, p. 248, 115 S. W. 236.

IV. Services Rendered by Quasi Members of the Family.

a. **Adopted Children.**—Children who have been adopted come within the rules applicable to parent and child: *Lang v. Dietz*, 191 Ill. 161, 60 N. E. 841; *Lunay v. Vantyne*, 40 Vt. 501.

b. **Illegitimate Children and De Facto Members of the Family.**—The rule is extended so as to include de facto members of the family, irrespective of relationship, and may therefore be taken to include natural children living with the legal family as well as children brought up with them without having been formally adopted: *Walker v. Taylor*, 28 Colo. 233, 64 Pac. 192; *Martin v. Martin*, 101 Ill. App. 640; *Hayes v. McConnell*, 42 Ind. 285; *Waechter v. Walters*, 41 Ind. App. 408, 84 N. E. 22; *Ottoway v. Milroy* (Iowa), 123 N. W. 467; *Frailey's Admr. v. Thompson* (Ky.), 49 S. W. 13; *Fitzpatrick v. Dooley*, 112 Mo. App. 165, 86 S. W. 719. In *Graham v. Stanton*, 177 Mass. 321, 58 N. E. 1023, *Holmes, C. J.*, said: "It would be a strange thing to say that an actual contract to pay for services could be inferred from the conduct of one who takes a child into his household under the name of daughter. The fact of his calling her so implies that he is not purporting to enter into relations with her on a business footing."

V. Effect of Emancipation of Minor.

The rule of law is that when a minor's time is given to him, and he thereafter works for his father, he may recover his wages. The act of emancipation is practically a declaration that the time when his gratuitous services have been received has ended: *Phelps, Dodge & Palmer Co. v. Hopkinson*, 61 Ill. App. 400; *Jenney v. Alden*, 12 Mass. 375; *Dierker v. Hess*, 54 Mo. 246; *Hall v. Hall*, 44 N. H. 293; *Titman's Admr. v. Titman*, 64 Pa. 480; *Eubanks v. Peaks*, 2 Bail. 497.

COMMONWEALTH v. INTERNATIONAL HARVESTER COMPANY.

[131 Ky. 551, 115 S. W. 703.]

CONSTITUTIONAL LAW—Class Legislation—Construction of Statutes.—Statutes which, when construed by the canons of statutory construction, confer the right upon one class of citizens to do an act, which is a criminal offense if done by any other class, contravene the fourteenth amendment to the federal constitution. (p. 260.)

CONSTITUTIONAL LAW—Statutes—Construction.—The federal constitution is the paramount law of the land, and a state statute in conflict with it is void. When state statutes come within the domain of the powers of government over which the federal constitution extends, they must be construed with reference to the provisions of that instrument. (p. 260.)

STATE LAWS—Definition—Construction by Courts—Federal and State.—The laws of a state are the enactments promulgated by its legislative body, expounded and applied by its courts, which interpret the meaning, and such interpretation guides the federal courts. In the absence of any state court interpretation of a statute, the federal courts will construe it. (pp. 260, 261.)

STATUTES—Construction—Legislative Intent.—In construing a statute the aim is to arrive at the legislative meaning by resorting to its language alone, where the language is unambiguous, and where ambiguous to the legislative intentment. (p. 261.)

STATUTES—Inconsistent—Construction.—Where two statutes on the same subject appear on their face inconsistent, the construing court should harmonize them if possible, so that both may stand entirely, but if not, then in part, and of the irreconcilable parts the later stands and the earlier is deemed repealed. (p. 261.)

STATUTES, INCONSISTENT—Construction of Ambiguities.—Among the aids to which the court may resort in arriving at the legislative purpose in enacting a statute which is ambiguous is to look to the evil which it was intended to correct, and this may be done by historical references, of which judicial notice will be taken. (p. 262.)

TRUSTS AND POOLS—Constitutional Provision—Construction of.—Constitution, section 198, delegates to the General Assembly power to enact laws to repress illegal trade combinations, and does not repeal act May 20, 1890. (p. 264.)

CONSTITUTIONAL LAW—Act of 1906, Page 429, Chapter 117, and Constitution, Section 198—Construction.—The act of 1906, page 429, chapter 117, conflicts with the constitution, section 198, but is not on that account wholly void; it is valid so far as it permits farmers to combine to obtain better prices, provided those prices do not exceed the real value. (p. 265.)

CONSTITUTIONAL LAW—Limitation of Legislative Power. State constitutions are limitations of power; and while a legislature may enact any statute not prohibited by the organic law, when it reaches that limit it must stop. (p. 266.)

CONSTITUTIONAL LAW.—Statutes on the same subject enacted at different sessions of the legislature are to be treated in *pari materia*, and read in conjunction with the state and federal constitutions. (p. 267.)

CONSTITUTIONAL LAW—Statutes and Constitutions—Superimposed Construction.—The combined effect of act of May 20, 1890 (Kentucky Statutes 1903, section 3915), act of 1906, page 429, chapter 117, constitution, section 198, and the fourteenth amendment to the federal constitution, is that of permitting persons to pool their property or combine their capital and other resources so as to get no more than the real value of their property when sold in the market. (p. 267.)

CONSTITUTIONAL LAW—Class Legislation—Fourteenth Amendment to Federal Constitution—Effect of.—The fourteenth amendment to the federal constitution does not prohibit the state from enacting a measure favorable to any class of persons within its jurisdiction. It acts automatically upon the laws of the state to raise the complainant class to the level of the favored one, securing to all the same benefits. (pp. 267, 268.)

CONSTITUTIONAL LAW—Statutes Invalid for Uncertainty. The act of May 20, 1890 (Kentucky Statutes of 1903, section 3915), and act of 1906, page 429, chapter 117, construed with constitution, section 118, are not invalid for uncertainty in legislating against combinations depreciating articles below or enhancing them above their real value, inasmuch as the real value is the market value. (pp. 269, 270.)

MONOPOLIES—Offenses at Common Law and by Statute—Distinction.—At the common law the test of monopolies by trade and commerce absorbing any of the necessities of life was if the

result brought the price of the commodities greatly above their real value, while under the Kentucky statutes, if the price is enhanced above or reduced below the real value, the offense is complete. (p. 272.)

INDICTMENT—Omission of Essential Element.—An indictment charging a violation of the law regulating pools and trusts, act of May 20, 1890 (Kentucky Statutes 1903, section 3915), must aver that the purpose or effect of the alleged combination or pool which the defendant entered into was to enhance the articles named in the indictment above their real value. (p. 272.)

N. B. Hays, attorney general, T. R. Layman, commonwealth's attorney, and C. H. Morris, for the appellant.

L. A. Faurest, Humphrey & Humphrey and Arthur M. Rutledge, for the appellee.

556 O'REAR, J. Appellee was indicted on June 9, 1909, under the Kentucky anti-trust statute, the indictment reading:

"The grand jurors of the county of Hardin, in the name and by the authority of the commonwealth of Kentucky, accuse the International Harvester Company of America, a corporation, of the offense of unlawfully and willfully creating, establishing, organizing, entering into and becoming and being a member and party to and interested in a pool, trust, combine and agreement, and understanding with a number of machine companies, which are independent companies from it for the purpose of controlling and fixing prices of certain articles of farming machinery and repairs, and fixing and controlling the output and number manufactured, committed in manner and form as follows, to wit: The said International Harvester Company of America, a corporation, in said county of Hardin on the ——— day of ———, **557** 1906, and before the finding of this indictment being a corporation created under and by the laws of one of the states of the United States of America other than Kentucky, organized for the purpose and engaged in doing business in Kentucky and other states of said United States, did unlawfully create, establish, organize, enter into, become a member of a party to and interested in a pool, trust, combine, agreement, confederation and understanding with the McCormick Machine Company, the Champion Machine Company, the Piano Machine Company, Deering Harvester Company, some of which are corporations and some of which are joint stock companies, but this jury cannot say which are corporations and which are not, nor can they say who constitute the members of any joint stock company named or in what state those companies being corporations are incorporated, and various other companies and incorporations to this grand jury unknown, for the purpose of controlling and fixing the prices, and limiting the quantity of mowers, reapers, binders, rakes and repairs for same, and

various other articles unknown to this grand jury, and binder twine, and said understanding, agreement, arrangement and combine now exists and has existed for some time, and said International Harvester Company of America handles and disposes of such articles in said county. This grand jury does not know and cannot say what state said company is incorporated in. All business done in said county by all of said companies is done pursuant to said agreement and understanding by said parties against the peace and dignity of the commonwealth of Kentucky."

The statute under which the indictment was returned is section 3915, Kentucky Statutes (edition of 1903), and is the ⁵⁵⁸ act adopted and approved May 20, 1890. It is as follows: "That if any corporation under the laws of Kentucky, or under the laws of any other state or county, for transacting or conducting any kind of business in this state, or any partnership, company, firm or individual, or other association of persons, shall create, establish, organize or enter into, or become a member of, or a party to, or in any way interested in any pool, trust, combine, agreement, confederation or understanding with any other corporation, partnership, individual or person, or association of persons, for the purpose of regulating or controlling or fixing the price of any merchandise, manufactured articles or property, of any kind, or shall enter into, become a member of, or party to or in any way interested in any pool, agreement, contract, understanding, combination or confederation, having for its object the fixing, or in any way limiting the amount or quantity of any article of property, commodity or merchandise to be produced or manufactured, mined, bought or sold, shall be deemed guilty of the crime of conspiracy, and punished therefor as provided in the subsequent sections of this act."

An act of the General Assembly was passed and approved March 21, 1906, being chapter 117, page 429, of the acts of 1906, the first section of which reads: "It is hereby declared lawful for any number of persons to combine, unite or pool any or all of the crops of wheat, tobacco, corn, oats, hay or other farm products raised by them, for the purpose of classifying, grading, storing, holding, selling, or disposing of same, either in parcels or as a whole, in order or for the purpose of obtaining a greater or higher price therefor than they might or could obtain or receive by selling said crops separately or individually."

⁵⁵⁹ The other sections of the latter act, as well as the act of May 20, 1890, have to do with the procedure under the acts, and affect only certain features of the main provisions which are set forth in the sections quoted above.

Appellee demurred to the indictment, on the ground that, as it failed to show when the offense charged had been com-

mitted. it must be presumed that it was at any period covered by the indictment most unfavorable to the prosecution, which would be subsequent to March 21, 1906, and prior to the time the indictment was returned: *Commonwealth v. T. J. Megibben Co.*, 101 Ky. 195, 19 Ky. Law Rep. 291, 40 S. W. 694. It was therefore contended by appellee that inasmuch as the act of 1890 made the transaction with which it was charged illegal, and as the act of March 21, 1906, allowed farmers to do the same thing as legal, the defendant was not furnished equal protection under the laws of Kentucky, and that in consequence the act of May 20, 1890, must fail, as the state is forbidden by the fourteenth amendment to the constitution of the United States from denying equal protection of the laws to all persons within its jurisdiction. The circuit court sustained the demurrer on the ground that discrimination was worked against appellee under the statute, and dismissed the indictment. From that judgment the commonwealth has prosecuted this appeal for a construction of the law.

We are satisfied the circuit court was not in error in sustaining the demurrer to the indictment, but that it was in error as to the ground upon which it based its ruling. As the construction of these statutes seems to be important to the welfare of the state, we here set down our interpretation of them, as reasons for the conclusion at which we have arrived.

560 In the first place, there is no denial that if the two statutes in question, when construed according to the canons of statutory construction, confer the right upon one class of citizens to do an act, which is made a criminal offense if done by any other class, it would controvert the fourteenth amendment to the federal constitution, which declares: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws." The federal constitution is the paramount law of the land. A statute of a state in conflict with it is void. State statutes, therefore, when they come within the domain of the powers of government over which the federal constitution extends, must be read and applied with reference to the provisions of that instrument.

The laws of a state, particularly its statutory laws, are such enactments as its legislative body promulgates, as expounded and applied by its courts. A state statute has such meaning as the judicial department of that state construes it to have: *Bank of Hamilton v. Dudley's Lessee*, 2 Pet. 492, 7 L. ed. 496; *Elmendorf v. Taylor*, 10 Wheat. 152, 6 L. ed. 289; *Atlantic & Gulf R. R. v. Georgia*, 98 U. S. 359, 25 L. ed. 185. This is so, even though, without such judicial construc-

tion, the federal courts might have, from the language of the statute, construed it differently: *Green v. Neal*, 6 Pet. 291, 8 L. ed. 402; *Bell v. Morrison*, 1 Pet. 351, 7 L. ed. 174; *Nesmith v. Sheldon*, 7 How. 812, 12 L. ed. 925. It is primarily for each state to say what police regulation it will adopt. In that matter it speaks through its legislature. ⁵⁶¹ It is for the judiciary of that state to declare the legislative intent and meaning of such enactments, and that declaration is the extent and limit of the particular statutes when they come to be applied either by the judiciary or the executive departments of the state government: *Sutherland on Statutory Construction*, sec. 5. In construing a statute, the aim is, of course, to arrive at the legislative meaning. The first, and most important, rule is to resort to the language of the act itself, and that language alone, to gather the legislative purpose, if the language used is unambiguous. It is not allowable, in such state of case, to resort to any other source of information to learn what the law-making department intended, or as to what evils they proposed remedying. If, however, the legislature has enacted two or more statutes which from their wording appear to be inconsistent, or if the statute under consideration appears to be in conflict with a provision of the constitution, state or federal, there is an ambiguity, for it is always presumed that the legislature did not intend to violate either constitution; it is always presumed it intended its enactments to become valid and enforceable laws. Nor are repeals by implication favored, as it must be presumed that, if the legislature had intended that one statute should repeal another, it would have so expressed it as to leave no doubt of its purpose. Hence when two statutes bearing on the same subject appear on their face to be so inconsistent with each other, the first duty of the court called upon to construe them is to harmonize them if possible so as to allow both to stand; or, if that cannot be done without violence to some part of the language employed in one or both the statutes, then the rule is to construe them so that both will stand so ⁵⁶² far as possible, and wherein any part of either is irreconcilable with any part of the other the latest stands, while the inconsistent part of the former is deemed to have been repealed. Where an ambiguity exists, whether because of the uncertainty of meaning of the words employed, or because of an apparent conflict in statutes, or between a statute and the constitution, then, and then only, are the courts permitted to look beyond words of the particular statute as to the legislative purpose. Such methods of construction are always for the sole purpose of arriving at the legislative intention.

The last statute is the first to be construed, as it is the latest in date, and as it controls if there is conflict between it and the other statute. Reading it in connection with the

act of May 20, 1890, it is perceived the two deal in part with the same subject. When considered literally, they seem to be in conflict. There then exists an ambiguity, an uncertainty as to what the legislature intended, as the latter does not expressly repeal the former, nor allude to it in terms. Among the aids to which the court may resort in arriving at the legislative purpose in enacting a statute which is ambiguous, is to look to the evil which it was intended to correct. This may be done by resorting to the history of the times, of which the court will take judicial notice. For two decades or more those commercial combinations of capital and resources for reducing competition in their products so as to realize greater and more certain profits from them, by which monopolies more or less complete have been created, have attracted wide public attention. They have been the subject of considerable discussion in the press, and of a great deal of legislation, both state and national. The question has become one of ⁵⁶³ large importance in political economy. Such combinations have been so frequent, so numerous, and in many instances so gigantic and successful in their purpose, that it is doubted by many publicists whether they can all be entirely, or ought to be entirely, suppressed by law. It is believed by many that they have come to stay, in some form, and mark an era of evolution in commercial matters, which it is impolitic, if not impossible, to wholly prevent. It is not within the province of a court, and certainly not our purpose, to discuss the political features of this subject. But of the existence of these discussions and of the causes leading up to them we must and do take notice. The principal enactment by the Congress bearing on this subject is popularly known as the "Sherman anti-trust law": Act July 2, 1890, c. 647, 26 Stats. 209 (U. S. Comp. Stats. 1901, p. 3200). All, or nearly all, of the states of the Union have enacted legislation embodying the principal features of the federal act, more or less drastic in their measures. It is to be noticed that all of them are kindred in purpose, the object being, broadly stated, to prevent monopolistic oppression. Since the first of these statutes, the measures resorted to by the several states have from time to time become complex and more stringent. From the nature of the subject, Congress alone could deal adequately and lawfully with that feature of it which falls within the term "interstate commerce," while in all other instances the state alone must handle the question. From the general tendency of this legislation, as well as from contemporaneous history, it may be gathered that the efforts of government in dealing with this subject have not been wholly satisfactory, have not been adequate, and that the subject is one about which ⁵⁶⁴ much has been learned in the various experiments adopted, and some rejected and replaced

by others. It is likely we have not yet seen the perfection of any system for adequately dealing with the question.

That such combinations of the capital and resources of competitors in any business whereby they produce a monopoly with which the public must deal, and by reason of which extortion is practiced upon the public, is admitted everywhere as being highly impolitic, and dangerous in the extreme to the general welfare. Kentucky has taken a part in this general crusade against the evils of the trusts. At a time when much similar legislation was being adopted, and when the subject was comparatively new as a legislative venture, this state enacted the act of May 20, 1890, already quoted in this opinion. The terms of that act seem to us to be as comprehensive as it is possible to have made them. The act included every form of combination, by whomsoever entered into in this state, and whatever kind of property, where the object was to "regulate, control or fix" the price of a commodity, and whether the object was successful or not. Notwithstanding, the evils which it was intended by that act to cure were not materially abated in this state. The statute was upon the books, but the conditions remained the same, or became worse. The effect was that many people of this state were being oppressed, or believed they were being oppressed, by one concern or another operating here in violation of that act.

But to go back a step. Directly after the passage of the act of May 20, 1890, something like a year after its passage, a convention was called by the popular vote to frame a new constitution for this state. In the debates leading up to the selection of members of ⁵⁶⁵ that convention the very evils here discussed were widely canvassed, and from the general scope and spirit of the instrument promulgated by the convention in September of 1891, and ratified by the people, it may be gathered that those evils, and the question of how best and wisely to handle them, engaged the earnest attention of that body. A reference to the debates in the convention (volume 3, pages 3693-3706, 3765) discloses that the act of May 20, 1890, and its inefficiency, were fully discussed. Of the many propositions submitted, there was finally adopted the following section, which is now section 198 of the constitution: "It shall be the duty of the General Assembly from time to time, as necessity may require, to enact such laws as may be necessary to prevent all trusts, pools, combinations or other organizations, from combining to depreciate below its real value any article, or to enhance the cost of any article above its real value." That was a step in the other direction in legislation. It did not evince any purpose to change the public policy of treating monopolistic trusts as evils where they operated oppressively. But it recognized that in dealing with the subject, lest too stringent measures intended to suppress

the evil should result injuriously to harmless or even useful combinations, it was expressly provided that the legislature should, from time to time, as necessity appeared, enact such legislation as would prevent combinations from depreciating commercial property below its real value or enhancing its cost above the real value. Two ideas are prominently advanced in this section: The main one is, that the real value of articles of commerce should obtain in the markets of that state, so far as affected by combinations; the other is, that it was left to the legislature to determine ⁵⁶⁶ the best method of obtaining that end, recognizing that the stage of legislation upon the subject was yet experimental, and that changes would be necessary from time to time to meet the changing conditions of the country.

It was supposed by some that section 198 of the constitution repealed the act of May 20, 1890. But not so. This court, in *Commonwealth v. Grinstead*, 108 Ky. 59, 21 Ky. Law Rep. 1444, 55 S. W. 720, 57 S. W. 471, held that that section of the constitution and the statute of May 20, 1890, were not inconsistent. On the contrary, it was said in the response to a petition for rehearing, at page 76 of 108 Ky., page 471 of 57 S. W.; "The requirement that the General Assembly shall 'enact such laws as may be necessary to prevent all trusts, pools,' etc., leaves to the legislature the choice of the legislative machinery to effect the required purpose, and necessarily some discretion as to how much machinery will be required to be effective. Both the means to be employed and the extent to which they are to be employed are committed to the discretion of the legislature; and if, in order to prevent combinations to depreciate or enhance an article below or above its real value, it is necessary to enact laws to prevent all combinations to fix prices, that is a detail of the necessary legislation required." It was further said that the legislature had refrained from other legislation for the accomplishment of the requirement of the constitution upon the assumption that the previous act left in force was best calculated to effectuate that purpose.

The evils intended to be suppressed by the constitution and the statute of 1890 were unabated. Conditions had grown up where the agricultural class in particular were being made the victims of such combinations. ⁵⁶⁷ The method was, those who bought many of their products formed pools or trusts, so that there was left but a single buyer in effect; while those who sold them many articles needful in the pursuit of their business formed combinations, so that there was but a single seller in effect. As the competition previously existing among the farmers' customers for certain of his products was destroyed by these combinations, he was forced to sell at his sole customer's price. Or, when he came to buy from the trust manufacturer, he had to buy at the seller's price, fixed

without competition. The result was that in the one instance commodities were depreciated below their real value, while in the other they were enhanced above their real value. It was with this aggravated situation that the legislature came to deal in 1906. It was conceived that, inasmuch as the most stringent laws did not effectually prevent unlawful combinations of capital and resources, it would have a tendency to counteract this evil to put it in the power of those against whom it was operating principally to protect themselves by combining their products, so that by classifying, grading and handling them in large bulks it would materially affect the general market of such commodities, and better prices would be realized in spite of the fact that there was but one buyer practically. Hence the act of March 21, 1906. It is now contended by appellee that that act allows the farmer to do precisely what his adversary had been doing, and which under the statute of 1890 was a crime. The same argument was advanced in the case of *Owen County Burley Tobacco Soc. v. Brumback*, 32 Ky. Law Rep. 916, 107 S. W. 710, which was a proceeding before Judge Carroll of this court to dissolve an injunction. Sitting with Judge Carroll in ⁵⁶⁸ considering the validity and scope of the act of March 21, 1906, here involved were all of the judges of this court, with the exception of the writer of this opinion, who was absent. The opinion delivered by Judge Carroll may be said to reflect the views of at least a majority of the court. And in those views I desire now to express my concurrence. Construing the act of 1906, Judge Carroll said: "The act, although confining the privilege granted by it to farmers, does not in terms prohibit other persons or corporations from pooling their products, or from pledging them to an agent to dispose of. . . . If this act undertook to confer upon farmers the exclusive privilege of combining and pooling their crops to the end that a greater price might be obtained therefor, and expressly denied to other classes or persons the right to combine or pool their products for the same purpose, or if it should be so construed, it is plain that it would be in direct violation, not only of section 3 of the Bill of Rights, but of the fourteenth amendment of the constitution of the United States." In the same opinion, construing section 198 of the constitution and this statute of 1906, it was said: "To put it in another way, it would seem that, so far as this section is concerned, trusts, pools, and combinations, the only purpose of which is to obtain a fair and reasonable price for an article, are permitted. The legislature could not enact a law legalizing a pool or combination of persons for the purpose of enhancing the cost of any article above its real value, yet it may legalize such pool or combinations as are created or organized for the purpose of obtaining fair and remunerative prices. . . . The act of 1906 does not authorize or permit a pool or combination to

enhance the cost of crops above their real value. This ⁵⁶⁹ is not the proper construction, and, if it allowed owners to place the price of their crops above their real value, it would clearly be a violation of the constitution."

State constitutions are limitations of power. While a legislature may enact any statute not prohibited by the organic law, when it reaches that limit it must stop. It was because of that fundamental principle that it was said in the opinion last quoted from that the legislature was without power to authorize any set of men to enter into a combination to sell their combined property at greater than its real value. Looking again to that rule of statutory construction which presumes that the legislature did not intend to enact a void statute, but that it intended to comply with the constitution, it was also held in the case just cited that the legislative purpose was to "enable the farmers to combine their resources and place their property in the hands of an agent selected by them, to the end that better prices might be obtained," but not "for the purpose of enhancing the price of an article above its real value." That construction of the act of 1906 the court now adopts.

But if it should be conceded that the actual purpose of the legislature was to authorize farmers to pool their property so as to get for it as much, and if possible more, than its real value, and holding, as we do, that such purpose would be in contravention of section 198 of the constitution as to the latter purpose, still the act of 1906 would not be a nullity. So far as it was within the legislative power, it would be upheld, and the excess alone would be held invalid. An act of the legislature of this state created the office of prison commissioners, defined their powers and duties and mode of selection, and fixed their term of office at six years. The constitution forbade the creation of ⁵⁷⁰ any office by the legislature with a term longer than four years. The validity of the act came before this court for determination in *Commissioners of Sinking Fund v. George etc.*, 104 Ky. 260, 84 Am. St. Rep. 454, 20 Ky. Law Rep. 938, 47 S. W. 779. It was held that the attempt to exceed the limit imposed by the constitution was void, but that the excess would be rejected, and the act in all other particulars was upheld, subject to that modification.

Construing the act of 1906 in consonance with section 198 of the constitution, the question then is, What is its effect upon the act of 1890? When two or more statutes are enacted at different sessions of the legislature, all having the same subject, the rule is, they are to be treated in *pari materia*. It is thus stated in *Sutherland on Statutory Construction*, section 238: "One who contends that a section of an act must not be read literally must be able to show one of two things: Either that there is some other section which cuts down or expands its meaning, or else the section itself is

repugnant to the general purview. The question for the court is, What did the legislature really intend to direct? And this intention must be sought in the whole of the act, taken together, and other acts in *pari materia*." It is not the custom of legislatures to declare their purposes as such. Legislation is usually enacted from time to time bearing on particular subjects. The courts presume that the legislature intended all its enactments on a given subject to constitute a consistent treatment within constitutional limitations of the whole subject. Provisions of the constitutions are therefore to be read in conjunction with such statutes, and all of them, the provisions of the constitutions, state and federal, and the several enactments of the legislature, ⁵⁷¹ will be treated as a harmonious, consistent system, in preference to supposing that, literally construed, one is repugnant to the others, and some enactments in consequence wholly fail.

As, then, the legislature had left the act of 1890 upon the statute books, and had enacted the one of 1906, upon the same subject, meaning by it to confer the right upon some to pool their property for the purpose and to the extent not forbidden by section 198 of the constitution, we must construe these two statutes and the section of the constitution together. And, in doing so, we must take into view the fourteenth amendment to the constitution of the United States, as it also was presumably in the legislative mind in enacting the last statute. If it be construed that the legislature intended a discrimination between farmers and all others, their enactment would be void. We must reject that view of it, if any other can be made to apply. If, however, it be construed that the act of 1906 operates to confer upon all persons the same benefits, as was intimated in the opinion in *Owen County Burley Tobacco Soc. v. Brumbaugh*, 32 Ky. Law Rep. 916, 107 S. W. 710, then there is no discrimination, as that construction is possible under the language employed, and as it would sustain the validity of the act it must be adopted. It therefore follows that appellee and all others have the right under the existing laws in Kentucky to pool their property, or combine their capital and other resources, so as to get no more than the real value of their property when sold in the market.

But if it should be conceded that the legislative purpose was not to confer upon all others the benefits expressly given to farmers by the act of 1906, what would be the result? An attempted discrimination would result, it is true, but it would be ineffectual as ⁵⁷² a law because of the operation of the fourteenth amendment to the constitution. That article does not prohibit the state from enacting any measure it chooses favorable to any class of persons within its jurisdiction. Its effect is to act automatically upon the laws of the state, not to annul the state statute conferring benefits, but to raise the complainant class to the same level as that enjoyed by the

avored class, securing to all the same benefits. A familiar application of this principle is in its invocation for the relief of persons of African descent from the effect of discriminatory statutes in their trial by jury. A single case will illustrate the application. In West Virginia a statute made white male persons alone eligible to jury service. A negro arraigned for a crime before a court of that state raised the question of the right of the state to try him by a jury impaneled under that statute. The supreme court held (*Strauder v. West Virginia*, 100 U. S. 303, 25 L. ed. 664) that the state statute operated as a discrimination. It did not hold, though, that the negro could not be tried at all because of that fact, or that West Virginia was, because of the repugnance of its statute to the fourteenth amendment of the constitution of the United States, without any statute on the subject of who was eligible to jury service in the courts of that state; but it held that members of the race discriminated against were, by operation of the amendment, entitled to the same legal privileges as to jury service that the more favored race was given by the laws of the state. It did not reduce the rights of the favored class to the plane attempted to be restricted to the unfavored one, but it elevated the lower to the level of the higher. Upon the same principle, the effect of the amendment upon the legislation in Kentucky **573** against pools and trusts is not to efface all the enactments because they were discriminatory, if they were, but is to give to everyone all the benefits conferred upon any one. The result would be the same as if, by construction as to the intention of the legislature in enacting the statute of 1906, it was held by the courts of this state that the legislature proposed giving all the benefits of that act to all persons, whether expressly named or not, and to that extent only had repealed, or rather amended, the act of 1890.

Appellee relies upon the opinion in *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 22 Sup. Ct. Rep. 431, 46 L. ed. 679, as sustaining the lower court in holding the act of 1890 void because of the subsequent act of 1906. In the *Connolly* case, Illinois had enacted a drastic anti-trust statute, but in one section excluded agriculturists from its effect altogether. No right was by the statute conferred upon the farmers. On the contrary, that was made a crime if done by any person other than a farmer. The statute was not severable. Any combination, except that by farmers of the products of their farms, was penalized. There was no room in the statute for any construction save that of an attempted purposeful discrimination as against all others than farmers. The supreme court held that under the operation of the fourteenth amendment all others were entitled to the same protection by the laws of Illinois as the farmers were. As there was no instance in which the farmer who pooled his farm

products would be punishable, it followed that in no instance could others be punished under the state statute for pooling their products. There is a wide difference between that case and the situation we have in hand here. We say that both our statutes apply to the farmer as well as to others, and that both ⁵⁷⁴ apply to others equally with farmers. There is no discrimination in intent, or in effect, as the statutes are construed and applied.

We are gratified in reaching this conclusion, as we are well satisfied that it more nearly comports with the fixed rules for construing statutes and our constitutions, as well as more effectually carries out the real purpose of the legislature, than by holding either that the act of 1906 is void, or that those vast aggregations of capital employed in monopolies that practice extortion in selling commodities to the public, and oppression in buying from the public, are unbridled upon the people of this state to do their worst without liability to punishment.

A final objection is urged against the construction being applied to these statutes, that, when read in conjunction with section 198 of the constitution, as we have held they now must be, there is such uncertainty in them as to what constitutes a breach of the statutes as to render them void. This is supposed to be so, because, it is argued, there is no way of establishing the "real value" of an article that is fixed and certain; that one jury might say upon a state of facts that the accused was guilty, while another jury upon the same facts would pronounce not guilty; that the accused ought not in justice be left in such uncertainty as to the state of law, as to whether the law made his act a crime. The opinion in *Louisville & N. R. R. Co. v. Commonwealth*, 99 Ky. 132, 59 Am. St. Rep. 457, 35 S. W. 129, 33 L. R. A. 209, is relied on. Section 816, Kentucky Statutes of 1903, made it an offense for any railroad to charge or receive "more than a just and reasonable rate of toll" for the transportation of freight or passengers. That appellant railroad was indicted for having violated the statute. In holding the statute to ⁵⁷⁵ be unconstitutional, this court said: "There is no standard whatever fixed by the statute, or attempted to be fixed, by which the carrier may regulate its conduct; and it seems clear to us to be utterly repugnant to our system of laws to punish a person for an act, the criminality of which depends, not on any standard erected by the law which may be known in advance, but on one erected by a jury, and especially so as that standard must be variable and uncertain as the views of different juries may suggest, and as to which nothing can be known until after the commission of the crime." We are not disposed in this case to overrule or pinch away from any adjudged case of this court in order to sustain the conclusion at which we have arrived, nor to indulge in over-nice dis-

tinctions. The principle announced in *Louisville & N. R. R. Co. v. Commonwealth*, 99 Ky. 132, 59 Am. St. Rep. 457, 35 S. W. 129, may be literally applied with safety to these acts without impairing their validity in the least, or disturbing the full authority of that opinion. It will be noticed that it is not the uncertainty of what the juries may do in a case, nor the uncertainty of the courts, nor the uncertainty of the character of evidence upon which verdicts may be found, but it is the uncertainty "of the standard erected by law" that is the test.

There is a marked difference between the qualities of the "real value" of an article and "reasonable compensation" for a service. The latter may depend alone upon the opinion of the trier of the fact; the former is itself a fact susceptible of proof and exact ascertainment. It is not an open question in the criminal law of the land. For example, the larceny of a chattel worth less than twenty dollars is in this state a misdemeanor; if more than twenty dollars in value, it is a felony. Different juries might form different conclusions ⁵⁷⁶ upon the same facts. What they might do is proverbially uncertain. Nevertheless the "standard erected by law" is not uncertain; it is the market value of the thing taken. So, hog stealing is a felony in this state (Ky. Stats. 1903, sec. 1196) if the hog taken is worth four dollars or more. A hog worth four dollars in the market where taken might have been worth only three dollars the day before, or three dollars the day after. The market may be fluctuating and uncertain, and the evidence, being the opinions of witnesses dependent upon their memories, their opportunities for knowledge, their competency to form a correct judgment, might be even more uncertain. Nevertheless, "the standard erected by law" is not uncertain. The "real value" spoken of by the constitution (section 198) is the market value. The words were used as to things to be sold and bought. It was known, of course, that sellers try to get the highest price, and buyers want to buy at the lowest price; that supply, demand and competition are the principal factors in regulating prices. Where the conditions are natural, the open market would show the real value of any commodity. Where they are not natural, where either supply, demand or competition are eliminated, or so controlled as to prevent its operation upon the market, then the commodity may or may not realize its real value. On the other hand, over-supply would reduce the selling value to a level below the normal. If a concerted action of producers resulted in only a normal supply of a commodity reaching the markets, the normal demand would maintain normal prices. Such action is necessary, or at least seems wise both as it affects the producer and the general public. Violent depressions of a market that result in heavy losses are hurtful to everybody, because they tend to disturb

the natural ⁵⁷⁷ equilibrium of business, and reflect harmfully, or are likely to, upon every other branch of commerce. The general public cannot be benefited by disaster to any legitimate business. Conditions that are stable, assuring and reasonably profitable are best for everybody. The object of the government should be to foster such conditions so far as within its power. Indeed, it is the unsettling of these conditions by one set of men, who by their combined force break them down at some point, by oppressing their adversary in the business, bringing ruin upon him that they may gather extraordinary profits, that is the main evil of the so-called "trusts," and the one which the legislation we are now considering aimed to correct.

When the law endeavors to maintain the real value of an article, it has in contemplation the value of the thing as sold under ordinary, normal conditions, unaffected by any combination of producers or dealers whose object is to create an abnormal condition in that market. If it is argued that this is difficult of proof and uncertain, it must be answered that the difficulty of proving the existence of a fact cannot be urged against the propriety of its being established. Nor is the standard uncertain. What the state of a market was immediately before an act, how it was affected by that act, the quantity of the commodity within reach of the market, the normal—that is, the usual—demand for it, are all facts susceptible of proof. They are in fact acted upon every day in the commercial affairs of the world; large business ventures are launched in reliance upon that identical evidence, and, in truth, upon it all commerce depends and is conducted. It is idle to say that that which everybody out of court can know, and does act upon as a fact, is too uncertain to be adopted as a standard, ⁵⁷⁸ or be susceptible of proof in court. What the "real value" of a thing is depends upon probative facts; it is a matter not to be fixed, as is "just and reasonable compensation," but one that has already been established by markets open to all. Market value depends wholly upon proof of pre-existing facts, and therefore may be known at any moment by anybody. "Just and reasonable compensation," as used in the statute in the Louisville & N. R. Co. case (99 Ky. 132, 59 Am. St. Rep. 457, 35 S. W. 129, 33 L. R. A. 209) had no necessary connection with any pre-existing fact, and therefore was insusceptible of being known in advance of its determination by the jury.

The application of this principle in law is not new. The Romans had laws based upon it. In 5 and 6 Edward VI. a statute was passed punishing "forestalling" and "regrating," the first being the buying of merchandise or victual coming to market, or dissuading persons from bringing their goods or provisions there, and the latter was the buying of corn or other dead victual in any market, and selling it again

in the same market, or within four miles of the place. "Engrossing was described to be getting into one's possession, or buying up, large quantities of corn or other dead victual, with intent to sell them again": Blackstone's Commentaries, 155. That statute was repealed in the twelfth year of George III. But Wharton in his Criminal Law says: "Entirely apart from these statutes, we must hold it to be indictable, on general principles of common law, to engross and absorb any particular necessary staple or constituent of life so as to impoverish and distress the mass of the community for the purpose of extorting, by terror or other coercive means, prices greatly above the real value": Wharton's Criminal Law, 1851. In Hale's Pleas of the Crown, chapter 80, it is laid down that to absorb, by fraud or coercion, all of a particular ⁵⁷⁹ class of staples, or currency, or labor in a community, so as to produce a dearth in any actual necessity of life, and in this way produce misery on one side and extortionate gains on the other, is undoubtedly an indictable offense. The common law confined the offense to an absorption of the necessities of life, whereas our statutes extend the principle to all articles of commerce; the common law made the crime depend upon the actors using fraud and coercion, while our statutes leave out those ingredients, as the act itself in its necessary effect is hurtful to society, and must have been known and intended by the perpetrators to be so; at the common law the result must have produced a dearth and misery upon the mass of people, while by our statutes it is enough if the result unsettles the usual balance of the market in that commodity, it being considered that in such state of case misery will be brought upon some members of society, and they are deemed by modern legislators as sufficiently important to the well-being of the whole body of the people as to warrant their protection; at the common law the final test was if the result brought the prices of the commodities greatly above their "real value," while under our statutes if the price is enhanced above or reduced below the "real value"—the offense is complete. It was competent and possible, then, to show the real value of corn and other necessities of life, and it is equally competent in law now to show the real value of any commercial commodity, and it is perhaps easier to prove the fact now than it was then.

The indictment in the case at bar should have stated that the purpose or effect of the alleged combination or pool which appellee is claimed to have entered into was to enhance the articles named in the ⁵⁸⁰ indictment above their real value. But as that was not charged, the indictment was deficient, and the demurrer was properly sustained.

It is therefore ordered that the judgment be affirmed.

Hobson, Barker, and Lassing, JJ., Dissented, as to so much of the opinion as holds that prosecutions may now be maintained under the act of 1890.

A Statute Purporting to Prohibit the Formation of Trusts for the purpose of fixing the price or regulating the production of articles of commerce, but exempting from its provisions all persons engaged in agriculture or horticulture, is, because of such exception, in conflict with the fourteenth amendment to the constitution of the United States, and therefore void: *State v. Cudahy Packing Co.*, 33 Mont. 179, 114 Am. St. Rep. 804. And a statute denying to employers the right to setoff or of counterclaim in actions brought by their employes to recover for wages, but exempting from its provisions the business of farmers or farm laborers and servants, is unconstitutional in discriminating against employers who are not farmers: *Kellyville Coal Co. v. Harrier*, 207 Ill. 624, 99 Am. St. Rep. 240.

A Statute Declaring That Any Person, Firm or Corporation engaged in the production, manufacture or disposition of any commodity in general use, which shall, for the purpose of destroying the business of a competitor in any locality, discriminate between different sections, communities or cities of the state by selling such commodity at a lower rate in one section than is charged by such party in another section or community after making due allowance, if any, in the grade and quality and in the actual value of transportation, shall be guilty of unfair discrimination, is not unconstitutional: *State v. Drayton*, 82 Neb. 254, 130 Am. St. Rep. 671.

PITTMON v. FLOWERS.

[131 Ky. 804, 115 S. W. 786.]

DEEDS—Delivery—Sufficiency—Declaration of Grantor at the Time.—If a deed is delivered by the grantor to the mother of the infant grantee, to be placed among the grantor's papers, and not with the intention of parting with the possession or control of it, that is not a delivery which passes title to the child. (p. 274.)

DEEDS—Delivery—Sufficiency—Declaration of Grantor at the Time.—If a deed is delivered by the grantor to the mother of the infant grantee for such infant, the title then passes to the infant. (p. 274.)

DEEDS—Delivery—Sufficiency—Presumption from Grantor's Silence.—If a deed is delivered by the grantor to the mother of the infant grantee without any direction with reference thereto, the presumption is that it is for the benefit of the child, and the title passes to the child. (p. 275.)

E. Bertram, for the appellant.

S. G. Smith, for the appellees.

805 NUNN, J. On the second day of June, 1903, appellant, R. Pittmon, made and executed a deed of conveyance to appellee, Jasper M. Flowers of about eighty acres of land,

worth from six hundred dollars to eight hundred dollars. The only consideration named in the deed was "love and affection." The deed was prepared in the usual form. At the time of the conveyance, Jasper M. Flowers was five years of age. Appellant, in the month of November, 1907, filed this action, by which he sought to have the deed canceled, and to recover possession of the land, which the child and its mother, Victory Flowers, were in possession of. He alleged that the real consideration for the conveyance was that the child should remain with and labor for him until it arrived at the age of twenty-one years. He also alleged that the child's mother had left his home and carried the child with her to the land sued for; that he had never delivered the deed to the child, or to anyone for it; that its mother, appellee Victory Flowers, had, without his knowledge or consent, taken it from a box in which he kept his papers and had it recorded. Appellees answered, controverting all the allegations of the petition.

Conceding, for the purpose of this case, appellant's competency as a witness against the infant appellee, he fails to show by sufficient testimony the truth of the allegations of his petition. He admits that he executed the deed before a deputy clerk and handed ⁸⁰⁶ it to the mother of the child, but claims, however, that he told her, at the time, to put it in a box with his other papers. The mother testified that when the deed was delivered to her she was told by appellant that she could have it recorded when she was ready to do so, which she did about twelve months thereafter, and that she was not told by appellant to place it with his papers. The deputy clerk who took the acknowledgment testified that the deed was handed by appellant to the mother of the child, but did not remember what, if anything, was said with reference to what should be done with it. This was all the testimony introduced upon this question. The testimony further showed that the mother of the child made her home with appellant for about fourteen years, and had performed all the household work for him, and that, when she left his house to go to the land conveyed to her child, appellant assisted her in moving. She also testified that there was no agreement whatever to the effect that the child should remain with appellant until it was twenty-one years old, or that this was any part of the consideration for the execution of the conveyance.

If the deed was delivered by appellant to the mother of the child, as his agent, to be placed among his papers, and not with the intention of parting with the possession or control thereof, then it was not a delivery which passed the title to the child; but if he delivered it to her for the child, then the title did pass to it, and if he delivered it to her without any direction with reference thereto, the presumption would be that it was for the benefit of the child, and the title would

pass to it. When a deed conveying land to an infant is delivered to the mother for the infant, the law presumes an acceptance for the benefit of the ⁸⁰⁷ child: *Hacker v. Hoover*, 23 Ky. Law Rep. 1848, 66 S. W. 382, and *Lay v. Lay*, 23 Ky. Law Rep. 1817, 66 S. W. 371.

There was no proof that this deed was purloined from the box in which appellant kept his papers, or that it was ever in this box after he delivered it to the mother.

For these reasons, the judgment of the lower court is affirmed.

What Constitutes a Delivery of a Deed is the subject of a note to *Brown v. Westerfield*, 53 Am. St. Rep. 537. Delivery rests on intention, and is to be collected from all the acts and declarations of the parties having relation to it: *Napier v. Elliott*, 146 Ala. 213, 119 Am. St. Rep. 17. In deeds for the benefit of infants, the presumption is in favor of their delivery. The delivery may be shown by facts and circumstances indicating an intention on the part of the grantor to part with his title and vest it in the grantee; and the act of recording alone is prima facie evidence of delivery: *Blankenship v. Hall*, 233 Ill. 116, 122 Am. St. Rep. 149. A deed executed by a father to his minor children, during his last sickness, may be effective without manual delivery, where he intends to convey the property to them: *Matson v. Johnson*, 48 Wash. 256, 125 Am. St. Rep. 924. But see *Hayes v. Boylan*, 141 Ill. 400, 33 Am. St. Rep. 326. That a deed given to a third person to be delivered by him to the grantee on the death of the grantor passes title when so delivered, see *Seibel v. Higham*, 216 Mo. 120, 129 Am. St. Rep. 502, and authorities cited in the cross-reference note thereto.

CASES
IN THE
SUPREME COURT
OF
MASSACHUSETTS.

DURGIN v. MINOT.

[203 Mass. 26, 89 N. E. 144.]

POLICE POWER—Determination of Necessity for Exercise of, by Whom must be Made.—Though the legislature, in the exercise of the police power, must determine whether a proposed law is within the constitution, such determination is not final, but is subject to review by the courts. (p. 278.)

POLICE POWER—Regulations Which may Impose and Enforce.—The enjoyment of private property must be held subordinate to such reasonable regulations as are essential to the peace, safety, good order and morals of the community, but, under the guise of enactments for its protection, lawful property cannot be confiscated. (p. 278.)

RIGHTS OF WAY, Legislative Interference with Which is not Permissible.—Though the enjoyment of a private right of way may be subjected to reasonable regulations for the protection of the health of the community, the easement cannot be arbitrarily restricted so as to be practically destroyed in the interests of the public without providing indemnity. (p. 279.)

RIGHTS OF WAY—Constitutional Law—Requiring Paving.—A statute purporting to confer on the board of health of a municipality the arbitrary power to declare a private passageway injurious to the public and to compel the owners to pave or lay the roadway permanently, as such board may direct, is not a reasonable exercise of the police power, and is therefore unconstitutional. (p. 280.)

Suit by the board of health to compel the defendants to pave a private right of way in a manner satisfactory to the complainants and in accordance with an order made by them under chapter 119 of the Statutes of 1894. The demurrer to the bill was overruled pro forma, and the question of the constitutionality of the statute relied upon being involved, the case was reported to the supreme appellate court for its determination.

G. A. Flynn, for the plaintiffs.

C. A. Williams, G. D. Burrage and W. H. H. Tuttle, for the defendants.

27 BRALEY, J. It is not improbable that, by the accumulation of stagnant water or of filth on the surface of the roadbed of a private way which is extensively used, it may become so offensive as to be dangerous to the health of the community. But if this condition is found by the authorities to constitute a nuisance, the board of health, under Revised Laws, chapter 75, sections 65, 67, has been delegated ample power to order it abated, although they need not direct the mode of abatement. If the mode is prescribed, the land owner or occupant, after notice, need not follow it, but may do away with the cause of complaint in any feasible and effectual manner: *Belmont v. New England Brick Co.*, 190 Mass. 442, 77 N. E. 504, and cases cited. Yet when the order is not complied with, the board under section 69 can cause the nuisance to be removed at the expense of those who are found to be responsible for its existence or continuance: *Salem v. Eastern R. R.*, 98 Mass. 431, 96 Am. Dec. 650. Plainly, so long as the way described in the bill was not detrimental to the public health, no restraint or regulation as to its use or maintenance was necessary, and, if a noxious condition calling for action by the public authorities existed, a remedy had been provided. It may be said that, if there were various owners upon whose lands collectively and from the same source a nuisance existed, they could not be joined in one order, but each should be ordered to abate the nuisance on his own land. But, if so, the remedy would be no less effective, as the form of procedure could be adapted to reach them, either jointly or severally: *Cambridge v. Munroe*, 126 Mass. 496.

It was while similar provisions found in Public Statutes, chapter 80, sections 16, 21 and 23, were in force, that the Statutes of 1894, chapter 119, were enacted. By section 1, "Whenever the board of health of the city of Boston shall adjudge that the public health requires and shall order that the surface of any private passageway in said city ²⁸ shall be paved or otherwise provided with a roadbed, the owners of said private passageway shall forthwith pave or lay said roadbed in accordance with said order and in a manner and with materials satisfactory to said board," and by section 3, "Any justice of any court having jurisdiction in equity may, on the petition of the board of health of said city, enforce the provisions of this act by any proper process or decree." The demurrants, who have been ordered to pave a passageway connected with their estate with materials satisfactory to the plaintiffs, contend that the statute is unconstitutional.

In the exercise of the police power upon which the statute rests, while in the first instance the legislature as a co-ordinate branch of the government must determine whether a proposed law is within the constitution, its determination is not final, but is subject to review by the courts: Mass. Const., c. 1, art. 4; *Talbot v. Hudson*, 16 Gray, 417. The limits within which such enactments are valid have been often considered, but no general definition has been attempted: See *Sawyer v. Davis*, 136 Mass. 239, 49 Am. Rep. 27; *Train v. Boston Disinfecting Co.*, 144 Mass. 523, 59 Am. Rep. 112, 11 N. E. 929; *Miller v. Horton*, 152 Mass. 540, 23 Am. St. Rep. 850, 26 N. E. 100, 10 L. R. A. 116; *Taft v. Commonwealth*, 158 Mass. 526, 33 N. E. 1046; and *Commonwealth v. Strauss*, 191 Mass. 545, 78 N. E. 136, 11 L. R. A., N. S., 968, 6 Ann. Cas. 842. In *Sawyer v. Davis*, 136 Mass. 239, 49 Am. Rep. 27, it was said: "Slight infractions of the natural rights of the individual may be sanctioned by the legislature under the proper exercise of the police power, with a view to the general good. Grave ones will fall within the constitutional limitation that the legislature is only authorized to pass reasonable laws. The line of distinction cannot be so laid down as to furnish a rule for the settlement of all cases in advance. The difficulty of marking the boundaries of this legislative power, or of prescribing limits to its exercise, was declared in *Commonwealth v. Alger*, 7 Cush. 53, and is universally recognized." But if the enjoyment of private property must be held subordinate to such reasonable regulations as are essential to the peace, safety, good order and morals of the community, yet, under the guise of enactments for its protection, lawful property cannot be confiscated: *Commonwealth v. Alger*, 7 Cush. 53; *Commonwealth v. Boston Advertising Co.*, 188 Mass. 348, 108 Am. St. Rep. 494, 74 N. E. 601, 69 L. R. A. 817; *Belmont v. New England Brick Co.*, 190 Mass. 442, 77 N. E. 504.

The demurrer admits that the private passageway was appurtenant ²⁹ to the defendants' estates and a part of the freehold, in whose use and enjoyment their rights apparently were exclusive. No reasons are set forth by way of recital to show the specific grounds of the action taken. All that appears is that the board adjudged that the public health required the changes. If, because of its general use by the public as a thoroughfare connecting with the highways into which it opened, the way had become out of repair and emitted noisome odors, authority could have been delegated to the city council to take a coextensive easement by right of eminent domain, and a street properly constructed and maintained would have removed any source of danger to the public health. Instead, the defendants, had they complied with the order of the plaintiffs, would have been indirectly compelled, at their own expense, to provide such accommo-

dation, upon the ground that the reconstruction merely restrained a harmful use of their premises.

The statute is expressed in the broadest terms. It includes not only ways similar to that described in the bill, but any private way which the land owner may construct on his own premises. If, however, the laying out and building of private passageways in any manner the owner sees fit to adopt is not prohibited, yet, whenever the board in the performance of its functions deems such action to be proper, a reconstruction may be ordered. A statute limiting the height of buildings, which was upheld in the case of *Welch v. Swasey*, 193 Mass. 364, 118 Am. St. Rep. 523, 79 N. E. 745, 23 L. R. A., N. S., 1160, is not analogous, as the property affected was left physically intact, and no changes in existing buildings were required. The statute authorizing the abatement of a nuisance where land is wet, rotten, spongy or covered with stagnant water, rendering it offensive to the residents in the vicinity, or injurious to the public health, furnishes a closer resemblance. But that legislation, while recognizing the right of the community to self-protection, preserves the constitutional guaranty by providing for the award of damages against which benefits may be set off or independently assessed upon estates benefited, where lands are filled or drained and made wholesome: Rev. Laws, c. 75, secs. 75-83; *Grace v. Newton Board of Health*, 135 Mass. 490. See *Cavanagh v. Boston*, 139 Mass. 426, 52 Am. Rep. 716, 1 N. E. 834.

A right of way also is property, and, if the enjoyment of its ³⁰ convenience may be subjected to reasonable regulations for the protection of the health of the community, the easement cannot be arbitrarily restricted so that practically it is destroyed, in the interest of the public, without providing indemnity: Declaration of Rights, art. 10. The present statute, without even providing that directions may be given to cease using the way until the conditions complained of have been remedied, purports through changes which may be ordered, to authorize the impairment of the natural right inherent from ownership freely to use property not of itself obnoxious to the general welfare. It is not an unreasonable inference that cases might arise where the land owner would prefer to discontinue, or to abandon the way altogether, rather than to bear the required outlay; but no alternative is given after the board has issued its order. While by section 2 a hearing must be granted to an objecting owner, and if he refuses compliance with the order the plaintiffs, under section 3, must resort to the court for a decree of enforcement, their adjudication that a nuisance exists cannot be revised: *Stone v. Heath*, 179 Mass. 385, 61 N. E. 268. The defendants, even if they have not been deprived of either title or possession, nevertheless are prohibited from availing themselves of an unconditional advantage for which the way was designed. In effect,

the judgment of the board becomes a condition, upon performance of which the defendants shall be permitted to continue its use. Under the most liberal interpretation, the act confers the arbitrary power to adjudge a private passageway injurious to the public health, and then to compel the owners or owner, instead of abating the nuisance in any proper manner as the necessity may demand, to pave, repave, or lay out the roadbed permanently as the board of health directs. The way, however, still remains a lawful private easement, while the defendants are subjected to a large expenditure which in the ordinary maintenance of their estates, or even in compliance with an order for abatement, might be wholly unnecessary. The plaintiffs urge that in a broad and general sense it is possible so to construe the statute that, even then, there has been no infringement of vested rights, but only the imposition of a lawful regulation in the use of land, not exceeding the limitations, which in one form or another have been recognized as authorized for the prevention of a manifest danger ³¹ in the interest of the public: *Nickerson v. Boston*, 131 Mass. 306; *Commonwealth v. Roberts*, 155 Mass. 281, 29 N. E. 522, 16 L. R. A. 400. But in our opinion, for the reasons stated, such a construction would sanction an unreasonable restriction upon the rights of the citizen in the ownership and use of real property as they stood at common law: See *Murdock v. Stickney*, 8 Cush. 113; *Brigham v. Edmands*, 7 Gray, 359; *Morse v. Stocker*, 1 Allen, 150; *Hersey v. Chapin*, 162 Mass. 176, 38 N. E. 442; *Bent v. Emery*, 173 Mass. 495, 53 N. E. 910; *Otis Co. v. Ludlow Mfg. Co.*, 186 Mass. 89, 104 Am. St. Rep. 563, 70 N. E. 1009; *Commonwealth v. Boston Advertising Co.*, 188 Mass. 348, 108 Am. St. Rep. 494, 74 N. E. 601, 69 L. R. A. 817; *Belmont v. New England Brick Co.*, 190 Mass. 442, 77 N. E. 504.

The demurrer, therefore, must be sustained, and the bill dismissed.

Decree accordingly.

As to What Authority may be Delegated to Boards of Health, see the note to *Blue v. Beach*, 80 Am. St. Rep. 212. Subsequent decisions on this question are *Lowe v. Conroy*, 120 Wis. 151, 102 Am. St. Rep. 983; *Anable v. Board of Commrs.*, 34 Ind. App. 72, 107 Am. St. Rep. 173.

The Constitutionality of Building Regulations is the subject of a note to *Bostock v. Sams*, 93 Am. St. Rep. 405. This question is discussed with special reference to regulations looking toward the promotion of public health in *Tenement House Department v. Moeschén*, 179 N. Y. 325, 103 Am. St. Rep. 910.

MINOT v. DOHERTY.

[203 Mass. 37, 89 N. E. 188.]

INTOXICATING LIQUORS—Right to Recover of the Liquor Seller for Damages Due for the Acts of a Habitual Drunkard.—A wife cannot recover of a seller of intoxicating liquors for the acts of her habitually drunken husband, done while perfectly sober, though the defendant had contributed to the formation of the habits of intoxication; yet if a man who is a habitual drunkard for a specified period assaults his wife while in a state of such drunkenness, the defendant who, by selling him liquor, had caused him that drunkenness in whole or in part is liable, if his intoxication at that time was the cause of the assault. (p. 282.)

JURY TRIAL—Erroneous Instructions, Curing of by Other Instructions.—An inaccurate statement by a trial judge may be rendered harmless by other instructions clearly and correctly stating the law upon the subject. (p. 282.)

INTOXICATING LIQUORS—Damages—Pain of Wife in Miscarriage.—A married woman entitled to recover for personal injuries causing her miscarriage is not deprived of her right of recovery on the ground that her labor in such miscarriage may not have been greater than would have ultimately or naturally resulted from her pregnancy. (p. 282.)

Action of tort by a married woman under section 58, chapter 100, Revised Laws of Massachusetts, to recover of the defendant, the proprietor of a barroom, for personal injuries resulting in her miscarriage and inflicted upon her by an assault of her husband due to his intoxication from liquor sold to him by the defendant. At the close of the trial the defendant asked the judge, among other matters, to instruct the jury as follows:

“8. There is no evidence that the alleged miscarriage was suffered in consequence of the intoxication of the plaintiff's husband caused in whole or in part by liquor sold or given him by the defendant.”

“11. The jury cannot consider the plaintiff's pain in labor at the time of the alleged miscarriage as an element of damage, as there is no evidence that such pain was more aggravated than would ultimately and naturally result from her pregnancy.”

The judge refused to so instruct, and the jury on the submission of the cause to them returned a verdict in favor of the plaintiff for fifteen hundred dollars. The defendant alleged exceptions.

P. A. Hendrick, for the defendant.

R. W. Shea, for the plaintiff.

38 LORING, J. 1. The defendant urges in support of his exception to the refusal of the judge to give the eighth ruling asked for that “the defendant would not be liable if a habitual

drunkard, to the formation of whose habits of intoxication the defendant had in whole or in part contributed, committed an assault while perfectly sober." That is true. That was decided to be ³⁹ law in *Bryant v. Tidgewell*, 133 Mass. 86. But it was laid down in that case that if a man who is habitually drunk for a specified period assaults his wife at that time, a defendant who, by selling him liquor, had caused that drunkenness in whole or in part would be liable if his intoxication at that time was the cause of the assault. That case established the distinction between causing a husband to form habits of drunkenness by selling liquor to him and causing him to be habitually drunk during a specified period by selling liquor to him.

The defendant has also argued that there was no evidence that the husband was in fact intoxicated at the time of the assault. But we are of opinion that from the evidence set forth in the bill of exceptions the jury were warranted in finding that he was intoxicated at that time. Moreover, the bill of exceptions does not purport to set forth all the evidence. Further, although the whole charge is not given, it affirmatively appears that the presiding judge instructed the jury that they must find that fact. He told them that he had been asked to give them this instruction: "The burden is upon the plaintiff to show that the intoxication of the husband at the time it is alleged that he struck and injured her was caused in whole or in part by liquors sold or given him by the defendant." As to this he told the jury: "I have already given you that and I repeat it."

2. In explaining to the jury that the defendant would not be liable for habits of intoxication formed by the husband before any liquor was sold to him by the defendant, the judge said that he would be liable if "those habits were continued afterward and were continued afterward on account of the acts of the defendant in selling him liquor in whole or in part." If this had stood alone, the charge would have been erroneous, for the same reason that the charge in *Bryant v. Tidgewell*, 133 Mass. 86, was held to be wrong. But this was an inaccurate statement used by the judge in pointing out that the defendant was not liable if her husband had become addicted to drunkenness before any liquor was sold to him by the defendant. When the judge later on in his charge instructed the jury as to what they must find to bring in a verdict for the plaintiff, this inaccuracy was cured. They were then told in substance that they must find that the assault was caused by his being in a state ⁴⁰ of habitual drunkenness at the time, and that this state of habitual drunkenness had been caused in whole or in part by liquor sold by the defendant.

3. The eleventh request could not be given. The pain in labor of a woman who by reason of an assault and battery

upon her brings forth a dead child when she is seven months gone in pregnancy, may be found to be greater than the pain in labor of a woman "who remembereth no more her anguish for joy that a man is born into the world."

Exceptions overruled.

That a Wife may Recover Against a Saloon-keeper for an assault upon her by her husband while he was intoxicated by liquor furnished him by the saloon-keeper, see the note to *Mastad v. Swedish Brethren*, 85 Am. St. Rep. 450, on the liability of liquor sellers for the acts of persons becoming intoxicated.

Though a Man is Sober at the Time he commits suicide, his wife may recover against a saloon-keeper and his sureties for such death, if it was proximately caused by the selling and furnishing of intoxicating liquors to the decedent at dates prior to the suicide: *Garrigan v. Kennedy*, 19 S. D. 11, 117 Am. St. Rep. 927.

BUTTERICK PUBLISHING COMPANY v. FISHER.

[203 Mass. 122, 89 N. E. 189.]

CONTRACTS not to Sell or Deal in the Goods of Any Other Person, When Permissible.—A contract between a corporation engaged in the business of selling patterns for garments and in publishing periodicals and catalogues thereof and a dry-goods merchant, providing that the corporation should sell and deliver to the merchant, for a stated period, patterns at a designated price, should allow him each year to make exchange for new patterns, should permit certain credits, and that the merchant would at all times keep on hand such patterns, and would not sell, or permit to be sold, on his premises, during the term of the contract, any other make of patterns, does not violate section 1 of chapter 56 of the Revised Laws of Massachusetts, making it a crime to impose a condition in the sale of goods "that the purchaser shall not sell or deal in the goods of any other persons." (p. 287.)

STATUTES, Construction of Penal.—A statute prohibiting and punishing an agreement in the sale of goods that the purchaser shall not sell or deal in the goods of any other person is highly penal, and must, therefore, be construed strictly and not as prohibiting a sale at a reduced rate in consideration of an agreement to sell the vendor's goods alone. (p. 288.)

EQUITY—Parties Defendant—Third Person Interested in the Result, When Need not be Made a Party.—In a suit to enforce a contract whereby the defendant agreed not to sell or permit the selling at his place of business of any goods except those of the complainant, it is not necessary to make a party defendant a rival of the complainant whose goods the defendant is sought to be prohibited from selling. (p. 288.)

SPECIFIC PERFORMANCE. Tests of the Right to.—The question whether a contract will or will not be specifically enforced depends on whether the thing contracted for can be purchased by the complainants and whether damages are an adequate compensation for the breach. (p. 288.)

SPECIFIC PERFORMANCE of Negative Covenants.—The specific performance of a negative covenant will not be denied in a proper case because an affirmative covenant, with which the negative covenant is allied, is in kind one which a court does not specifically enforce. (p. 288.)

SPECIFIC PERFORMANCE of an Agreement not to Sell Any Goods Except Those of the Complainant.—A contract between a manufacturer and seller of patterns for all kinds of garments worn by women and children and the owner of the largest dry-goods store in a city that the latter will purchase such patterns and keep them on hand for sale, and will not sell, or permit to be sold, during the term of the contract, any other patterns, will be specifically enforced by enjoining its violation. (p. 289.)

CONTRACT, Parol Evidence, When will not Vary Written Contract.—Parol evidence to place upon one of the parties to a contract a greater burden than was imposed by such contract, though admitted without objection, cannot have the effect of changing a contract in writing. (p. 290.)

SPECIFIC PERFORMANCE of Written Contract—Parol Evidence, When may Affect Right to.—Where it appears that a written contract was entered into by the complainant and the defendant, and parol evidence is received which shows that it was agreed to make the latter the sole agent of the former, specific performance will not be decreed against him of such contract until the complainant carries out an agreement to make the defendant such agent. He who seeks equity must do equity. (p. 291.)

DAMAGES, Award of, When cannot be Sustained for Want of Proof as to the Amount.—Where, in a suit to enjoin the violation of a written agreement, such violation is found, and also that it resulted in damages which were more than nominal, but there is no proof of the amount in dollars and cents, the award of twenty-five dollars cannot be sustained. (p. 291.)

Suit in equity. The bill alleged that the plaintiff engaged in the business of manufacturing and selling patterns for all kinds of garments worn by women and children, and in publishing periodicals and catalogues illustrating such patterns, and that they had a very large and extensive sale and valuable reputation, and had long been in the market in Newburyport and vicinity; that their handling and introduction and sale required skill, knowledge of the trade and a leading position in the business of selling dry-goods; that the defendant had long been engaged in the dry-goods business in Newburyport, having the largest store and business of that kind in that city, and had long handled patterns for garments; and on or about April 5, 1906, the plaintiff and defendant entered into a contract whereby the plaintiff granted to the defendant the right to act as special agent for the sale of such patterns in the defendant's store, and agreed to sell and deliver to the defendant patterns at fifty per cent of the retail price and advertising matter at a price specified, to allow the defendant to return twice each year at nine-tenths of the sum paid for them patterns purchased under the agreement and in exchange for new patterns to be ordered at the time of the return or subsequently; to

permit the sum of two hundred dollars, part of the purchase price of patterns, to stand on credit bearing interest at four per cent per annum, and to become due on the termination of the agreement; and the defendant agreed to purchase from the plaintiff and to keep on hand for sale, while the agreement remained in force, patterns to a specified amount of the retail price, to purchase advertising matter of a specified amount, to pay certain expenses, and not to sell the patterns except at label prices, nor to assign the pattern stock to any other party without the written consent of the plaintiff, and not to sell or permit to be sold on the premises of the defendant during the term of the contract any other make of patterns. The contract was to continue for three years and thereafter until terminated by three months' notice in writing. The complainant alleged that the defendant had not performed the conditions of the contract, had sold, and permitted to be sold, continuously a make of patterns other than those of the plaintiff, to wit, the McCall patterns, manufactured by the McCall Company, and that the defendant intended to continue the sale of such McCall patterns throughout the term of the contract, and otherwise to violate its provisions.

The prayer was that the defendant and his agents and servants be enjoined from advertising, selling or distributing patterns, fashion sheets, catalogues and other literature or printed matter of the McCall Company, or any manufacturer other than the plaintiff, and from using his store, business, agents, clerks, apparatus or connections to further advance the interests of the McCall Company or any pattern manufacturer other than the plaintiff, and from permitting to be sold at his store, during the term of the contract, any other make of patterns than those of the plaintiff, and that plaintiff might be awarded such damages as might be ascertained.

The defendant demurred, claiming that the contract was unlawful because contrary to chapter 56, Revised Laws, section 1. The demurrer was overruled by the trial judge: the defendant appealed. Subsequently the case was heard upon the merits before a commissioner appointed to take testimony, and upon the testimony taken by him, the trial judge found as follows:

"At the time of the making of the written contract it was not agreed that the Pray agency* should be terminated before the defendant should begin performance of his contract, or if there was such an agreement, it was not embodied in the contract, and being inconsistent with its terms, evidence of it was inadmissible. Subsequent to the making of the contract in question its terms were modified by an oral agreement whereby

*The contract with H. W. Pray and Company later referred to.

the time for the beginning of the performance was extended to June 28, 1908. This modification was in pursuance of and carried out a parol understanding and agreement that the defendant should have an exclusive right of sale, and that the Pray contract should be terminated, the earliest date at which the plaintiff's could terminate it being June 28th.

"The purpose of the plaintiff is to establish but one place of sale for its goods.

"The patterns manufactured by the plaintiff and referred to in the contract in question are duly patented by United States letters patent.

"The plaintiff has always been, and is now ready, willing and able to perform the written contract as modified by parol. The first step would be the termination of the Pray contract, and on its termination the performance of the other provisions.

"For several years before and continuously since June 28, 1908, the defendant has sold McCall patterns and intends to continue to do so under a contract which he has made with the McCall Company dated April 2, 1908, and running for three years and until terminated by three months' notice. The McCall Company [and the plaintiff] were rival dealers in paper patterns. The defendant has the largest dry-goods store in Newburyport, and better facilities than anyone else for the sale of the plaintiff's advertising matter and the distribution of its advertising matter. . . .

"The plaintiff company made a contract with H. W. Pray & Company of Newburyport dated September 13, 1905, which was similar in terms to its contract with the defendant. It was terminable by written notice after the expiration of two years. This contract has never been terminated.

"At the time when the written contract between the plaintiff and the defendant was executed, it was stated by the plaintiff's agent that the defendant was to be the exclusive agent of the plaintiff in Newburyport, and both parties so understood it, then and at the time when the contract was modified by parol. The plaintiff intended to give the notice to terminate the Pray contract. It did not do so, because the defendant was refusing to carry out the contract. The defendant absolutely refused to carry out its contract with the plaintiff before the time for performance arrived. The defendant has proved nothing which excuses him in repudiating the contract.

"The only injury to the plaintiff caused by the defendant's refusal to perform the contract is the larger sales which might be made by the defendant over those made by Pray & Company, and the less sales which might be made by the McCall Company if compelled to sell through a smaller dealer. It is impossible to determine accurately the amount of that dam-

age in dollars and cents, although I am satisfied that it is more than nominal."

The trial judge ruled that under the contract the patterns were sold by the plaintiff to the defendant, and the defendant sold them as his own goods to his customers, and that in such sales he did not act as agent; that the refusal of the defendant to carry out his contract "excused the plaintiff from taking any steps to terminate the Pray contract while such refusal was persisted in." The trial judge refused to rule that the plaintiff was not entitled to equitable relief, or that it was entitled to nominal damages only, and ordered a final decree; that the plaintiff's damages be assessed at twenty-five dollars; that the defendant pay this sum, together with costs of suit, and that the plaintiff have no other relief in the suit. Both parties appealed.

R. G. Dodge and J. B. Sheehan, for the plaintiff.

W. F. White, for the defendant.

¹²⁹ LORING, J. 1. We are of opinion that the contract sued on is not within Revised Laws, chapter 56, section 1. It was held by this court in *Commonwealth v. Strauss*, 188 Mass. 229, 74 N. E. 308, that that statute, being a ¹³⁰ highly penal one, is to be construed strictly, and that so construed it does not prohibit a sale at a reduced rate in consideration of an agreement to sell the vendor's goods alone. It is not necessary, therefore, to consider whether the defendant was the plaintiff's agent as matter of law, and so within the exceptions stated at the end of the section.

2. The defendant's objection that no decree can be had in the absence of the McCall Company is not well taken. No relief is sought against that company. It is usual to join such a person as a proper party defendant; and in *Strobridge Lithographing Co. v. Crane*, 12 N. Y. Supp. 834, it was held that under a statute giving a proper party defendant a right to intervene it was error to refuse to admit a person standing in the position of the McCall Company on his making application therefor. We know of no case or principle which makes the McCall Company a necessary party defendant.

3. The next question is whether the plaintiff was entitled to have the defendant enjoined from violating his negative agreement "not to sell or permit to be sold on the premises of the party of the second part during the term of this contract any other make of patterns."

It may be taken to be settled in this commonwealth that the question whether a contract will or will not be specifically enforced depends upon the question whether the thing contracted for can be purchased by the plaintiff, and whether damages are an adequate compensation for a breach: See

Clark v. Flint, 22 Pick. 231, 33 Am. Dec. 733; Gloucester Isinglass & Glue Co. v. Russia Cement Co., 154 Mass. 92, 26 Am. St. Rep. 214, 27 N. E. 1005, 12 L. R. A. 563; New England Trust Co. v. Abbott, 162 Mass. 148, 38 N. E. 432, 27 L. R. A. 271; Howe v. Watson, 179 Mass. 30, 60 N. E. 415; Beekman v. Marsters, 195 Mass. 205, 122 Am. St. Rep. 232, 80 N. E. 817, 11 L. R. A., N. S., 201, 11 Ann. Cas. 332.

It may also be taken to be settled, following the decision in *Lumley v. Wagner*, 1 De Gex, M. & G. 604, that the specific performance of a negative covenant will not be denied in a proper case because an affirmative covenant with which the negative covenant is allied is in kind one which a court of equity does not specifically enforce: See *Peabody v. Norfolk*, 98 Mass. 452, 96 Am. Dec. 664; *Ropes v. Upton*, 125 Mass. 258; *Anchor Electric Co. v. Hawkes*, 171 Mass. 101, 68 Am. St. Rep. 403, 50 N. E. 509, 41 L. R. A. 189; *United Shoe Machinery Co. v. Kimball*, 193 Mass. 351, 79 N. E. 790. See, also, *Rice v. D'Arville*, 162 Mass. 559, 39 N. E. 180.

¹³¹ The defendant's covenant not to sell or permit to be sold on his premises any other make of patterns is a covenant where the thing contracted for cannot be purchased by the plaintiff, and where damages are not an adequate compensation. The plaintiff's business consists in making and selling patterns for women's and children's garments. For the purpose of pushing its business it creates an agency in each of the principal cities and towns for the sale of its patterns. The agent also agrees to buy a certain number of its pamphlets and catalogues, the pamphlets to be resold at a profit and the catalogues to be distributed gratuitously. For example, in the contract made between the plaintiff and the defendant, the plaintiff agreed to sell to the defendant its patterns at fifty per cent of the retail price, and the defendant agreed to keep on hand for sale (with the exception of four months there named) patterns to the amount of four hundred dollars. The plaintiff agreed to sell to the defendant its pamphlets, called "*Butterick Metropolitan Fashions*," at seven and one-half cents apiece, the retail price being ten cents, and the defendant agreed to buy thirty thousand sheets of said "*Fashions*." The defendant also agreed to buy one thousand catalogues for twenty dollars a thousand, to be distributed gratuitously. The defendant further agreed to keep the patterns on the ground floor of the store and to give through a "lady attendant" proper attention to the sale of them.

It appeared in evidence that the defendant's store was easily the largest dry-goods store in Newburyport, and that it is of advantage to have such patterns sold in the same store

where goods are sold for making women's and children's garments.

It is manifest that the plaintiff cannot get the same return from a smaller store, and that its loss from the defendant's breach of his contract cannot be measured or made good by giving it damages.

The case is within the decided cases. An injunction was issued in a similar case by the supreme court of New York, and that decision was affirmed by the court of appeals: *Standard Fashion Co. v. Siegel-Cooper Co.*, 30 App. Div. 564, 52 N. Y. Supp. 433; on appeal, 157 N. Y. 60, 68 Am. St. Rep. 749, 51 N. E. 408, 48 L. R. A. 854. Moreover, this court in *Butterick Publishing Co. v. Boynton*, 191 Mass. 175, 77 N. E. 705, where there was no negative covenant, said that if there had been one an injunction ¹³² would have issued. In *Catt v. Tourle*, L. R. 4 Ch. 654, violation of a covenant not to buy beer for sale from anybody but the plaintiff was enjoined. The covenant there was in a lease, but that was held to be immaterial in the original case of *Lumley v. Wagner*, 1 De Gex. M. & G. 604; See pp. 617, 618. The same point was decided in *Metropolitan Electric Supply Co. v. Ginder*, [1901] 2 Ch. 799. The negative covenant which was enjoined in that case was a covenant not to take electricity from anybody but the defendant and was not contained in a lease. For other cases, see *Western Union Tel. Co. v. Rogers*, 42 N. J. Eq. 311, 11 Atl. 13; *Myers v. Steel Machine Co.*, 67 N. J. Eq. 300, 57 Atl. 1080; on appeal, 68 N. J. Eq. 795, 64 Atl. 746; *Jones v. Williams*, 139 Mo. 1, 69 Am. St. Rep. 436, 39 S. W. 486, 40 S. W. 353, 37 L. R. A. 682; *Ferris v. American Brewing Co.*, 155 Ind. 539, 58 N. E. 701, 52 L. R. A. 305; *Southern Fire Brick & Clay Co. v. Garden City Sand Co.*, 223 Ill. 616, 79 N. E. 313, 7 Ann. Cas. 50; *Feigenspan v. Nizolek*, 71 N. J. Eq. 382, 65 Atl. 703. For a collection of cases, see *Joyce on Injunctions*, secs. 451-457.

4. The defendant has contended that in the case at bar the plaintiff is not now, and never has been, in a position to ask for specific performance of the contract between them. He bases this contention on the finding of the judge who heard the case that "subsequent to the making of the contract in question its terms were modified by an oral agreement, whereby the time for the beginning of the performance was extended to June 28, 1908. This modification was in pursuance of and carried out a parol understanding and agreement that the defendant should have an exclusive right of sale and that the Pray contract should be terminated, the earliest date at which the plaintiff could terminate it being June 28th."

But we are of opinion that this finding was plainly wrong.

During the negotiations which led up to the written contract here in question, it was stated by the plaintiff company that it was its policy to have but one "agency" in Newburyport, and that it intended to bring its agency with H. W. Pray & Company to an end (as it had a right to do under its contract with them), at the same time that its contract with the defendant went into effect. But the plaintiff came under no obligation to the defendant to that effect in the original contract, as was found in terms by the judge who heard the case. The ruling that parol evidence is not admissible to contradict a written contract usually ¹³³ is spoken of as a rule of evidence. It is a rule of evidence, but it is a rule of evidence founded on the substantive rights of the parties, namely, that, where the trade finally struck between the parties is put in writing, the writing sets forth the trade which is struck. For that reason evidence that during the negotiations the plaintiff agreed by word of mouth that the defendant should be its sole "agent," although not objected to, is not of consequence: *Mears v. Smith*, 199 Mass. 319, 85 N. E. 165. See, also, in this connection, *Farquhar v. Farquhar*, 194 Mass. 400, 80 N. E. 654.

The change subsequently made by which the contract between the plaintiff and the defendant was to go into effect on June 28, 1908, in place of March 28, 1908, was made to enable the defendant to bring his contract with the McCall Company to an end before or at the time that his contract with the plaintiff went into operation, and not as part of a subsequent agreement that the defendant was to be the sole "agent," as found by the judge. To bring the contract with the McCall Company to an end, the defendant had to give three months' notice; and after the contract here in question had been made it was discovered that notice could not be given before March 28, 1908. This fact was not discovered when the written contract was made, but was discovered later on. One of the plaintiff's witnesses (Marsh, by name), testified that March 28, 1908, was originally fixed upon as the date when the contract here in question was to go into operation, because the plaintiff did not wish to put its patterns into the defendant's store until the defendant's contract with the McCall Company had expired; and the date was changed from March 28, 1908, to June 28, 1908, when it was discovered that that was the earliest date on which the defendant could terminate his contract with the McCall Company. The defendant, when on the stand, also testified to the same thing, and fixed February as the time when this subsequent agreement changing the date was made. That was all the testimony there was in the case as to the change from March 28, 1908, to June 28, 1908.

The plaintiff throughout intended to have but one "agency" in Newburyport. But at no time did it come under an obligation to the defendant to that effect. We are therefore of opinion that the fact that the plaintiff never has brought its ¹³⁴ agency with H. W. Pray & Company to an end does not prevent it from asking for specific performance.

But we are also of opinion that, since the plaintiff stated that it intended to have but one "agency" in Newburyport, the defendant should not be required specifically to perform the contract until after H. W. Pray & Company have ceased to be the plaintiff's agent. He who seeks equity must do equity.

5. The plaintiff has asked for such damages as have accrued in addition to the injunction, as was done in *Foss v. Roby*, 195 Mass. 292, 81 N. E. 199, 10 L. R. A., N. S., 1200, 11 Ann. Cas. 571. We think that doubtless it has suffered damages, but we think also that it is not possible to prove, and that the plaintiff has not proved, what they amount to in dollars and cents.

The decree of the superior court must be reversed and a decree entered enjoining the defendant from selling or permitting to be sold on his premises, during the term of the contract, any make of patterns other than those of the plaintiff, from and after the time when its contract with H. W. Pray & Company shall have come to an end.

So ordered.

That the Specific Performance of Contracts relating to the sale of personal property may be decreed in a proper case, see *Northern Cent. Ry. Co. v. Walworth*, 193 Pa. 207, 74 Am. St. Rep. 683; *Steinmeyer v. Siebert*, 190 Pa. 471, 70 Am. St. Rep. 641; *Manton v. Ray*, 18 R. I. 672, 49 Am. St. Rep. 811; *Rothholz v. Schwartz*, 46 N. J. Eq. 477, 19 Am. St. Rep. 409; *Eckstein v. Downing*, 64 N. H. 248, 10 Am. St. Rep. 404. Specific performance may be had of a contract to deliver stock, the pecuniary value of which is not provable: *Baumhoff v. St. Louis etc. R. R. Co.*, 205 Mo. 248, 120 Am. St. Rep. 745.

FENEFF v. NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

[203 Mass. 278, 89 N. E. 436.]

HUSBAND AND WIFE.—The Right of Consortium is a right growing out of the marriage relation, which the husband and wife have respectively to enjoy the society, companionship and affection of each other in their life together. (p. 292.)

HUSBAND AND WIFE—Her Right to Recover for Loss of Consortium Due to the Negligent Injury of the Husband by the Defendant.—Where the husband has suffered personal injuries by

the negligence of another and has recovered damages therefor, his wife cannot recover for loss of consortium due to the same negligence and injury. (p. 295.)

Action of tort for loss of consortium. The plaintiff, as the wife of Antoine Feneff, sued to recover for loss of consortium, which she claimed to have resulted to her on account of personal injuries received by her husband from the negligence of the defendant, though the husband had previously brought an action and recovered damages for the same injury. The trial judge ruled that the plaintiff could not maintain the action, and ordered a verdict for the defendants. She alleged exceptions.

C. E. Tupper, for the plaintiff.

R. A. Stewart, L. R. Chamberlain, C. M. Thayer and A. H. Bullock, for the defendants.

279 KNOWLTON, C. J. The plaintiff's husband was injured physically and mentally by the negligence of the defendants, and he has recovered full compensation for his injuries: *Feneff v. Boston & Maine R. R. Co.*, 196 Mass. 575. 82 N. E. 705. The plaintiff sues for damages suffered by her from his injury, by reason of her relation to him as his wife. In her declarations she avers that, by reason of his disability, she has endured great suffering and anxiety, and has been obliged to assume heavy and arduous duties which she did not have to assume before the injury, and that she has lost the comfort, society, aid and assistance of her husband. In her bill of exceptions she says that the action is "for the loss of consortium." This statement covers the case: for it is plain that the other averments in her declaration do not show an invasion of a legal right, nor anything more than a remote and consequential damage which did not result from any wrong done directly to her.

The right of consortium is a right growing out of the marital relation, which the husband and wife have, respectively, to enjoy the society and companionship and affection of each other in their life together. At the common law, the husband had a right to the labor and services of his wife, and in suing for the damages which are personal to the husband for an injury to his wife, he was permitted to recover, not only for the expenses of her care and cure, but for the loss of her labor and services and the loss of consortium: *Kelley v. New York etc. R. R. Co.*, 168 Mass. 398. 60 Am. St. Rep. 297. 46 N. E. 1063. 38 L. R. A. 641, and cases there cited. It is said in that case, and in *Nolin v. Pearson*, 191 Mass. 283. 114 Am. St. Rep. 605. 77 N. E. 890. 4 L. R. A. N. S. 643. 6 App. Cas. 658, that a wife could not maintain an action at common law for the loss²⁸⁰ of

consortium of her husband. The reason of this was that she could not sue in her own name for a personal injury, and that a recovery for such a wrong could only be had in a suit brought jointly by her and her husband. The right to the consortium of the other spouse seems to belong to husband and wife alike, and to rest upon the same reasons in favor of each. Since the removal of the wife's disability to sue, this is now settled in most courts by a great weight of authority: *Nolin v. Pearson*, 191 Mass. 283, 114 Am. St. Rep. 605, 77 N. E. 890, 4 L. R. A., N. S., 643, 6 Ann. Cas. 658, and cases cited. It is now generally held, in accordance with the decision in *Nolin v. Pearson*, that, for a direct and intentional invasion of a wife's right of consortium by another woman, through the alienation of the husband's affections and criminal conversation with him, an action may be maintained, as a similar action may be maintained by a husband for a similar wrong inflicted through adultery with his wife. Formerly a wife could not maintain such an action, because her suit could only be brought by her husband, with whom she must join. The husband's own misconduct would ordinarily be a sufficient reason to prevent his bringing such an action, if, indeed, it would not bar him, in most cases, from maintaining an action against a joint wrongdoer. The change of the statutes in this commonwealth and similar changes in most other jurisdictions have given wives the same right as husbands to sue an offender for a wrong of this kind.

The wrong which may be redressed through such suits is one which has a direct tendency to deprive the husband or wife of the consortium of the other spouse. No case has been brought to our attention, and after an extended examination we have found none, in which an action for a loss of consortium alone has been maintained merely because of an injury to the person of the other spouse, for which the other has recovered, or is entitled to recover, full compensation in his own name, when the only effect upon the plaintiff's right of consortium is that, through the physical or mental disability of the other, the companionship is less satisfactory and valuable than before the injury. The actions by husbands at common law for expenses and loss of services, in which the loss of consortium has been considered in estimating damages, were all in cases in which no damages could be awarded for loss of the ability to earn money²⁸¹ and render services and be helpful to others, in an action by the husband and wife for the wife's personal damages, because at common law all these elements of damage belonged to the husband: See cases cited in *Kelley v. New York etc. R. R. Co.*, 165 Mass. 308, 60 Am. St. Rep. 307, 46 N. E. 100, 15 L. R. A. 631. There was not an allowance to the wife for

her loss of ability to earn wages and render services, and at the same time an allowance to the husband, in the form of compensation for the loss of consortium for the same diminution of ability to be helpful.

Where there is no intentional wrong, the ordinary rule of damages goes no further in this respect than to allow pecuniary compensation for the impairment or injury directly done. When the injury is to the person of another, the impairment of ability to work and be helpful and render services of any kind is paid for in full to the person injured. Ordinarily, the relation between him and others, whereby they will be detrimentally affected by the impairment of his physical or mental ability, makes the damage to them only remote and consequential, and not a ground of recovery against the wrongdoer. It may be conceivable that one may have a contractual right to the labor or services of another, continuing after the time of his injury, such that, if his ability is impaired, the contractor will be directly damaged. If there may be such a case, it is unnecessary to consider whether the contractor with such a right should have his action for damages, and receive his proper share of the amount allowable for the impairment of the other's earning powers, and the damages of the other be diminished accordingly. It is enough for the present case that persons whose relations to the injured party are purely domestic should not be permitted to share the compensation to which he is entitled for the impairment of his powers by the tort of another person, nor to receive an additional sum beyond the full compensation to which the injured person is entitled. Their damages are too remote to be made the subject of an action.

The minor children of an injured father who is legally bound to furnish them with support may suffer indirectly from his injury. So, too, may his wife, to whom he owes the same legal duty to furnish support; yet it was never held that a wife or minor child could recover for the consequences of a father's disability, ²⁸² against one who had negligently injured him. The diminished value of the husband's consortium with his wife, in such a case, is like the diminished value of the work that the husband can do for the support of his wife and the education and support of his minor children. The negligent defendant is supposed to have made full pecuniary compensation to the husband and father for his injury. In the benefit from this payment the wife and children may be expected to share to some extent. If they still suffer loss, it is not direct, but only consequential.

The case most relied on by the plaintiff, and the only one that comes near to supporting her contention, is *Kelley v. New York etc. R. R. Co.*, 168 Mass. 308, 60 Am. St. Rep.

397, 46 N. E. 1063, 38 L. R. A. 631. In that case actions of the husband and wife for an injury to the wife were tried together, and the damages in the two suits were assessed at one time by the same jury. It is said in the opinion that "it might be sufficient to dispose of this case to say that the plaintiff was bound to support his wife, and that the expenses incurred by him appear to have exceeded the amount of the verdict, and that therefore the defendant's exceptions should be overruled." In assessing the damages the jury were permitted to consider the loss of consortium by the husband, and the court held that there was no error. It seems from the verdict that the defendant suffered no injustice in the amount of damages awarded, and doubtless the court scrutinized less closely the narrow legal question involved than it would have done if it had been called upon to consider whether an action for loss of consortium alone could be maintained in a suit for negligence, when there had been a full recovery by the person injured for all the mental and physical effects of the injury. We are of opinion that in this class of cases there should be no recovery for loss of consortium, where the impairment of the powers and faculties of the plaintiff's spouse has been fully paid for in money. Indirectly, the plaintiff in such a case reasonably may be expected, through the same marital relation which gives a right of consortium, to be somewhat benefited by such a payment.

The doctrines stated in the case just cited are not to be applied to cases like the present, and to this extent the decision is overruled.

Exceptions overruled.

A Wife is Entitled to the Society, Companionship and Affection of her husband, and may maintain an action against one who alienates his affection: Nolin v. Pearson, 191 Mass. 283, 114 Am. St. Rep. 605; Leucht v. Leucht, 129 Ky. 700, 130 Am. St. Rep. 486, and cases cited in the cross-reference note thereto.

If Personal Injury Inflicted upon a Wife by the wrongful act of a stranger is such as to deprive her husband of her society and comfort, and of his right of consortium, he is entitled to recover therefor: Birmingham etc. Ry. Co. v. Lintner, 141 Ala. 420, 109 Am. St. Rep. 40, and see authorities cited in the cross-reference note thereto.

ASHLEY v. DOWLING.

[203 Mass. 311, 89 N. E. 434.]

PARTNERSHIP, Voluntary Association, When is a.—A voluntary unincorporated association of individuals for the purpose of conducting a business whose proportions of ownership in the assets are represented by certificates having a similarity to shares of stock in a corporation is a partnership. (p. 300.)

PARTNERSHIP, Limitation of Profits, When Does not Prevent a Voluntary Association from Being a.—The fact that partners having shares or interests in a voluntary unincorporated association are by its by-laws limited in their profits to six per cent, that a sinking fund of five per cent of the profits is provided for, and that the surplus of the profits is to be distributed as dividends to purchasers of goods sold by the association, does not prevent the association from being liable as partners nor constitute them creditors of the association, nor make the purchasers members of the association or subject to any liability as such. (pp. 300, 301.)

PARTNERSHIP—Voluntary Associations, Liabilities of Members of as.—The fact that there are large numbers of persons holding shares in a voluntary unincorporated association, that they adopted articles of copartnership which were not in all respects strictly complied with, and called these articles by-laws and themselves stockholders, does not exempt them from the ordinary rules governing partnerships. Persons choosing to avail themselves of a partnership for business purposes cannot escape the responsibilities accompanying such a relation. (p. 301.)

PARTNERSHIPS, Power of to Purchase on Credit.—The right of a business partnership to purchase on credit and make notes for goods purchased cannot be doubted. (p. 301.)

PARTNERSHIP, Authority of One Member.—If a partnership consists of an unincorporated association of many persons, the right of each to act within the apparent scope of the business binds his copartners. (p. 301.)

PARTNERSHIP, Power of Agent to Create Liability Against Partners.—An agent of a partnership consisting of a voluntary unincorporated association is empowered, on behalf of the copartnership, to incur such indebtedness as the ordinary conduct of the business requires. (p. 301.)

PARTNERSHIP, Authority of Agent of to Execute Commercial Paper.—If one acting as agent of an unincorporated association exercises for years the power to buy on credit and pay with notes, this must be deemed to have been done with the knowledge and consent of those persons who had an interest in the business, and to have bound the association and the partners therein. (p. 302.)

PARTNERSHIP—Unincorporated Association, When Bound by Acts of a Purchasing Agent.—If an unincorporated association is formed for the purpose of carrying on a co-operative store, and employs a salesman who assumes general control of the business, doing all the buying and selling for many years, making purchases on credit and giving notes therefor, the members of the association are bound as partners by his acts, and it is not necessary to show that those of them against whom liability is sought to be enforced had knowledge of the particular transaction upon which the liability is founded. (p. 302.)

PARTNERSHIP, Liability of Members, When not Prevented by a By law or Article of Association.—Where members of a voluntary

unincorporated association adopt articles of association which they style by-laws, one of which declares that the cash system shall be strictly enforced, this does not govern wholesale purchases of goods nor prevent the shareholders from being liable as partners for purchases made on credit. (p. 302.)

PARTNERSHIP in an Unincorporated Association, When Sufficiently Established.—One who pays for a share in an unincorporated association about the time it is established becomes a partner therein and liable as such, though he may not have received the certificate of stock or any interest thereon, nor attended any of the meetings or received notice of them, or had a copy of the by-laws or any knowledge of the business of the firm. (p. 302.)

Action against the defendants and other persons unknown as copartners, doing business by the name of the "Knights of Labor Co-operative Store Association." All of the defendants except Graham admitted that they owned shares of stock in the association.

The findings of the trial judge were as follows:

"From the evidence I find that the defendant Graham was a member of the association and liable in the same measure as the other defendants.

"The method employed was to credit to the account of each shareholder the amount of his 'interest,' which was paid him upon his demand therefor at the store.

"All of the defendants except Horace B. Robbins and James F. Graham received 'interest' on their holdings from time to time.

"The defendant Robbins allowed his 'interest' to accumulate in order that he might purchase another share of stock.

"Other than the above there was no evidence that this defendant had ever received any 'interest,' or that he had any knowledge of any 'interest' declared or assumed to be payable to him.

"A sinking fund, in accordance with the by-laws, was set aside and deposited in a savings bank, which bank failed, and in the later years no further contributions were made toward such fund.

"The method of business, while Mahoney was treasurer, was as follows: When a person came in and made a purchase, he was given a check representing the purchase, and at the end of six months the checks were returned to the store and counted by the bookkeeper, each customer being credited with the amount sent in; and when the business was figured and the amount of profit determined, a percentage was declared upon those checks as a dividend to the purchaser.

"Financial reports were made by Mahoney as treasurer to the executive committee from time to time, but toward the end of the business they were not.

"The plaintiff, who was doing business under the name of the Ashley Beef Company, had dealt with the store for a number of years; and had from time to time taken notes which were always signed 'Knights of Labor Co-operative Store Association, by George A. Mahoney, Treasurer.'

"The account on which he brought suit extended back for a period of not more than three or four years prior to the time when the store went out of business, and was contracted subsequent to the purchase by the defendants of any stock which they held. At no time had he given credit to Mahoney as an individual but to the association of which he was treasurer.

"At no time after the first year in the history of the business of the association was it conducted on a strictly cash basis. Mahoney was accustomed to buy goods upon credit and to give notes in payment thereof. The plaintiff had, in the course of his business dealings with the association, received notes from time to time, which had been paid.

"During the whole time when Mahoney conducted the business of the store, no objection was made on the part of any shareholder to the manner in which he was conducting the same.

"Upon the foregoing evidence I find that he had authority to pledge the credit of the store and give notes. All the certificates of stock, a copy of one of which is annexed to and made a part of this report, were signed by the members of the executive committee.

"The defendants, other than Graham and Williams, who was not present at the trial, testified that they purchased these shares as an investment with the understanding that they were to receive interest on the amount that they so invested and their share in the sinking fund.

"Article 8 of the by-laws reads in part as follows: 'On the capital invested interest shall be allowed at the rate of six per cent per annum.' Because of this language I have used the word 'interest' in this report. It does not seem to me material whether the payments to the shareholders be called 'interest' or 'dividends,' nor whether the shareholders under the by-laws were to receive all of the profits or only a part of them.

"My conclusion rests upon the fact that the association was not incorporated, and its members were therefore necessarily the principals by whom its debts were contracted.

"At the request of the parties, I do not pass upon the question of the amount of the plaintiff's claim, but merely rule that the plaintiff is entitled to recover from all the defendants, and report the case to the supreme judicial court.

"If the ruling is sustained, the case is to go to an auditor for final judgment merely upon the amount of the plain-

tiff's claim; otherwise, such entry is to be made as shall seem proper to the supreme judicial court."

E. H. Vaughan, E. T. Esty and J. Clark, Jr., for the plaintiff.

H. Parker and H. H. Fuller, for the defendants.

316 RUGG, J. This is an action of contract brought against certain persons as partners. The facts as to the alleged copartnership are that in 1886 a voluntary trading association was formed under the name of "Knights of Labor Co-operative Store Association," for the purpose of carrying on a general country store. Certain by-laws were adopted, which provided, among other things, for the issuance and transfer of an unlimited number of "shares of stock," each of a par value of five dollars, for the general conduct of a store business through a salesman under the supervision of an executive committee, for interest on the capital at the rate of six per cent per annum, payable semi-annually, for the setting apart of five per cent on the net profits as a sinking fund, and the quarterly payment of the balance of such profits to purchasers as "dividends" in proportion to the amounts of their respective purchases, for accumulation of uncollected interest or dividends to the credit of the several members of the association, and the transfer of uncollected dividends on purchases by nonmembers to the sinking fund. Shares were issued from time to time, and regular meetings were held for several years, but none after 1894. One Mahoney entered the employ of the association as salesman when it began business, and so continued until 1908, when it ceased to do business. In 1891 he was elected at a regular meeting of the stockholders a member of the executive committee and treasurer, and continued without subsequent election to hold these offices until 1908. He did all the buying and issued, and received money for, stock. Interest was declared annually to the shareholders, up to the time the store was closed, at the rate of six per cent, save that for four or five years the stockholders voted to pay themselves eight per cent. Financial reports were made by Mahoney to the executive committee from time to time, except toward the end of the business. The plaintiff had sold goods to the store, and from time to time took notes, which were always **317** signed, "Knights of Labor Co-operative Store Association, by George A. Mahoney, Treasurer," and which were paid. The indebtedness for which this action is brought was incurred subsequent to the purchase by defendants of any stock they held. All the time after the first year of the business, it was the custom of Mahoney to buy goods on credit, and give notes in payment. No objection

was ever made by any stockholder to the method in which Mahoney conducted the business.

A voluntary unincorporated association of individuals for the purpose of conducting business, whose proportions of ownership in the assets are represented by certificates having similarity to shares of stock in a corporation, has repeatedly and uniformly been held to be a partnership: *Tappan v. Bailey*, 4 Met. 529; *Hoadley v. County Commissioners*, 105 Mass. 519; *Taft v. Ward*, 106 Mass. 518; *Edwards v. Warren Linoline & Gasoline Works*, 168 Mass. 564, 47 N. E. 502, 38 L. R. A. 791. See *Opinion of the Justices*, 196 Mass. 603, 85 N. E. 545; *Merchants' National Bank of Cincinnati v. Wehrmann*, 202 U. S. 295, 26 Sup. Ct. Rep. 613, 50 L. ed. 1036. The defendants undertake to distinguish the present case from these on several grounds. It is urged that because the income, which might be received by the stockholders, was limited by the by-laws to six per cent, they were creditors and not stockholders. A like provision was in the by-laws of the association under consideration in *Ricker v. American Loan & Trust Co.*, 140 Mass. 346, 6 N. E. 284, but it was nevertheless held to be a copartnership. Moreover, the stockholders varied this rate by increasing it for several years.

There is also here a by-law for the establishment of a sinking fund, but no regulation for its use or ultimate disposition. If this fund had been kept intact and regularly increased, it might have become a substantial sum. Its ownership would have been in the association. Its distribution, in case of the winding up of the association, would have been among the stockholders in the nature of profit sharing.

It is argued that the purchasers of goods were really the persons for whose benefit the business was carried on. But the purchasers were not associated in the enterprise. They had no voice, directly or indirectly, in the management, and are not anywhere recognized in the plan of the association as having a proprietary relation to it. They were under no obligation to collect ³¹⁸ their so-called "dividends" on purchases, and if these were not collected, they were not credited on the books of the company to the purchasers, but transferred to the sinking fund, which was in its last analysis for the benefit of the stockholders. The phrase of the by-laws in describing its members as "stockholders" indicates a participation in the fortunes of the venture. Dividends or interest uncollected by the stockholders was carried to their credit on the books, and not transferred to the sinking fund. The device of dividing a large share of the profits among the purchasers was well adapted to advertising the business. It cannot have the effect of making such pur-

chasers members of the association against the language of the by-laws.

It is immaterial, so far as the rights of creditors are concerned, that the by-laws have not in all respects been strictly complied with. The so-called stockholders, when they paid in their money, became copartners with the other associates, and subject to the general principles of the law of partnership, both as to rights and liabilities. The members are not exempt from the ordinary rules governing partnerships, because there were a large number of partners who, for their own convenience as to internal management, adopted articles of copartnership, which they called by-laws, nor are these regulations without express notice imposed upon those who deal with them on the basis of their apparent and real connection with each other. If persons choose to avail themselves of the advantages of a partnership for business purposes, they cannot escape the responsibilities accompanying such a relation: *Tyrrell v. Washburn*, 6 Allen, 466; *Phillips v. Blatchford*, 137 Mass. 510. The right of a business partnership to buy upon credit and make notes for goods purchased cannot be doubted. The act of one partner in this respect within the apparent scope of the business binds his copartners. It does not appear whether Mahoney was a stockholder, and thus a partner. But he was one of the executive committee, which was charged with general oversight of the affairs of the association, and he conducted the business. If not a partner by reason of membership in the association, he was by some or all of the partners, without objection from any of them, appointed managing agent, and served as such for many years. Under familiar principles of the law of agency, he was empowered³¹⁹ in behalf of the copartnership to incur such indebtedness as the ordinary conduct of the business required. Although the authority of an agent to execute commercial paper in the name of his principal must be clearly shown, and may not be implied merely from general authority to do business (*Brown v. Parker*, 7 Allen, 337), in the present case it may be inferred from the exercise by Mahoney of buying on credit and paying therefor by notes since the first year of the business, which must have been with the knowledge and consent of those partners who took any interest in the business. If the others did not avail themselves of their rights of supervision as partners, they cannot now complain. It does not appear that any limitation upon Mahoney's authority was known to the plaintiff. The nature of the association was not such as to give warning of limitations upon the liabilities of members or the powers of agents, as in *Volger v. Ray*, 121 Mass. 439, and *Ray v. Powers*, 134 Mass. 22. It was not necessary to show any knowledge of the particular

transaction on the part of the defendants. It is plain that the by-law,* upon which the defendants rely, is regulative merely of the retail trade, and does not purport to govern the conduct of wholesale purchases of stock.

The defendant Graham contends that there was not sufficient evidence to support a finding that he was a member of the association. It appeared from his own testimony that he paid five dollars for a share about the time the store was started, and although he never received cash interest on the share, might have received it in way of goods, that he "never saw the stock," and did not remember that he ever had a certificate or had forgotten it, and that he never attended meetings nor received notices of them nor had a copy of the by-laws. The payment for the share of so-called stock was all that was necessary to constitute him a partner, entitled to share in profits and responsible for losses. It is immaterial upon the question of his liability that he may not have received a certificate of stock nor attended a meeting of the ³²⁰ association nor had any knowledge as to the business of the firm: *Boston & Albany R. R. v. Pearson*, 128 Mass. 445.

Under the terms of the report, the case is to be sent to an auditor for the single purpose of determining the amount of the plaintiff's claim, and judgment is to be entered in his favor for the amount so found.

So ordered.

As to What Agreements or Associations Constitute a Partnership, see the note to *Brotherton v. Gilchrist*, 115 Am. St. Rep. 400.

Each Partner is Ordinarily Regarded as the General Agent of his copartners as to firm business, and the members of the partnership are considered as sanctioning the contract which they singly enter into: *Edwards v. Dillon*, 147 Ill. 14, 37 Am. St. Rep. 199; *Marsh v. Wheeler*, 77 Conn. 449, 107 Am. St. Rep. 40.

BOWEN v. KIMBELL.

[203 Mass. 364, 89 N. E. 542.]

BUILDING CONTRACTS—Substantial Performance, What Amounts to.—Whether there was a substantial performance of a building contract is to be determined in reference to the entire contract and what was done or omitted under it, and not in reference to one specification. (p. 305.)

BUILDING CONTRACTS—Pleading Where There has not Been a Complete Performance.—If the plaintiff, relying on a building con-

*The by-law referred to was as follows: "Cash System. The stock in trade shall be, as far as possible, pure in quality, and the sales made at the prevailing retail price, and the cash system strictly enforced; provided, that this article shall not be construed as preventing the salesman from exchanging commodities as stock in trade; but no checks shall be given in exchange."

tract, declares upon the contract alone, he cannot recover unless there has been a complete performance. (p. 306.)

BUILDING CONTRACT—Quantum Meruit, When will not Sustain a Recovery.—A plaintiff contracting to erect a building cannot recover on a quantum meruit unless he has acted in good faith under the contract in endeavoring to perform it. (p. 306.)

BUILDING CONTRACTS—Abandonment.—A person contracting to erect a building who abandons his contract without excuse when he has only half performed it has no remedy. (p. 306.)

BUILDING CONTRACTS, Substantial Departure. When Precludes Recovery.—Where a builder, with respect to one specification of his contract, intentionally employs material containing less of a designated ingredient than such specifications require, he cannot recover, even on a quantum meruit, though the difference in value between the resulting building and what it would have been had the specification been followed is much less than he would be entitled to recover if he could maintain a quantum meruit under the circumstances. The action of the contractor must be regarded as lacking in good faith, and does not amount to a substantial performance of the contract. (p. 307.)

M. B. Warner, for the plaintiff.

C. J. Parkhurst and C. T. Phelps, for the defendants.

367 KNOWLTON, C. J. The plaintiff Dodge made a contract in writing to erect a large building for the defendants in North Adams. He received many payments under the contract, and afterward brought this suit to recover the balance of the contract price. Having become a bankrupt, his trustee was permitted to come into court and prosecute the suit. By agreement of parties the case was referred to a referee, whose determination of all matters of fact was to be final, his decision of questions of law being subject to review by the court. He reported that the plaintiff was not entitled to recover, and judgment was ordered for the defendant on his report. The case comes before us on an appeal by the plaintiff, which presents for our consideration all questions of law that appear of record.

The declaration contains three counts—two upon the contract and one upon an account annexed. The plaintiff now concedes that he is not entitled to recover upon the contract, and he relies upon the common counts, which are open to him under the count upon the account annexed.

368 The price fixed by the contract was ninety-six thousand five hundred dollars. It was admitted that the defendants were entitled to an allowance of ninety dollars for a saving in the price of face brick, and that payments have been made amounting to eighty-seven thousand one hundred and ninety-five dollars. Nine thousand eight hundred and fifteen dollars is the balance claimed in this action.

There were many particulars in which the defendants contended that the plaintiff failed to perform his contract. In regard to some of these the findings of the referee were for

the plaintiff. But besides the plastering, of which we shall speak hereafter, there were ten different particulars in which it was found that the contract was not performed, for each of which the defendants would be entitled to an allowance, if they were obliged to pay at all. The deductions that ought to be made on account of these departures from the contract were found by the referee to amount in the aggregate to four thousand seventy-one dollars. It is not contended that any error of law entered into these findings.

The specifications in regard to the plastering provided, among other things, that the first coat for the whole building should be "good lime and hair mortar and mixed when used in with adamant plaster, two bags of adamant to one hod of lime mortar." They declared that "This mixture must be strictly adhered to without any deviation whatever." The findings on this point are as follows: "The 'adamant' referred to in these specifications is a patented composition of the class commonly called hard plasters. It contains a considerable amount of plaster of Paris. It sets more quickly than lime and mortar plastering, and gives a harder surface, less liable to injury from blows of any kind, and is quite commonly used in modern office buildings. It is somewhat more expensive than lime and mortar plastering. I find that in plastering this building the plaintiff used less than half the adamant called for by the specifications. I find that this was an intentional departure from the contract in a substantial matter, which cannot be remedied afterward without disproportionate expense. I further find that the composition of the plaster was not known to the architect until after the certificates given by him under the contract had all been issued. I therefore find that the plaintiff is not entitled to recover in this action. . . . I find that the cost of removing the plastering in the building and replastering with plaster mixed in accordance with the specifications, including ³⁶⁹ the necessary retinting of walls, would be seven thousand dollars (\$7,000). But I further find that the owner would not be justified in incurring such expense, and that the difference between the value of the building as actually plastered and as it would have been, if plastered in accordance with the specifications, is eight hundred dollars (\$800)."

The plaintiff contends that the conclusion of the referee in this particular is erroneous in law, and that the judgment should be reversed. This contention seems to be twofold: First, that an intentional departure from the contract in a matter of this kind will not preclude the contractor from recovering on a quantum meruit; and, secondly, that, as matter of law, the referee could not find that there was not a substantial performance of the contract. It becomes neces-

sary to consider the law of Massachusetts in these particulars.

It is to be noticed, first, that the question whether there was a substantial performance of the contract is to be determined in reference to the entire contract, and what was done or omitted under it, and not in reference to the plastering alone. The referee might well find that the plaintiff failed to perform the contract substantially, in view of all his departures from it, even if he would not have made that finding upon the defective plastering alone. The validity of the finding must be determined in reference to all the facts of the case. But as the referee indicates that this breach is the principal reason for his decision, we will consider this branch of the case by itself.

Formerly, it was generally held in this country, as it is held in England, that a contractor could not recover under a building contract, unless there was a full and complete performance of it, or a waiver as to the parts not performed, and that he could not recover on a quantum meruit after a partial performance from which the owner had received benefit, unless there had been such subsequent dealings between the parties as would create an implied contract to pay for what had been done: *Smith v. Brady*, 17 N. Y. 173, 72 Am. Dec. 442; *Ellis v. Hamlen*, 3 Taunt. 52; *Munro v. Butt*, 8 El. & B. 738; *Sumpter v. Hedges*, [1898] 1 Q. B. 673, and cases cited. But in most of the American states a more liberal doctrine has been established in favor of contractors for the construction of buildings, and it is generally held that if a ³⁷⁰ contractor has attempted in good faith to perform his contract and has substantially performed it—although by inadvertence he has failed to perform it literally according to its terms—he may recover under the contract, with a proper deduction to the owner for the imperfections or omissions in the performance: *Woodward v. Fuller*, 80 N. Y. 312; *Phillip v. Gallant*, 62 N. Y. 256; *Nolan v. Whitney*, 88 N. Y. 648; *Oberlies v. Bullinger*, 132 N. Y. 598, 30 N. E. 999; *Elliott v. Caldwell*, 43 Minn. 357, 45 N. W. 845, 9 L. R. A. 52; *Jones & Hotchkiss Co. v. Davenport*, 74 Conn. 418, 50 Atl. 1028; *Pitcairn v. Philip Hiss Co.*, 113 Fed. 492, 51 C. C. A. 323; *Page on Contracts*, secs. 1603, 1604, and cases cited. It would seem that in cases of this kind, while the plaintiff recovers under the contract not the contract price, but the contract price less the deduction, he ought to aver, not absolute performance, but only substantial performance of his contract, and a right to recover only the balance after allowing the owner a proper sum for the failure to do the work exactly in the way required: *Spence v. Ham*, 163 N. Y. 220, 57 N. E. 212, 51 L. R. A. 238. The rule very generally adopted is that, to entitle the plaintiff to re-

cover, he needs to show only that he proceeded in good faith in an effort to perform the contract, and that the result was a substantial performance of it, although there may be various imperfections or omissions that call for a considerable diminution of the contract price. The reason for this construction of such contracts is in part the difficulty of attaining perfection in the quality of the materials and workmanship, and of entirely correcting the effect of a slight inadvertence, and the injustice of allowing the owner to retain without compensation the benefit of a costly building upon his real estate that is substantially, but not exactly, such as he agreed to pay for. In none of the courts of this country, so far as we know, is the contractor left remediless under conditions like those above stated. The recovery permitted is generally upon the basis of the contract, with a deduction for the difference between the value of the substantial performance shown and the complete performance which would be paid for at the contract price.

In Massachusetts the hardship upon the contractor of leaving him without compensation, if, acting in good faith, he performs a contract substantially, but fails to perform it completely, was early recognized by the courts, and it was decided that under ³⁷¹ such circumstances he might recover upon a quantum meruit. In Massachusetts this method of obtaining relief has ever since been treated as the only one for such cases, and has often been referred to as the doctrine stated in *Hayward v. Leonard*, 7 Pick. 181, 19 Am. Dec. 268. Because of this rule it is held to this day that, if the declaration is upon the contract alone, there can be no recovery under a building contract unless there has been a complete performance of it: *Allen v. Burns*, 201 Mass. 74, 87 N. E. 194, and cases cited.

This anomalous form of proceeding in this commonwealth does not give the plaintiff any larger rights than those stated above, under the rule which generally prevails in actions upon a building contract in other states. In the first place, it has always been held that he cannot recover upon a quantum meruit unless he has acted in good faith under the contract, in an endeavor to perform it: *Burke v. Coyne*, 188 Mass. 401, 74 N. E. 942; *Sipley v. Stickney*, 190 Mass. 43, 112 Am. St. Rep. 309, 76 N. E. 226, 5 L. R. A., N. S., 469, 5 Ann. Cas. 611. If he abandons the contract without excuse when he has only half performed it, he has no remedy: *Homer v. Shaw*, 177 Mass. 1, 58 N. E. 160. In both these particulars the contractor is governed by the same rules as those which are adopted generally in other states: *Hayward v. Leonard*, 7 Pick. 181, 19 Am. Dec. 268; *Powell v. Howard*, 109 Mass. 192; *Atkins v. Barnstable County*, 97 Mass. 428; *Cullen v. Sears*, 112 Mass. 299; *Blood v. Wilson*, 141

Mass. 25, 6 N. E. 362; Gleason v. Smith, 9 Cush. 484, 57 Am. Dec. 62; Wagner v. Allen, 174 Mass. 563, 55 N. E. 320; Bee Printing Co. v. Hichborn, 4 Allen, 63; Reed v. Scituate, 5 Allen, 120.

We think that the referee's finding of fact that the plaintiff was guilty of an intentional departure from the contract, in a substantial matter, is conclusive against his right to recover, as well under the rule in Massachusetts as it would be under that in other states. It shows a lack of good faith on the part of the plaintiff in his dealings with the defendants under the contract. We think the findings and decision of the referee, taken together, are a finding that there was not a substantial performance of the contract. On both grounds the report was rightly confirmed and judgment was rightly ordered for the defendants.

Judgment affirmed.

If the Parties to a Building Contract agree that the architect's certificate shall be a condition precedent to the contractor's right to payment, the agreement, while valid, is deemed to embody the condition that the architect shall exercise his function as arbitrator in good faith: Halsey v. Waukesha Springs etc. Co., 125 Wis. 311, 110 Am. St. Rep. 838; Young v. Stein, 152 Mich. 310, 125 Am. St. Rep. 412. As to the effect of impossibility of performance, as where a building is destroyed, on the right of the contractor to recover for what he has done, see Halsey v. Waukesha Springs etc. Co., 125 Wis. 311, 110 Am. St. Rep. 838; Angus v. Scully, 176 Mass. 357, 79 Am. St. Rep. 318; note to Huyett & Smith Co. v. Chicago Edison Co., 59 Am. St. Rep. 285. When a building nearly finished falls down solely because of defects in the plans and specifications prepared for the owner by an architect, and made a part of the building contract, the contractor is not relieved from his obligation to restore and complete the building: Lonergan v. San Antonio Loan etc. Co., 101 Tex. 63, 130 Am. St. Rep. 803.

Recovery upon a Quantum Meruit Under Special Contracts is discussed in the note to Hayward v. Leonard, 19 Am. Dec. 272. As a rule, one who voluntarily fails to complete a piece of work to be done under a special contract for an entire sum is without remedy: Sipley v. Stickney, 190 Mass. 43, 112 Am. St. Rep. 309; Walsh v. Fisher, 102 Wis. 172, 72 Am. St. Rep. 865.

CURTIS MANUFACTURING COMPANY v. SPENCER WIRE COMPANY.

[203 Mass. 448, 89 N. E. 534.]

PRIVATE RIGHT OF WAY, Unauthorized Construction of a Building Foundation in.—The owner of adjacent real property has no right to construct the foundation walls of his building so that their base will rest within a private right of way, the fee of which belongs to another. Such rights exist and are applicable only to public ways. (p. 309.)

MANDATORY INJUNCTION to Compel the Removal of a Foundation Wall Erected Without Right Beneath a Private Right of Way.—Where the owner of land adjoining a private court or right

of way commences to erect a building and projects his foundation beneath such way, and is notified by the owner of the fee after the foundations have been put in, but before the superstructure is built, that no encroachment will be allowed, nevertheless proceeds with his building and is compelled to project the foundation as essential to its support, a mandatory injunction will issue for the removal of the foundation, though it may impose expense on the defendant disproportionate to the apparent benefit to the complainant. (p. 310.)

Suit for a mandatory injunction to require the defendant to desist from completing a building resting on a wall alleged to have been built by the defendant within the boundaries of Webster Court, a private right of way, the fee of which was in the plaintiff and over which the defendant had a right of way. The defendant, in his answer, offered to pay the plaintiff such sum as the court adjudged to be due as compensation for any damages suffered by reason of the extension of the wall in and under Webster Court, and disclaimed any right to an easement.

The case having been referred to T. H. Gage, Jr., master, was, after the filing of his report, heard by Pierce, J., who, at the request of the parties, reserved and reported the case upon the pleadings and master's report for determination by the supreme court.

W. C. Mellish, for the plaintiff.

H. H. Thayer, for the defendant.

449 HAMMOND, J. Webster Court is a private way, the fee of which, subject to the defendant's right of way and to the right of the city of Worcester to maintain a sewer therein, is in the plaintiff. As to the foundation which the defendant has projected into the way, the master has found as follows:

"The respondent has projected the foundation of its building (but no part of the superstructure), over into Webster Court.

"Said projections consist of a concrete foundation twelve feet deep at its westerly end, five feet at its easterly, fifty-five and **450** four-tenths (55.4) feet long, and extending into the limits of the way, two and forty-six hundredths (2.46) feet at the bottom, sixty-five hundredths (.65) feet at the top.

"Thus occupying one hundred thirty-six and twenty-eight hundredths (136.28) square feet.

"This foundation was begun and finished within the three weeks preceding February 12, 1909.

"This foundation is substantially on a line with or below the surface of the way. The superstructure of the building sets back from the way four or five inches.

"The respondent company knew the line of the way and extended its foundation beyond said line with full knowl-

edge thereof. It did not notify the complainant that it proposed so to do, or ask consent therefor, but it was told by the contractor of the building that it was all right to extend foundations over the lines of streets and ways. With this information, and in the desire to obtain as large a mill building as possible, it erected its mill on the line of the court, and extended the foundation therefor into the limits of Webster Court, the fee of which, subject to the rights above mentioned, was owned by the complainant."

In this manner the master finds that the respondent has "deliberately appropriated to itself the right to project its foundation two and forty-six hundredths (2.46) feet into the limits of the court." While no part of the superstructure projects into the court, still the master has found that if this projection be cut off, the remaining foundation would not be adequate to support the superstructure. In a word, the building is in part supported by the projecting part of the foundation, and that support is essential to the maintenance of the building in its present condition. And all this has been done without any claim of right, or even a plausible pretense of such a claim. The statement made to the defendant by the contractor that "it was all right to extend foundations over the lines of streets and ways," was manifestly applicable only to such ways as were public, and falls far short of showing or justifying the inference that the defendant was acting under a claim of right.

Moreover, the defendant had notice. While it is true that the foundation had been laid before the defendant received the letter ⁴⁵¹ from the plaintiff of February 11, 1909, still no part of the superstructure had been built. In the letter the defendant was told in plain and emphatic language that the plaintiff was surprised at his (the defendant's) conduct in projecting the foundation into the court, and that "no encroachments will be allowed on same . . . the bounds of which are so clearly defined." Notwithstanding this notice the defendant used this foundation as an essential support for the building, or, in other words, proceeded to erect the building, considered as a whole, in part upon the court.

Here, then, is a plain, intentional violation of the right of the plaintiff as owner of the fee of the way, made under no mistake of fact, or of law, or claim of right, and (as to a considerable part of the building) after an express warning that the owner would allow no encroachments.

That in such a case equity can give relief by way of mandatory injunction is too clear for discussion, and we do not understand the defendant to contend to the contrary. It contends, however, that in many cases this kind of relief is refused, and the party whose right is violated has been remitted to his remedy at law upon the ground that it would

be inequitable and oppressive to compel the defendant to restore things to their former condition; and in support of this contention it has cited several cases in this state, among which are *Lynch v. Union Institution for Savings*, 159 Mass. 306, 34 N. E. 364, 20 L. R. A. 842, *Jackson v. Stevenson*, 156 Mass. 496, 32 Am. St. Rep. 476, 31 N. E. 691, *Harrington v. McCarthy*, 169 Mass. 492, 61 Am. St. Rep. 298, 48 N. E. 278, and *Levi v. Worcester Consolidated Street Ry. Co.*, 193 Mass. 116, 78 N. E. 153, as well as many in other jurisdictions where this principle has been recognized and applied. They need not be considered here in detail.

The principles governing the action of a court of equity have been considered in many recent cases beside those above mentioned: See, among others, *Tucker v. Howard*, 128 Mass. 361; *Starkie v. Richmond*, 155 Mass. 188, 29 N. E. 700; *Methodist Episcopal Society v. Akers*, 167 Mass. 560, 46 N. E. 381; *Attorney General v. Algonquin Club*, 153 Mass. 447, 27 N. E. 2, 11 L. R. A. 500; *Codman v. Bradley*, 201 Mass. 361, 87 N. E. 591.

We see no redeeming feature in the case before us so far as respects the manner of the trespass. Nor do we think that the fact that an injunction will impose upon the defendant an expense disproportionate to the apparent benefit to the plaintiff is ⁴⁵² of itself enough to deprive the latter of its right to an injunction.* Nor has there been laches on the part of the latter. If, after the notice of February 11th, the defendant had desisted and made no use of the foundation, the case might have presented a different aspect. But, by the further act of the defendant in erecting its building upon that foundation, it has voluntarily placed itself where the rest of the building must be separated from the projection, and under all the circumstances we think that the remedy should be commensurate with the trespass: See *Downey v. H. P. Hood & Sons*, 203 Mass. 4, 89 N. E. 24.

*The master found "that the plaintiff up to the time of filing this bill and up to the time of the hearing has suffered no actual damage from said encroachments . . . that the fair market value of the one hundred thirty-six and twenty-eight hundredths square feet of unencumbered land in the vicinity of said ways is thirty-five dollars. No evidence was introduced and I am unable to determine upon any evidence the fair market value of land occupied by the encroachments subject to the defendant's right of way over it, and with reference to the city's sewer location fifteen feet to the north, and between said land and other property of the petitioner. I find that the defendant can undo its encroachment in three ways: 1. By tearing down the end of the building and setting the foundation back. This can be done for nineteen hundred and twenty-seven dollars and forty cents. 2. By temporarily supporting the superstructure and tearing down and rebuilding the foundation. This can be done for eight hundred and twenty-five dollars and forty-one cents. 3. By cutting off the projection and strengthening the foundation on its own land. This could be done for nine hundred and eighty-seven dollars and fourteen cents."

It may be remarked, also, that we are dealing not with a right of an equitable nature, for an injury to which the remedy is only in equity, but with a legal right for an injury to which an action of trespass will lie. This building, as it stands, is a continuing trespass, and successive actions at law can be brought. And upon the facts found by the master there would be no apparent defense to such an action. It is manifest that after judgment in the second action the plaintiff here would be entitled under Revised Laws, chapter 186, section 3, as part of the judgment, to an order abating the nuisance. We see no reason, under the circumstances of this case, why it should be compelled to take this more dilatory method to enforce its rights.

Decree for the plaintiff for an abatement of the nuisance, including the removal of the projecting foundation.

Where One Erects a Building on His Own Land, but Projects the Foundation thereof into the soil under the surface of his neighbor's land, the latter may maintain ejectment to recover the portion of his property of which he is thereby ousted: *Wachstein v. Christopher*, 128 Ga. 229, 119 Am. St. Rep. 381.

The Use of Private Ways is discussed in the note to *Bakeman v. Talbot*, 88 Am. Dec. 279-282; and the rights and obligations of parties to private ways are considered in the note to *Dudgeon v. Bronson*, 95 Am. St. Rep. 318-330.

SLATTERY v. NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

[203 Mass. 453, 89 N. E. 622.]

RAILWAYS, Persons Crossing and Relying Exclusively on the Gates Being Up.—One intending to cross the track of a railway has no right to rely exclusively on the fact that the gates are up, but is bound to use his own senses to determine whether it is safe to go on. (p. 313.)

RAILWAYS, Want of Due Care on the Part of a Person Injured, When Shown.—If the evidence shows that a person who was struck and killed on the track of a railway by a passing train did not look or must have seen the train had he looked, he is shown not to have been in the exercise of due care, though the gates were up when he passed them. (p. 313.)

RAILWAYS, Effect of Failure to Hear the Bell Rung at a Crossing.—The fact that one in crossing did not hear the bell rung is some evidence that it did not ring, if his position was such that the sound would have been likely to attract his attention if the bell had been rung. Though the testimony on cross-examination is somewhat conflicting, it is still for the jury to say whether the bell rang or not. (pp. 314, 316.)

NEGLIGENCE, Gross, Burden of Proving.—In an action against a railroad company to recover of defendant for the injury and death of plaintiff's intestate, where it is clear that such injury

and death were due to his gross negligence, the defendant must assume the burden of proof. (p. 316.)

RAILWAYS, Liability of for Personal Injuries and Death Unless the Party was Guilty of Gross Negligence—Failure to Ring a Bell or Sound a Whistle.—If the testimony on the trial of an action against a railroad company to recover for the death of plaintiff's intestate, killed at a crossing, tends to prove that when decedent entered upon and undertook to pass the crossing, the gates were up, the morning dark and foggy, and no whistle was blown, bell rung or other signal given, and the first three tracks were filled with cars, wholly concealing the approaching train until he came within twenty-five feet of it, a verdict should be directed for the defendant, for the statute permits a recovery, unless decedent was guilty of gross negligence. Whether he was guilty of such negligence should be submitted to the jury. (p. 317.)

D. L. Walsh and F. B. Spellman, for the plaintiff.

A. J. Young, for the defendant.

454 LORING, J. These are two actions of tort brought by the administratrix of the estate of one James A. Slatery, who was killed by one of the defendant's passenger trains on a highway crossing at grade in the city of Worcester. The first count in the first action is founded on Statutes of 1907, chapter 392 (amending Revised Laws, chapter 111, section 267, and Statutes of 1906, chapter 463, part 1, section 63), which (inter **455** alia) makes a railroad liable to a fine in case the death of one in the exercise of due care is caused by the negligence of its agents or servants. The second count is founded on Statutes of 1906, chapter 463, part 2, section 245 (re-enacting Revised Laws, chapter 111, section 268), which makes a railroad liable to a fine in case a person is killed at a crossing where the bell must be rung or the whistle sounded, and it appears that those signals were not given as required by law, and that that neglect contributed to the accident, unless the defendant proves that the deceased was guilty of gross or willful negligence.

The second action was brought for the conscious suffering of the intestate caused by the same accident.

An agreement was made as to the point from which the deceased had a view of the track in question. It was also agreed that "by order of the board of railroad commissioners issued under Revised Laws, chapter 111, section 189, as amended by acts of 1906, chapter 463, part 2, section 148, the defendant company was exempt from blowing the locomotive whistle as a signal at this crossing." On these two agreements and the plaintiff's evidence the presiding judge directed a verdict for the defendant in both actions. The cases are here on exceptions to those rulings.

The accident happened at about forty-two minutes after 6 o'clock on the morning of December 14, 1907. The intestate came to the crossing in question on the northerly side of

Plymouth street, and was killed by an out-bound passenger train on the fifth of the eight tracks which are laid across that street and which constitute the grade crossing in question. There are gates across the highway at each end of the crossing, operated by a crank situated on the west end of it. The intestate came to the crossing from the east. The evidence showed that the gates were up on the east side of the crossing when he passed them.

The nearest rail of the track here in question was eighty-four feet from the gate as a man walked on the north side of Plymouth street and of the crossing. There was evidence that there were freight-cars standing on the first three tracks, which wholly obstructed the view of a train on the track here in question—that is, the outward-bound track. From the gate to the westerly rail of the third track was fifty-nine and five-tenths ⁴⁵⁶ feet. From there to the nearer rail of the track in question was twenty-four and one-half feet. The parties “agreed that the distance from a point where Slattery had a clear view of five hundred feet in the direction from which the train was approaching to the nearer rail of the track on which the train that hit him came was twenty-five feet.”

Only one witness testified to what Slattery did after he passed by the gates. He testified that “The freight was passing the New Haven road about at the time he passed when I was coming and they commenced to lower the gates. The gates had not been completely lowered at the time he was struck. They were just being lowered at the time I saw him struck. I saw the engine of the passenger train strike him. As he walked along beyond the gates and over the tracks there as he walked up to the time he was struck, he was walking along just as he would be going to his work, not heeding anything I thought. He had his dinner-pail in his hand. He was kind of looking straight ahead. His face was pointing straight ahead.”

The intestate had no right to rely exclusively on the fact that the gates were up when he passed by them. He was bound to use his own senses to determine whether it was safe to go on: *Ellis v. Boston & Maine R. R.*, 169 Mass. 600, 48 N. E. 839, and cases there cited; *Santore v. New York Cent. etc. R. R. Co.*, 203 Mass. 437, 89 N. E. 619, and cases cited.

The only evidence introduced by the plaintiff shows that the intestate did not look. In addition, it is apparent that he would have seen the train if he had looked. Under these circumstances the plaintiff failed in showing that the intestate was in the exercise of due care: *Hudson v. Lynn & Boston R. R. Co.*, 185 Mass. 510, 71 N. E. 66; *Walsh v. Boston & Maine R. R.*, 171 Mass. 52, 50 N. E. 453; *Raymond v. New York etc. R. R. Co.*, 182 Mass. 337, 65 N. E. 399:

Roberts v. New York etc. R. R. Co., 175 Mass. 296, 56 N. E. 559; Fitzgerald v. Boston Elevated Ry. Co., 194 Mass. 242, 80 N. E. 224. It follows that the verdicts were rightly ordered in the second action and on the first count in the first action.

We are, however, of opinion that there was error in ordering a verdict for the defendant on the second count of the first action.

Three witnesses testified as to the ringing of the bell. When two of them, Boyer and Nora Moriarty, came to the gates, they ⁴⁵⁷ were down. But the third, Cahill, who was trying to catch up with Slattery, passed the gates as they were being lowered, and kept on after Slattery. On his direct examination Cahill testified: "I didn't notice any bell or sound from the train as it came along." On his cross-examination he testified: "I didn't notice whether the bell was ringing or not. I didn't hear it. I would pay attention to it if I heard it, but I didn't hear it. If it had rung I would have heard it. I wasn't paying any attention to hear whether the bell was ringing or not because I didn't hear it."*

Whether testimony by a witness that he did not hear a bell ring is evidence that it did not ring depends upon the surrounding circumstances. "Ordinarily, all that a witness can say, in such a case, when called to prove that a bell was not rung, is that he did not hear it. Such a statement, with no accompanying facts, is merely negative, and of no value as evidence. But attending circumstances may be shown which make the statement strong affirmative evidence. It may appear that all the attention of which the witness was capable was concentrated on the effort to ascertain whether the bell was rung, and his failure to hear it could only have been because it made no sound. A witness may be in any conceivable attitude of attention or inattention, which will give his evidence value, or leave it with little or no weight; but where his position is such that the sound would have been likely to attract his attention if the bell had been rung, his failure to hear it is some evidence that there was no ringing": Knowlton, J., in *Menard v. Boston & Maine R. R. Co.*, 150 Mass. 386, 23 N. E. 214.

Cases like *Tully v. Fitchburg R. R. Co.*, 134 Mass. 499, and *Livermore v. Fitchburg R. R. Co.*, 163 Mass. 132, 39 N. E. 789, on the one hand, and those like *Lamoureux v. New York etc. R. R. Co.*, 169 Mass. 338, 47 N. E. 1000, *Walsh v. Boston & Maine R. R.*, 171 Mass. 52, 50 N. E. 453, and *McDonald v. New York Cent. etc. R. R. Co.*, 186 Mass. 474, 72 N. E. 55, on the other hand, do not reach the question which

*He also testified in cross-examination, "No, I am not much deaf, I think."

we have to decide. All that the witness testified to in *Tully v. Fitchburg R. R. Co.*, 134 Mass. 499, was, "About the bell ringing I cannot say whether I heard ⁴⁵⁸ it or not"; and the testimony given by the witness in *Livermore v. Fitchburg R. R. Co.*, 163 Mass. 132, 39 N. E. 789, was similar. On the other hand, in *Lamoureux v. New York etc. R. R. Co.*, 169 Mass. 338, 47 N. E. 1009, the witness testified: "What took my attention was the team came along and there was not any whistle or sound from the train, and I says to myself, 'That's funny.'" In *Walsh v. Boston & Maine R. R.*, 171 Mass. 52, 50 N. E. 453, a husband and wife stopped to see the train go by, and they both testified "that they heard the usual noise of an approaching train, but that they heard no whistle blown or bell rung before the train reached the crossing." The wife also testified that "her attention was concentrated on it [the train] all the time." In *McDonald v. New York Cent. etc. R. R. Co.*, 186 Mass. 474, 72 N. E. 55, "two witnesses testified positively that the whistle was not blown nor the bell rung."

The remaining cases are *Menard v. Boston & Maine R. R. Co.*, 150 Mass. 386, 23 N. E. 214; *Johanson v. Boston & Maine R. R. Co.*, 153 Mass. 57, 26 N. E. 426; *Hubbard v. Boston & Albany R. R.*, 159 Mass. 320, 34 N. E. 459, and *Daniels v. New York etc. R. R. Co.*, 183 Mass. 393, 67 N. E. 424, 62 L. R. A. 751. In *Menard v. Boston & Maine R. R.*, *Johanson v. Boston & Maine R. R.*, and *Daniels v. New York etc. R. R.*, testimony by witnesses that they did not hear the whistle or bell, or one of them, was held to be evidence that those signals were not given. In *Hubbard v. Boston & Albany R. R. Co.*, 159 Mass. 320, 34 N. E. 459, it was held that it was not.

In *Hubbard v. Boston & Albany R. R. Co.*, one witness was engaged in "putting the boards down around the bottom of a hen-house" near the track, and the other was working for the first witness "on the hen-house fence." The court took the view that from their occupation there was affirmative evidence showing that they would not be likely to have heard the bell if it had rung.

It does not appear from the report of *Johanson v. Boston & Maine R. R. Co.*, 153 Mass. 57, 26 N. E. 426, who the witnesses were who testified that they did not hear the whistle or what they were doing. It appears from the original papers that the first witness was a brother of one of the boys killed, and was following them; and that the other was in a building adjoining the roadbed of the railroad and about five hundred feet away, and that he was looking from ⁴⁵⁹ a window toward Boston, the direction from which the train in question was coming. In *Menard v. Boston & Maine R. R. Co.*, 150 Mass. 386, 23 N. E. 214, some of the witnesses

were driving in a carriage over the same crossing, directly ahead of the three persons who were killed: and in *Daniels v. New York etc. R. R. Co.*, 183 Mass. 393, 67 N. E. 424, 62 L. R. A. 751, the statement put in evidence was the statement of the deceased. It was said by this court in *Menard v. Boston & Maine R. R. Co.*, that "three of them were riding at great risk to their lives, if they failed to notice such signals as they heard": Page 387. There is nothing contrary to these cases in the recent case of *Hines v. Stanley Electric Mfg. Co.*, 203 Mass. 288, 89 N. E. 628.

In the case at bar Cahill's testimony on his direct examination comes within *Menard v. Boston & Maine R. R.* and *Daniels v. New York etc. R. R. Co.* He was crossing these same tracks after the gates had been lowered. It was enough under those circumstances that he testified that he did not "notice" a bell. There is nothing in his cross-examination which should obliterate what he said on direct: See *Purple v. Greenfield*, 138 Mass. 1; *Cameron v. New England Tel. etc. Co.*, 182 Mass. 310, 65 N. E. 385. His testimony on cross-examination was conflicting. On all his testimony it was for the jury to say what he meant, and whether on his evidence the bell did or did not ring. It follows that the ruling directing a verdict for the defendant must stand, if it is to stand, on the gross negligence of the plaintiff's intestate.

The burden of proving gross negligence on the part of the intestate was on the defendant: *Copley v. New Haven & Northampton Co.*, 136 Mass. 6; *Walsh v. Boston & Maine R. R.*, 171 Mass. 52, 50 N. E. 453; *McDonald v. New York etc. R. R. Co.*, 186 Mass. 474, 72 N. E. 55; *Brusseau v. New York etc. R. R. Co.*, 187 Mass. 84, 72 N. E. 348; *Kenny v. Boston & Maine R. R.*, 188 Mass. 127, 74 N. E. 309; *Kelsall v. New York etc. R. R. Co.*, 196 Mass. 554, 82 N. E. 674. There have been cases where it has been held on the plaintiff's own story that as matter of law he was guilty of gross negligence: See *Debbins v. Old Colony R. R.*, 154 Mass. 402, 28 N. E. 274; *Emery v. Boston & Maine R. R.*, 173 Mass. 136, 53 N. E. 278.

But in our opinion the case at bar is not such a case. By the testimony of every witness the gates were up when the deceased ⁴⁶⁰ passed by them, and the jury could find that no statutory signals were given. The first three tracks were blocked with cars, which wholly obstructed Slattery's view of the approaching train until he came within twenty-five feet of it. The accident happened before the sun was up, and there was testimony that on the morning in question "it was kind of dark and foggy like." We do not think that the case can be fairly distinguished from *Brusseau v. New York etc. R. R. Co.*, 187 Mass. 84, 72 N. E. 348. See, also,

Kenny v. Boston & Maine R. R., 188 Mass. 127, 74 N. E. 309. In addition to that there is this statement in the bill of exceptions, as testified to by Cahill: "The freight was passing the New Haven road about at the time he passed when I was coming and they commenced to lower the gates." That would seem to warrant a finding that a freight train was passing in the opposite direction. If that be so, it was a further fact tending to distract Slattery's attention from the train which ran him down. We are of opinion that the question whether the deceased was or was not guilty of gross negligence was for the jury.

The result is that the exceptions must be overruled which were taken to the ruling directing verdicts for the defendant in the second action, and on the first count in the first action; and that the exception to the ruling directing a verdict for the defendant on the second count in the first action must be sustained.

So ordered.

The Failure to Stop, Look and Listen Before Crossing a Railroad track seems to be regarded by some authorities as negligence as a matter of law, but probably this is too strict a rule: See Louisville etc. R. R. Co. v. McNary, 128 Ky. 408, 129 Am. St. Rep. 308, and cases cited in the cross-reference note thereto.

The Failure of a Railroad Company to Ring the Bell or Sound the Whistle at a railroad crossing, as affecting the right of a traveler to recover for injuries received in attempting to cross in front of an approaching train, is discussed in Louisville etc. R. R. Co. v. McNary, 128 Ky. 408, 129 Am. St. Rep. 308, and cases cited in the cross-reference note thereto. As to negative evidence in regard to whether signals of the approach of a train were given, see Northern Cent. Ry. Co. v. State, 100 Md. 404, 108 Am. St. Rep. 439; Nashville etc. Ry. Co. v. Harris, 142 Ala. 249, 101 Am. St. Rep. 29; Cotton v. Willmar etc. Ry. Co., 99 Minn. 366, 116 Am. St. Rep. 422.

Safety Gates at Railroad Crossings, which should be closed in case of danger, if standing open, are an invitation to a traveler on the highway to cross, and while this fact does not relieve him from the duty of exercising care, it is a fact for the consideration of the jury in determining whether he exercised care according to the circumstances: Messinger v. Pennsylvania R. R. Co., 215 Pa. 497, 114 Am. St. Rep. 970, and see cases cited in the cross-reference note thereto.

DAVIS v. NEW ENGLAND RAILWAY PUBLISHING COMPANY.

[203 Mass. 470, 89 N. E. 565.]

INJUNCTION Against Publication Misrepresenting or Ignoring Complainant and His Business.—One who carries on an express business in a city is entitled to enjoin the publication of a directory which apparently purports to contain the names of all persons and corporations in such business, but omits the complainant's name and business with the purpose of injuring him and securing the business for others. (pp. 321, 322.)

COMPETITION IN BUSINESS, What not Justified by.—One's desire to advance his own business in competition does not justify his attempting to interfere with the business of another by misrepresentation and the making of false and misleading publications. (p. 322.)

INJUNCTION — Joinder of Parties — Multifariousness.—The publishers of a directory, apparently purporting to contain the names of all the persons carrying on a designated business in a large city, who refuse to insert therein the name of a person carrying on such business, with a view to injuring him and promoting the interests of other persons carrying on a like competing business in the same city, and are instigated to so refuse by such business rivals, may, with them, be joined in one suit to enjoin the continuance of such directory without inserting the plaintiff's name and business therein. The complainant has the right to prevent the rivals from attempting to procure this wrongful kind of publication in the future and to have the publishers of the directory relieved from the temptation to continue the wrongful publication. (p. 322.)

Suit by William L. Davis, against the New England Railway Publishing Company, a Connecticut corporation, having a place of business in Boston, and also against Robert J. Kelley and Edward J. Sampson. The bill showed that the complainant was the owner and holder of a lease of certain premises in Boston, which were fitted up for the purpose of carrying on a local express business; that the plaintiff was doing business under the name of the Northern Express Company, and the owner of an express business between Boston and various other designated cities and towns, and that the plaintiff and his subtenants had expended large sums in developing the goodwill of the business; that the defendants Kelley and Simpson conducted, managed and controlled local general express offices in Boston, and acquired a dominating influence of the business in that city, and sought to obtain a monopoly thereof to the exclusion of the plaintiff; that the defendant New England Railway Publishing Company was engaged in the business of publishing a publication known as the "A B C Pathfinder and Dial Express List," which was the only publication of its kind in Boston; that the form of the publication was intended to create in the minds of the public the idea that it contained the names of all reputable express companies doing business in and around Boston, and

that this belief was the main reason inducing the purchases of the publication by the public, and enabled the defendant to obtain a large circulation among business houses in Boston and vicinity; that the publication was usually consulted by persons having occasion to employ a local express, and had come to be recognized and accepted by the public as a directory of local express companies; that the publication contained on its face, in black type, the words "Express List," and gave directions for the method of finding names of expresses running to various towns, and their officers and hours of departure; that the defendant intended to bring out another issue of the publication in September, 1909, and that the plaintiff had requested the defendant to include in its list of express offices and telephone numbers the complainant's location in India street and the number of its telephone, and to make such reference to its business as was made to other express businesses in such directory, but that the defendant corporation had refused so to do; that the plaintiff and his subtenants were conducting the express business in a lawful and proper manner; that the defendant corporation utterly refused to assign any reason for excluding all reference to the plaintiff from its directories; that the plaintiff was willing and ready to pay the defendant corporation such sum, if any, as it charged to other express companies for reference to them in its forthcoming publication, provided similar reference to the plaintiff and its subtenants was made, but the defendant persisted in refusing to make such reference.

The plaintiff prayed that the defendants Kelley and Sampson might be enjoined from inducing the defendant corporation not to make reference to the business of the plaintiff and of his subtenants by any fraud, misrepresentation, threat, intimidation or in any other unlawful manner, and that the defendant corporation, its officers, agents and servants, might be enjoined from making any further issues of its publication not containing a reference to the express business of the plaintiff and his subtenants.

A demurrer was interposed to the complainant's bill on the ground that it was not entitled to relief in equity, and had complete and adequate remedy at law, and was multifarious. The matter was reported to the supreme court for its determination.

E. F. McClennen, for the defendants.

E. H. Warren, for the plaintiff.

476 KNOWLTON, C. J. The plaintiff is the proprietor of the Northern Express Company, which carries merchandise between Boston and many cities and towns in Massachu-

setts, Maine and New Hampshire. He also sublets portions of his office to the proprietors of other express companies doing business in or near Boston. The defendant corporation is the publisher of the "A B C Pathfinder and Dial Express List." The bill contains the following averments: "This publication is the only one of its kind issued or in circulation in Boston. The publication is in a form intended and calculated to create in the minds of the public the belief that it contains the names of all the reputable local expresses ⁴⁷⁷ doing business in Boston and vicinity. It has created, and does now create, such belief in the minds of the public. This belief is the main, if not the sole, reason inducing purchases of the publication by the public. This belief has enabled the defendant corporation to obtain a large circulation among the business houses and general public in Boston and vicinity. The publication is usually and frequently consulted by persons having occasion to employ a local express. It has come to be accepted by the general public as the recognized directory of local express companies." There are other averments showing some of the particulars of the contents of the publication, which tend to support the above general averments, and particularly the averment that it is intended and calculated to create in the minds of the public the belief that it contains the names of all the reputable local expresses doing business in Boston and vicinity. A copy of the publication is made a part of the bill, and it tends to confirm and strengthen this averment. It is averred that "the plaintiff and each of his subtenants is conducting his express business in a lawful and proper manner, and to the convenience and satisfaction of his patrons"—in substance, that these express companies are reputable, and that "no good reason exists why the defendant corporation should discriminate against them, or any of them, or should exclude reference to them, or any of them, from its publication." It is averred that the defendant corporation has omitted any reference in its publication to the business of the plaintiff or of his subtenants, and that it is about to bring out another issue of the same general publication, and has been requested to include the plaintiff's office in the list of express offices, and to make reference to the express business of the plaintiff and his subtenants, and has refused, and still refuses, so to do. The plaintiff also alleges that the defendant corporation refuses to assign any reason for its objectionable conduct.

It is alleged that the other two defendants control a majority of the general local express companies whose names appear in the publication, that they have an acquired and dominating influence in this business in Boston, and are seeking to obtain an absolute monopoly of this kind of business,

to the exclusion of the plaintiff. He avers that they have conspired together to prevent the publication by the defendant corporation of any ⁴⁷⁸ reference to the business of the plaintiff and his subtenants, and by threats and false statements have induced the defendant corporation to leave the plaintiff and his business without mention in the publication.

The case comes before us on a demurrer, which, for the purposes of the hearing, admits the truth of all the averments of the bill.

The ground on which the plaintiff seeks relief is not that he has a right to compel the defendants, or either of them, to do anything for his benefit, but that he has a right to have them refrain from intentionally doing anything, without legal justification, to his injury. The defendant corporation professes to give the public a full list of all the reputable express companies doing business in Boston. While it does not say in express words that the list is complete, that is the meaning which the publication is intended to convey and does convey. Its list is false and misleading, to the plaintiff's injury. One purpose of the list is to show the public where they can go to get their express business done. Another purpose is to give the express companies named in the list the benefit of having their names and the nature of their business brought before the public who have such business to be done. The direct effect of the false statement is to point those who want the services of an express company to other companies, and to divert them from the plaintiff. They are told, in substance, that there is not such person as the plaintiff, and no such company as the Northern Express Company, engaged in this kind of business. The averment of the plaintiff that he is greatly injured in this way is no more than a statement of the natural result of publishing a directory of express companies with his name and the name of his company left out of it. An intentional act of this kind, without excuse, is a violation of his legal rights. It is the publication of a falsehood concerning him, the direct and natural effect of which is to injure him in his business. The public is misled by the intentional publication of an incorrect list. But the gist of the plaintiff's action is the wrong done him by intentionally turning away from him those who otherwise would do business with him. He is entitled to a remedy for this wrong.

It is peculiarly a case for equitable relief. The wrong is a ⁴⁷⁹ continuing and, in a sense, an irreparable one. The extent of the injury cannot be measured accurately in an attempt to assess damages.

The injury is to property, and it is not technically a libel upon the plaintiff. The rule that a court of equity will not

enjoin the mere commission of a crime does not apply. The conduct complained of works a continuing and permanent injury to the plaintiff's property. Upon proof of the facts set out in the bill, the plaintiff will be entitled to an injunction to protect him from the wrongful publication.

The defendants Kelley and Sampson are alleged, not only to have participated in the wrong, but to have instigated it. It is said that, for their own interests, and to obtain a monopoly in certain departments of the express business, they made false statements about the plaintiff to the other defendant, and threatened injury to the other defendant's business, in order to induce the wrongful publication. Upon proof of these facts and the other averments of the bill, the plaintiff is entitled to an injunction against these defendants, to prevent them from attempting to procure this wrongful kind of publication in the future. He has a right to have the other defendant relieved from the temptation to continue the wrongful publication, to which their misstatements and threats might subject it.

Their desire to advance their own interests, in competition, is not a justification for attempting to interfere with the plaintiff's business by misstatements, and the making of a false and misleading publication: *Carew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 287; *Walker v. Cronin*, 107 Mass. 555; *Sherry v. Perkins*, 147 Mass. 212, 9 Am. St. Rep. 689, 17 N. E. 307; *Vegeahn v. Guntner*, 167 Mass. 92, 57 Am. St. Rep. 443, 44 N. E. 1077, 35 L. R. A. 722; *Plant v. Woods*, 176 Mass. 492, 79 Am. St. Rep. 302, 57 N. E. 1101, 51 L. R. A. 339; *Berry v. Donovan*, 188 Mass. 353.

The bill is not multifarious in seeking relief against all of these defendants. In different ways they were all participating in the infliction of an injury on the plaintiff and his subtenants. To a degree, each was responsible for the commission of the wrongful act. Their relations to the matter complained of were such that it was proper to join them, so that the plaintiff might obtain relief at one time against all the persons engaged in the interference with his rights of property, in order to protect him, if possible, from a repetition of the wrong. It is proper, too, ⁴⁸⁰ that the defendant corporation should have protection against a continuance of threats and false statements by the other two defendants.

Demurrers overruled, defendants to have leave to answer.

The Right to an Injunction Against Wrongful Acts calculated to injure the complainant's business has often been recognized in recent years; *Pratt Food Co. v. Bird*, 148 Mich. 631, 118 Am. St. Rep. 601, and cases cited in the cross-reference note thereto. A complaint which states, in substance, that the defendant, a banker and man of wealth and influence in the community, maliciously established a barber-shop, employed a barber to carry on the business, and used

his personal influence to attract customers from the plaintiff's barber-shop, not for the purpose of serving any legitimate purpose of his own, but for the sole purpose of maliciously injuring the plaintiff, whereby the plaintiff's business was ruined, states a cause of action: *Tuttle v. Buck*, 107 Minn. 145, 131 Am. St. Rep. 446.

LEAVITT v. MAYKEL.

[203 Mass. 506, 89 N. E. 1056.]

LANDLORD AND TENANT—Renewal of Lease, When not Affected by Continuing in Possession With the Privilege.—If a lease provides that at its expiration the lessees shall have the privilege of renewing the lease for a further term of two years, the holding over and payment of rent due at the rate fixed in the original lease does not renew or create a new lease without a formal renewal or something equivalent to it, nor extend the term through the additional period. (p. 324.)

LANDLORD AND TENANT, Holding Over by Lessees, There Being a Privilege of Renewal—Tenancy Created by.—If a lease gives the lessees the privilege at its expiration to renew for the period of two years, and they remain in possession paying rent, but without any actual renewal, the tenancy thereby created is not at sufferance, but at will, and cannot be terminated, against the objection of the landlord, without the notice required in a tenancy at will. (p. 325.)

LANDLORD AND TENANT, Action to Recover Rent Upon Lease Which has Terminated and not Been Renewed.—If, after the expiration of a lease, the lessees remain in possession, paying rent, the lease giving them the privilege of renewal, of which they have not availed themselves, the landlord cannot maintain an action of covenant for rent under the expired lease, because the circumstances give rise to a tenancy at will, which is an implied new contract, and it is only under the latter tenancy that the rent can be recovered. (p. 325.)

LANDLORD AND TENANT—Lease, Termination of, When Does not Extend to an Implied Tenancy.—Though a lease provides that the lessees named will pay rent not only during the term, but for such further term as the lessees or any other person claiming under them shall hold the premises, yet if the lessees remain in possession, paying rent, under circumstances from which the law implies a new leasing at will, an action cannot be maintained against such lessees under the original lease, for they are not holding under it, but under a new and implied lease. (p. 325.)

C. W. Wood and C. H. Wood, for the defendants.

G. S. Taft and G. R. Stubbs, for the plaintiffs.

508 **KNOWLTON, C. J.** This is an action to recover rent for premises leased by the plaintiffs to the defendants. The rent for the term covered by the lease was fully paid, but the defendants remained in occupation eight months after the expiration of the term and during that period made monthly payments of rent to the plaintiffs at the rate pre-

scribed by the lease. They then removed from the premises, giving only three days' notice of their intention to remove. This action is brought to recover rent for the next two months.

The lease contained this clause: "It is further agreed in consideration hereof the lessees shall have the privilege and right to renew this lease at its expiration for further term of two years upon the same terms and conditions of this lease." No new agreement, either oral or written, was made expressly between the parties at the expiration of the term, or at any other time. The plaintiffs contended that the defendant had renewed the ⁵⁰⁹ lease for two years more, by holding over eight months and paying rent. The defendants contended that they were holding merely as tenants at sufferance, and that they could quit at any time without notice and without liability for future rent. The only exceptions are to the refusal of the judge to make four rulings requested, which were, in substance, that the defendants after the expiration of the stated term were holding as tenants at sufferance, that the quoted clause was a covenant providing for a renewal, that the word "renew" imports a giving of a new lease like the old one, with the same terms, stipulations and covenants, and that the defendants have done nothing which either directly or by implication can be held to have renewed the old lease.

We are of opinion that the defendant's construction of the quoted clause is correct. It gave the lessees a right to have a renewal of the lease for two years more, but without a formal renewal or something equivalent to it, it did not extend the term through this additional period. In *Cunningham v. Pattee*, 99 Mass. 248, the court said of "renew": "The word, *ex vi termini*, imports the giving a new lease like the old one, with the same terms and stipulations, at the same rent and with all the essential covenants." The language differs from that in *Kramer v. Cook*, 7 Gray, 550; *Dix v. Atkins*, 130 Mass. 171; *Atlantic National Bank v. Demmon*, 139 Mass. 420, 1 N. E. 833; and *Stone v. St. Louis Stamping Co.*, 155 Mass. 267, 29 N. E. 623. In this last case the court said of the language: "This does not contemplate the making of a new lease, but provides that the term shall be three years instead of one, if the lessee so elects." In *Ferguson v. Jackson*, 180 Mass. 557, 62 N. E. 965, the court only held that the giving of the notice and the payment of the rent at the prescribed increased rate constituted an equitable defense to the suit for a forcible entry and detainer. Under the language used in the present lease, it was necessary that there should be, either the making of a new lease for the additional term, or a formal extension of

the existing lease, or something equivalent thereto, in order to bind both parties for a period of two years more.

We are of opinion that the defendants' last three requests for rulings were correct as propositions of law. But it does not follow that their first proposition was also correct, that "after the ⁵¹⁰ first day of June, 1908, the defendants held the premises as tenants at sufferance." If they had simply held over for a time, without communication or dealings of any kind between them and the plaintiffs, this would have been the legal result: *Delano v. Montague*, 4 Cush. 42; *Edwards v. Hale*, 9 Allen, 462. The defendants are quite right in their contention that what occurred was not equivalent to an arrangement that the term should be extended and both parties bound for two years more. But their conduct in staying on the premises and making payments of rent month by month, at the former rate, eight in all, after the expiration of the term, was an indication that they desired to continue the tenancy for an indefinite period. The acceptance of this rent by the plaintiffs, without anything being said on either side, indicated a willingness of the plaintiffs that the tenancy should be extended. The fair inference from the conduct of both parties is that they impliedly agreed to a tenancy at will which should exist on the same terms as those stated in the lease: *Benton v. Williams*, 202 Mass. 189, 88 N. E. 843. There being a tenancy at will, it could not be terminated against the objection of the plaintiffs without notice; and upon a proper declaration the defendants are liable for rent for the two months next after they removed from the premises.

But this is an action upon a covenant contained in the lease. Plainly, the rent sued for is not rent that accrued during the term. It is rent under a new tenancy, namely, a tenancy at will which was created by a new contract between the parties. True, the contract is only implied from their dealings; but it is the same in legal effect as if they had come together and expressly agreed to create a tenancy at will.

The only question of difficulty is whether the covenant that the lessees should pay the rent, not only during the term, but "for such further time as the said lessees, or any other person or persons claiming under them, should hold the said premises or any part thereof," includes this rent under the new tenancy at will. We are of opinion that it does not. Plainly, it would not include rent under a new lease. We think that rent under a new oral contract that creates a tenancy at will stands the same in this particular as rent under a new lease. The language was intended to cover a case of holding over without the ⁵¹¹ creation of a new contract, either written or oral, express or implied.

The defendant's last three requests having been erroneously refused, and exceptions having been taken to the refusal, and to the decision in favor of the plaintiffs, the entry must be, exceptions sustained.

Covenants for the Renewal of Leases are discussed in the note to *Drake v. Board of Education*, 123 Am. St. Rep. 460. If, under a lease purporting to be for three years, with the privilege of two years additional, the tenants remain in possession after the expiration of the three years, they are to be deemed as electing to be tenants for the two years additional, and not to be tenants remaining in possession after the hiring, and are, on the reception of rent by the landlord, deemed, under section 1437 of the Civil Code of South Dakota, to have renewed the hiring but for one year only: *Heffron v. Treher*, 21 S. D. 194, 130 Am. St. Rep. 711, and see the cases cited in the cross-reference note thereto.

DUNN v. LOWE.

[203 Mass. 516, 89 N. E. 1046.]

SEARCH in Suspected Places, Right of Which Does not Justify Seizing Property from the Person of Another.—A statute giving commissioners of game the right to search in suspected places for, and seize and remove, lobsters which have been unlawfully taken, held or offered for sale does not justify the seizing of property upon the person or in the hands of another and taking it from him for the purpose of examining the contents of a receptacle which is seized while in his hands and taken from his person against his will. (p. 327.)

Tort for forcibly, and against the plaintiff's objection, seizing, opening and searching, without right, certain sacks containing lobsters. The defendant sought to justify his action as a deputy fish and game commissioner. The trial judge found pro forma in favor of the defendant, and the plaintiff appealed.

W. B. Perry, L. W. Jenney and G. H. Potter, for the plaintiff.

D. Malone, attorney general, and F. B. Greenhalge, assistant attorney general, for the defendant.

517 KNOWLTON, C. J. The plaintiff was engaged in the business of taking, buying and selling lobsters. The defendant is a deputy of the commissioners on fisheries and game of the commonwealth. The plaintiff was carrying by hand, through the streets of New Bedford, two sacks securely tied, containing lobsters. He had just received them from a common carrier, and had not opened them. It was not unlawful for him to take, hold or offer for sale these lobsters.

The defendant met the plaintiff, and suspecting that the lobsters in the sacks had been taken, held or offered for sale unlawfully, and acting under the Revised Laws, chapter 91, section 91, he seized and opened the sacks, searched them, and removed the lobsters and measured them, all against the objection and protest of the plaintiff and without a search-warrant, and then returned them to the sacks. These facts appear by an agreed statement; and the question of law presented is whether the plaintiff can recover for the alleged wrong.

The provision of law under which the defendant seeks to justify his conduct is the Revised Laws, chapter 91, section 91, as follows: "For the purpose of enforcing the provisions of section 88, any one of the commissioners on fisheries and game or their deputy or any member of the district police may search in suspected places for, seize and remove lobsters which have been unlawfully taken, held or offered for sale."

The first question is, What is the scope of the words "search in suspected places for"? In the present case the lobsters were in the manual possession of the plaintiff. They were taken from his person. They were in his hands, and had the protection of his personal, manual control. We do not think authority to search in suspected places gives a right to seize property that is upon the person or in the hands of another, and to take it from ⁵¹⁸ him for the purpose of examining the contents of a receptacle which is seized while in his hands and which is taken from his person against his will. The statute does not contemplate or authorize such a violation of personal rights. It is directed to an examination of places, rather than to a direct interference with the person of one under suspicion, with a view to an inspection of articles held in his hands. This view of the statute leaves the defendant without justification for what he did.

Since this occurrence the Statutes of 1908, chapter 255, has been enacted, under which, in such a case, a commissioner may request the suspected person to forthwith display for inspection the fish, birds and animals then in his possession, and may arrest him without a warrant if he refuses.

The Statutes of 1904, chapter 367, purports to cover the whole subject of searches by a commissioner or deputy commissioner on fisheries and game for game or fish believed to be taken or held in violation of law. Seemingly, it was intended to relieve the subject of constitutional objections that might be made to searches under the Revised Laws, chapter 91, section 91: See Constitution of Massachusetts, Declaration of Rights, art. 14; *Fisher v. McGirr*, 1 Gray, 1, 61 Am. Dec. 381. This later statute includes searches for lobsters, and supersedes, and repeals by implication, so much of section 91, relied on by the defendant, as relates to

searches. It is therefore unnecessary to consider the constitutional question discussed at the argument.

Judgment for the plaintiff for damages to be assessed by the superior court.

The Right of an Officer to Search a person suspected of crime is discussed in *Hebrew v. Pulis*, 73 N. J. L. 621, 118 Am. St. Rep. 716; *Thornton v. State*, 117 Wis. 338, 98 Am. St. Rep. 924; *Hubbard v. Garner*, 115 Mich. 406, 69 Am. St. Rep. 580d; *Pickett v. State*, 99 Ga. 12, 59 Am. St. Rep. 226. The search of premises of a private person is the subject of a note to *McClurg v. Brenton*, 101 Am. St. Rep. 328. A proceeding for the search for and seizure and destruction of intoxicating liquors kept in a prohibited district to be sold contrary to law is a civil and not a criminal proceeding, and the preponderance of evidence is sufficient to sustain it: *Kirkland v. State*, 72 Ark. 171, 105 Am. St. Rep. 25.

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

PEOPLE v. GRANT.
[157 Mich. 24, 121 N. W. 300.]

LICENSE TAX—Power of City to Impose for Revenue.—Under the statutes of Michigan a city of the fourth class may impose license fees for revenue on transient tradesmen. (pp. 331, 332.)

LICENSE TAX—Reasonableness as to Amount.—In View of 1 Compiled Laws, section 3108, license fees imposed by cities, whether for regulation or for revenue, must be reasonable in amount and not so heavy as to be prohibitory, and the question of reasonableness is for judicial determination. (pp. 331, 332.)

LICENSE TAX—When Reasonable in Amount on Transient Traders.—A license fee imposed by a city on transient traders of two dollars a day for each day less than a week, ten dollars for a week, twenty-five dollars for a month, fifty dollars for three months, and two hundred dollars for a year, is not oppressive, unjust, or unreasonable. (p. 332.)

M. F. Guinon, for the appellant.

B. H. Halstead, city attorney, for the people.

²⁵ **HOOKER, J.** Grant was prosecuted as a “transient tradesman” in the city of Petoskey, under an ordinance which provided:

“Section 1. The words ‘transient tradesmen,’ for the purpose of this ordinance, shall be construed to mean and include all persons, both principals and agents, who engage in temporary or transient business in this city, or in traveling from place to place therein, selling goods, wares and merchandise, and who, for the purpose of carrying on such business, hire, lease or occupy any building or structure for the exhibition or sale of such goods, wares and merchandise. And no such transient tradesman shall be exempt from the provisions of this ordinance by reason of associating himself temporarily with any local dealer, trader or auctioneer, or by conducting such temporary or transient business in connec-

tion with or as a part of the business of or in the name of any local dealer, trader or auctioneer. . . .

"Sec. 3. Every transient tradesman before engaging in business, or before advertising or exposing his wares, goods or merchandise for sale, shall make affidavit, procure a transient tradesman's license from the common council of the city upon application therefor, the same to be issued by the city clerk and he shall pay the city treasurer a license fee depending upon the time he proposes to engage in such business, to be stated in his application: Fifty dollars for three months, twenty-five dollars for one month, ten dollars for one week, and two dollars for each day less than one week. The time for which said license is to run and the date of its expiration shall be specified therein. All such licenses shall at the latest expire on the first Monday in June, following their issue; a license shall not give authority to more than one person to sell goods; each license shall state that it is not assignable nor transferable, and that it may be revoked by the common council at any time upon return to the licensee of the unearned license fee. . . .

"Sec. 7. Every person who shall in any manner engage in doing or transacting the business of a transient tradesman in selling goods, wares or merchandise without first having procured and paid for a license, as required by this ordinance, or who shall continue such business after the time limit in said license obtained therefor shall have expired."

²⁶ The facts are not in dispute. The defendant is a non-resident of said city and of this state, and was a transient tradesman within the terms of said ordinance. He had been in the habit for several years of engaging in such business in Petoskey about July 15th and continuing until about October 1st. He did so in 1907, and he procured no license. His stock was from two thousand dollars to five thousand dollars in value, and the rate of taxation for that year was two dollars and five cents upon each one hundred dollars valuation. He was sentenced to pay a fine of fifty dollars, and to be imprisoned in the county jail until paid, not exceeding ninety days, and has appealed.

Counsel for respondent contend that: (1) The charter, i. e., the general act for the incorporation of cities, has not conferred authority to pass this ordinance. (2) The ordinance should be declared void because oppressive and unjust. (3) It is unreasonable and void for that reason.

Petoskey is a city of the fourth class. The power to license conferred upon cities is found in 1 Compiled Laws, section 3107. Under the various subdivisions of this section, cities are given authority to license and regulate billiard-tables, etc. (subdivision 5), auctioneers, etc. (subdivision 10), hawkers and peddlers (subdivision 11), wharfboats (subdi-

vision 12), ferries (subdivision 13), taverns, saloons, etc. (subdivision 14), vehicles used for hire, etc. (subdivision 15), toll bridge, etc. (subdivision 16), drays, hacks, etc. (subdivision 29), dogs (subdivision 32). Subdivision 39, under which the city claims to have acted in passing the ordinance in question, provides that:

"The council may also license transient traders, which shall be held to include all persons who may engage in the business of selling goods or merchandise after the commencement of the fiscal year, and the license fee in such cases may be apportioned with relation to the part of the fiscal year which has expired, but such traders, if they continue in the same business, shall not be required to take out a second license after the commencement of the next fiscal year: Provided, such goods or merchandise have been assessed for taxes for said fiscal year."

27 "(3108) Sec. 2. The council may prescribe the terms and conditions upon which licenses may be granted and may exact and require payment of such reasonable sum for any license as they may deem proper. . . .

"(3109) No license shall be granted for any term beyond the first Monday in June next thereafter, nor shall any license be transferable, and the council may provide for punishment by fine or imprisonment, or both, of any person, who, without license, shall exercise any occupation or trade, or do anything for or in respect to which any license shall be required by any ordinance or regulation of the council.

"(3110) All sums received for licenses granted for any purpose by the city or under its authority, shall be paid into the city treasury to the credit of the contingent fund."

Our attention is called to the fact that, whereas, every other subdivision above cited contains the words "license and regulate," the word "regulate" is not found in subdivision 39. We have held that license fees may be imposed by cities for the purpose of regulation or for revenue: *Wells v. Torrey*, 144 Mich. 694, 108 N. W. 423. When for regulation and not for revenue, the fee should not exceed the necessary or probable expense of issuing the license and of inspecting and regulating the business covered by it (2 *Cooley on Taxation*, 3d ed., p. 1141); but if for revenue, the extent of the tax must be understood to be left to the judgment and discretion of the municipal government, to be determined in the usual mode in which "its legislative authority is exercised; but the grant of authority to impose fees for the purpose of revenue would not warrant their being made so heavy as to be prohibitory, thereby defeating the purpose": 2 *Cooley on Taxation*, 3d ed., p. 1140. It is true that many cases hold that when authority is given to a city to grant licenses for revenue, or for regulation and revenue,

the courts will not inquire into the reasonableness of the amount; but, in view of 1 Compiled Laws, section 3108, quoted above, we must hold that cities are restricted to reasonable license fees, whether imposed for regulation or revenue, and that involves a judicial determination of the question of reasonableness if a controversy²⁸ arises. We are of the opinion that the thirty-ninth subdivision referred to authorizes the requirement of licenses for the purpose of revenue. Not only is the absence of the word "regulate" significant, but the nature of the business and the provisions as to other taxation clearly indicate it.

The fee imposed cannot be said to be unreasonable. It was as follows: Two dollars per day for each day less than one week; ten dollars for one week; twenty-five dollars for one month; fifty dollars for three months; two hundred dollars for one year. Three dollars for one day was held a reasonable fee for hawking and peddling: *City of Alma v. Clow*, 146 Mich. 443, 109 N. W. 853. Three dollars per day and fifteen dollars per year for selling merchandise was held reasonable in *People v. Russell*, 49 Mich. 617, 43 Am. Rep. 478, 14 N. W. 568. Ten dollars for one week and fifty dollars per year for hawking and peddling spices, teas, coffee, baking-powder, extracts, and essences was held valid in *City of Muskegon v. Zeeryp*, 134 Mich. 181, 96 N. W. 502. Five dollars a week for hawking and peddling was held valid in *People v. Baker*, 115 Mich. 199, 73 N. W. 115. See, also, *City of Grand Rapids v. Norman*, 110 Mich. 544, 68 N. W. 269; *People v. Smith*, 147 Mich. 391, 110 N. W. 1102.

We hold, therefore, that the license was lawfully imposed for revenue, that it was neither oppressive nor unjust, and that it was not shown to be unreasonable.

The conviction is affirmed.

Ostrander, Moore, McAlvay and Brooke, JJ., concurred.

The Constitutionality of License Taxes is the subject of a note to *Hager v. Walker*, 129 Am. St. Rep. 249. In the recent case of *Leonard v. Reed*, 46 Colo. 307, ante, p. 77, a statute imposing a license fee upon itinerant venders is pronounced unconstitutional.

MAILHOT v. TURNER.

[157 Mich. 167, 121 N. W. 804.]

LEASE—When an Executed Rather Than an Executory Agreement.—A proposition to lease, signed by the lessor when presented to him by the lessee, under which the lessee is placed in possession to estimate the value of the stock in trade, will be regarded as a present lease rather than an agreement for a lease, no other writing having been demanded or thought necessary by the lessee. (p. 334.)

HOMESTEAD—Validity of Lease not Joined in by Wife.—The lease of a homestead, without the signature of the wife, is without validity, if it will exclude any enjoyment of the premises by her; it is an "alienation" of the homestead, which the statute declares invalid unless signed by the wife. (p. 334.)

LEASE—Severable Provisions.—Where an Agreement Provides for the leasing of stores and the purchasing of the stock and fixtures therein, the two provisions being mutually dependent, and neither party being bound by the lease of the real estate, then neither is bound by the agreement as to the personal property. (p. 335.)

Benjamin & Quay, for the appellant.

Frost & Sprague, for the appellee.

¹⁶⁸ BLAIR, C. J. For some time previous to January 20, 1906, plaintiff and defendant were the only merchants engaged in business—grocery and general store—in the village of Topinabee, a summer resort on Mulletts Lake. There were only three store buildings, one of which was owned and occupied by the plaintiff, and the others owned and occupied by the defendant. Plaintiff presented to defendant a written proposition, which proposition was signed by defendant, and thereby, plaintiff claims, became a binding agreement between the parties. The agreement was as follows:

"Jan. 20, 1906.

"Mr. G. H. Turner.

"Dear Sir: I make you the following proposition for the purchase of your property: I will lease the properties described as lot one, block seven, and lots five and six, block one, village of Topinabee, and the buildings thereon, for a period of four years from date of this agreement, at a monthly rental of \$15.00 for both properties, with the privilege of purchasing said properties at any time within four years from date of agreement, for the sum of \$2,000.00. The stock to be taken by me at 75 cents on the dollar of invoice price. Payment to be made in the following manner: \$1,500.00 cash, remainder in notes to be paid at the rate of \$25.00 or more per month until paid in full with interest on deferred payments at the rate of 6 per cent. per annum. To be secured by a mortgage second to one of \$1,000.00. The show cases,

etc., etc., to be taken by me at the rate of 50 cents on a dollar invoice price.

"J. H. MAILHOT.

"G. H. TURNER."

169 The buildings on lot 1 consisted of a store and a living house attached to it. Defendant and his wife lived in the house. Defendant did not own the title in fee to lot 1, block 7, but owned a life estate therein. Defendant refused to carry out the agreement, and plaintiff brought this action for damages alleged to have been suffered in consequence of such refusal. At the conclusion of the testimony, the court directed a verdict for the defendant, and plaintiff brings the case to this court for review upon writ of error.

Treating the signature of defendant to the plaintiff's proposition as creating a contract between the parties containing their entire agreement, we think the plaintiff's counsel misinterpret the effect thereof. The contract was not, in our opinion, an agreement for a lease, as claimed by plaintiff, and was not so regarded by the parties. Shortly after the signing of the agreement, defendant put plaintiff in possession of the store building and other buildings on lots 5 and 6, in block 1, and permitted him to look over the stock, for the purpose of estimating its value. Afterward plaintiff gave up the possession of the real estate last mentioned to defendant. Plaintiff never demanded a written lease or bill of sale, nor is there any intimation in his testimony that he supposed any further papers were to be executed. In the light of the testimony, we think it should be held that the agreement was intended by the parties as, and was, a present lease of the real property for a period of four years from January 20, 1906, at a monthly rental of fifteen dollars, with an option to purchase at any time within four years for the sum of two thousand dollars. The constitutional provision as to homesteads provides that a mortgage thereof "or other alienation of such land by the owner thereof, if a married man, shall not be valid without the signature of the wife to the same": Const., art. 16, sec. 2. This provision covers a lease of the homestead, at least where, as in this case, it would exclude any enjoyment of the premises by the wife: 15 Am. & Eng. Ency. of Law, 2d ed., p. 674, subd. 4; *Maatta v. Kippola*, 102 Mich. 116, 60 N. W. 300. The lease of the homestead, without the signature of the wife, was absolutely void, just as a deed of the homestead without her signature would have been void. So far as the leasehold interest was concerned, the instrument in question was not an agreement to alienate the premises, but was the instrument of alienation itself, and, lacking the signature of the wife, was invalid: *Lott v. Lott*, 146 Mich. 580, 109 N. W. 1126, 8

L. R. A., N. S., 748; Maatta v. Kippola, 102 Mich. 116, 60 N. W. 300.

Plaintiff treats the agreement as an agreement to execute a lease, and contends that, while it was so far void as not to support a decree for specific performance, it was so far valid as to support an action for damages for nonperformance. Plaintiff further contends as follows: "(b) Even if it could be held that the agreement to lease and sell the real estate was void on account of it not having been signed by the wife, would that affect the validity of the sale of the personal property—the stock of goods? We think not. The proposition to purchase and the price to be paid therefor and the method of payment are fully set forth in the memorandum, and are distinct and separable from the proposal to lease and sell, and this part of it need not be signed by the defendant's wife, so that, even if this court should hold that the plaintiff cannot recover damages for the agreement in reference to the real estate, plaintiff could still recover for his damages sustained by the refusal to carry out the agreement to sell the personalty."

It appears from the plaintiff's testimony that defendant wished to dispose of all of the property, for the reason that he intended to remove with his family from Topinabee to Sault Ste. Marie and make his home there. The contract itself indicates that it was an entire and indivisible contract. The bill of particulars bases the right of recovery upon the contract, and it is clear that the lease of the real estate with the privilege of purchase was regarded as an essential part of the contract, without which probably neither party would have entered into it. The ¹⁷¹rent was not divided between the separate properties, but was a single sum for both properties, and, when plaintiff was refused possession of the homestead, he surrendered the possession of the other real estate. Evidently, if he could not have the homestead, he did not want the other real property. We are therefore of the opinion that the invalidity of the lease as to the one description avoided it as to both. The agreement provided for the leasing of the stores and the purchase of the stock and fixtures therein as mutually dependent, the one upon the other. Neither of the parties was bound by the lease of the real estate, and therefore neither of the parties should be held to be bound by the agreement as to the personal property, which was in no sense independent of the lease: Co-operative Telephone Co. v. Katus, 140 Mich. 367, 112 Am. St. Rep. 414, 103 N. W. 814.

The judgment is affirmed.

Grant, Montgomery, Ostrander and McAlvay, JJ., concurred.

THE LEASE OF A HOMESTEAD BY ONE SPOUSE ONLY.

- I. General Policy of the Law, 336.
- II. What Amounts to an Alienation Under the Homestead Law.
 - a. Conveyances on Sale, 337.
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- IV. The Exceptional Cases of Separation and Insanity.
 - a. Separation, 340.
 - b. Insanity, 340.
- V. The Covenant for Quiet Possession, 340.

I. General Policy of the Law.

The very name of homestead carries with it, like the word "heirloom," an odor of inalienable sanctity. In the language of the supreme court of Iowa in *Parsons v. Livingstone*, 11 Iowa, 106, 77 Am. Dec. 135, homestead legislation was based upon the idea that it was a matter of public policy, for the promotion of the prosperity of the state, and the general good of the people, that the citizen should be independent and above want—that he should have a home, a place where he and his family might live in security beyond the reach of financial misfortune, and the demands of creditors. Similar expressions are to be found in *Walker v. Darst*, 31 Tex. 682, and in *Wood v. Wheeler*, 7 Tex. 13. In this last-named case Chief Justice Hemphill said, in speaking of the protection thrown around the homestead by the law: "Its design was not only to protect citizens and their families from the miseries and dangers of destitution, but also to cherish and support in the bosom of individuals those feelings of sublime independence which are essential to the maintenance of free institutions."

Having thus provided for the exemption of the homestead property from involuntary alienation—i. e., by devolution of the law—insolvency and execution, the next care of the legislature was to restrain voluntary alienation, to see that it, in its turn, was surrounded by safeguards to preserve the homestead to the family practically in spite of themselves. To that end the law provided for its voluntary inalienation in the case of married men without the voluntary signature and assent of the wife. It is restating a truism to say that the ingenuity of lawyers was at once directed to what was thought to be the weakest panel in the fence of protection to the home, and that their energies were zealously directed toward such a construction of the words "mortgage or other alienations" used in the homestead statutes as would permit of some dealings—tortuous negotiations—for the benefit of creditors. Equally steadily the courts have strained, and hitherto their efforts have been successful, to zealously guard what they have properly deemed the sacred rights attaching to the homestead. In *McGuire v. Van Pelt*, 55 Ala. 344, they held that a mortgage of the homestead by the husband, without the signature and assent of the wife, is inoperative for any purpose whatever. It is invalid and confers no rights, present or prospective. Next was attacked the words "voluntary signature and assent of the wife," and its answer is contained in *Miller v. Marx*, 55 Ala. 322, which is in itself a handy vade mecum

of the homestead law. So far then, practically, all efforts to frustrate the wise provision of the legislature have failed, though the courts have been equally alert to protect bona fide dealings to which the wife's assent has once properly and formally been obtained. In *Graham v. Anderson*, 42 Ill. 514, 92 Am. Dec. 89, the court said: "Where the certificate of the privy examination of a married woman is in the form required by the statute, it is not sufficient, in order to impeach it, to allege that there was no private examination; that she did not acknowledge the deed as her act and deed; that she did not release her homestead right. There must be some allegation of fraud or imposition practiced toward her; some fraudulent combination between the parties interested and the officer taking the acknowledgment." There have been many changes in the statutes, but throughout the vital principle has been left untouched. Decision has followed decision with a constant iteration that as to absolute conveyances the alienation of a homestead by one only of the spouses is invalid and passes no title to the alienee: *Jerde v. Furbush*, 115 Wis. 277, 95 Am. St. Rep. 904 and note, 91 N. W. 661; the latest decision being *Clark v. Bird*, 158 Ala. 278, 132 Am. St. Rep. 25, 48 South. 359, wherein it was held that a bond to sell part of a homestead, not being signed and acknowledged by the vendor's wife, was void as an obligation to convey, and was not the subject of specific enforcement. That case, which is interesting, apart from being the latest exposition of the law on the subject, went further and said that such a bond did not operate as an estoppel against the husband though he received a valuable consideration, and that the refunding of such money was not a condition precedent to the recovery of the homestead which he had conveyed without his wife's assent and signature.

We have thus seen how in regard to absolute conveyances and mortgages the legislation on the subject has withstood the insidious and strategic attacks upon its outworks. But there still remained another to be repulsed—the attempt to make valid a lease by the husband without the wife's statutory concurrence. In *Mailhot v. Turner*, 157 Mich. 167, ante, p. 333, 121 N. W. 804, will be found the report of the failure to evade the evident and praiseworthy spirit of the statute. The consideration of that case invites the attention of the lawyer to the matrix within which lie other principles and rules, an outline of which is presented for his assistance.

II. What Amounts to an Alienation Under the Homestead Laws.

a. **Conveyances on Sale.**—The courts, in the exercise of their wide discretion and their liberal interpretation of legislation intended for the betterment of the primary worker—the small holder of land as well as his wealthier confrere—have preferred to construe alienation of the homestead broadly as the alienation of any interest therein, and a conveyance of the homestead property by one of the spouses without the consent of the other has been held to be such an alienation contrary to the statute and therefore void: *Marks v. Wilson*, 115 Ala. 561, 22 South. 134; *Park v. Park*, 71 Ark. 283, 72 S. W. 993; *Clarkin v. Lewis*, 20 Cal. 634; *Gray v. Schofield*, 175 Ill. 36, 51 N. E. 684; *Burnap v. Cook*, 16 Iowa, 149, 85 Am. Dec. 507; *Hill v. Alexander*, 2 Kan. App. 251, 41 Pac. 1066; *Ganson v. Baldwin*,

93 Mich. 217, 53 N. W. 171; McKenzie v. Shows, 70 Miss. 388, 35 Am. St. Rep. 654, 12 South. 336; Johnson v. Hunt, 79 Miss. 639, 31 South. 205; Hoselton v. Hoselton, 166 Mo. 182, 65 S. W. 1005; Buettgenbach v. Gerbig (Neb.), 90 N. W. 654; Wittrowsky v. Gidney, 124 N. C. 437, 32 S. E. 731; McBroom v. Whitefield, 108 Tenn. 422, 67 S. W. 794; Gober v. Smith (Tex. Civ. App.), 36 S. W. 910; Penn v. Case, 36 Tex. Civ. App. 4, 81 S. W. 349; Virginia etc. Iron Co. v. McClelland, 98 Va. 424, 36 S. E. 479; In re Smith, 2 Hughes, 307, Fed. Cas. No. 12,979, on a Virginian statute; Jerdee v. Furbush, 115 Wis. 277, 95 Am. St. Rep. 904, note, 91 N. W. 661.

b. Mortgages.—It will be found, in addition to outside authorities, that those courts which have held conveyances void for want of the signatures of both husband and wife have also consistently held mortgages and deeds of trust of the homestead void for the same reason: Rogers v. Day, 115 Mich. 664, 69 Am. St. Rep. 593, 74 N. W. 190; Hammond v. Rathbone, 113 Mich. 499, 71 N. W. 858, 75 N. W. 928; Norbury v. Harper, 70 Neb. 389, 97 N. W. 438.

c. Leases.—With regard to leases the rule has been somewhat modified, but may be stated to be that a lease of the homestead property amounts to such an alienation as to render it void when executed by one of the spouses only, when it interferes with the possession and enjoyment of the premises as a homestead. In the language of C. J. Horton, if "it is conceded that the husband cannot sell, mortgage, or encumber the homestead without the consent of the wife, and as it is conceded she has a certain estate therein, clearly the husband cannot deprive the wife of such estate and of her possession by a lease, to which she refuses to give her assent. If he may do so for a period of five years, as attempted in this case, he may continue to lease the premises for a longer and even for an indefinite period. . . . We are of opinion, therefore, under a fair construction of the provisions of our constitution and statutes, that whenever the lease of a homestead, although the title thereto is held by the husband, attempts to interfere with the use and occupancy of the homestead, that the assent of the wife is necessary to the validity of such lease or transfer. Without her consent thereto the lease is void": Coughlin v. Coughlin, 26 Kan. 116. This decision was followed in Franklin L. Co. v. Wea etc. Co., 43 Kan. 518, 23 Pac. 630; Pritchett v. Davis, 101 Ga. 236, 65 Am. St. Rep. 298, 28 S. E. 666. In the last-named case the point is emphasized that a lease creates an interest in land within the spirit of the homestead law, and after citing Coody v. Gress Lumber Co., 82 Ga. 793, 10 S. E. 218, in which it was laid down that a sale of growing trees is a sale of an interest in land, Mr. Justice Little said: "These authorities, and the reason upon which they are predicated demonstrate that, by the terms of the contract of lease and sale made by the head of the family for whose benefit the homestead was set apart, a part of the realty embraced in the homestead estate was alienated to the defendants, and thus the inhibitions imposed by the constitution and laws of this state were contravened; and therefore these contracts of lease and sale were void and conveyed nothing to the defendants." The foundation for this reasoning was laid in Wea Gas etc. Co. v. Franklin Land Co., 54 Kan. 533, 45 Am. St. Rep. 297, 38 Pac. 790, and followed in Palmer Oil & Gas Co. v. Parish, 61 Kan. 311, 59 Pac. 649, where a lease was held to be such an aliena-

tion of interest in the homestead land as to require the joint consent of both husband and wife. The mere knowledge by the wife of the transaction and her willingness to sign it if requested were held to be without the main issue.

Where the husband leased the homestead for the purposes of oil and gas extraction, with the right to the lessees to erect machinery and lay pipes for five years, with the right to indefinite renewal, the court held it to be practically a conveyance of a portion of the homestead—oil in place under the soil being a mineral and mineral in place being land—and consequently void for want of the wife's assent: *Southern Oil Co. v. Colquitt*, 28 Tex. Civ. App. 292, 69 S. W. 169; *Palmer Oil & Gas Co. v. Parish*, 61 Kan. 311, 59 Pac. 640, and the same rule was followed in *Houston & T. C. Ry. Co. v. Click*, 31 Tex. Civ. App. 211, 72 S. W. 83.

Coming back to the exception to the rule, viz., that leases of the homestead do not require the joint assent of husband and wife when there is no interference with the possession and enjoyment of the premises, authority is found for the proposition in *Dickey v. Waldo*, 97 Mich. 255, 56 N. W. 608, 23 L. R. A. 449. In that case the lease was for forty acres of the homestead property on which fruit trees supplied by the lessees were to be planted and cared for during ten years by the lessor and the profits divided equally. The occupation and possession of the buildings and land were not interfered with. Under these circumstances, neither the lessor nor his wife had parted with any homestead right, nor was their possession in any manner interrupted, and the consent of the wife to the lease therefore was not necessary.

d. Licenses.—But it has been held, and care must be exercised to prevent a confusion of those decisions dealing with licenses as distinguished from leases, that a husband may, without joining the wife, give a license for the removal of minerals from the premises, if their use as a homestead is not thereby impaired, especially where the wife tacitly acquiesces in the work: *Poole v. Gerrard*, 65 Am. Dec. 487, note.

III. When Leases by One Spouse Valid.

It now only remains to see in what cases a lease of a homestead by one spouse only may be valid. We have already shown, II, *supra*, that where there is no interference with the possession and enjoyment of the premises a lease thereof is valid without the consent of the wife. In some states, however, the courts have gone farther than others in widening the exception. In Texas a temporary renting of the homestead is not aligned with a sale of it, and the consent of the wife in the manner required on a sale is not essential. In that state the husband's control of the community property, and his right to manage it and as head of the family to make provision for it, makes consistent his right to lease the premises for a year: *Engelhardt v. Batla* (Tex. Civ. App.), 31 S. W. 324. In *Randall v. Texas Cent. Ry. Co.*, 63 Tex. 586, it was held that the husband alone may grant a right of way to a railroad over a homestead when it does not materially affect the rights of the wife to the enjoyment thereof. In the opinion in the case just cited the court gives as a reason for its decision that the husband "may rent or lease a part or all of the homestead, without the consent of the wife, for a reasonable time. He also has the right to subject the property to such

use as to him may seem best, provided the use does not destroy or materially affect it as a homestead." But a lease for two years without the wife's assent was held invalid: *Haile v. Haile* (Tex. Civ. App.), 93 S. W. 435. In Alabama, however, the direct opposite is held. In that state it has been definitely settled that a right of way over the homestead granted and conveyed by the husband in an instrument in writing duly executed by him, but in which the wife did not join, is void and has no operation as an estoppel or otherwise against the husband: *Alford v. Lehman, Durr & Co.*, 76 Ala. 526; *McGhee v. Wilson*, 111 Ala. 615, 56 Am. St. Rep. 72, 20 South. 619; *Marks v. Wilson*, 115 Ala. 561, 22 South. 134; *Cowan v. Southern Ry. Co.*, 118 Ala. 554, 23 South. 754. In Michigan the same rule obtains: *Evans v. Grand Rapids L. & D. R. Co.*, 68 Mich. 602, 36 N. W. 687.

IV. The Exceptional Cases of Separation and Insanity.

a. Separation.—The fact that husband and wife are living separate and apart, that he has abandoned her, or driven her from him, does not dispense with the necessity for her consent in any alienation of the homestead: *Chambers v. Cox*, 23 Kan. 393; *Rogers v. Day*, 115 Mich. 664, 69 Am. St. Rep. 593, 74 N. W. 190; *Gardner v. Gardner*, 123 Mich. 673, 82 N. W. 522; *France v. Bell*, 52 Neb. 57, 71 N. W. 984; *Herron v. Knapp etc. Co.*, 72 Wis. 553, 40 N. W. 149.

In some states the law requires the consent of the wife only if she and the husband are living together. In such case, he cannot, by driving her away, himself sign the document affecting the homestead interest: *Scott v. Scott*, 73 Miss. 575, 19 South. 589. The separation must be that intended by the law in both letter and spirit, and mere absence for business or education of the family is not to be so misconstrued: *Walton v. Walton*, 76 Miss. 662, 71 Am. St. Rep. 540, 25 South. 166; *Gibbons v. Hall* (Tex. Civ. App.), 59 S. W. 814; *Hector v. Knox*, 63 Tex. 613.

b. Insanity.—The rule is that the insanity of one of the spouses does not dispense with the necessity of joinder of both in the alienation of any interest in the homestead except the power is conferred by statute: *Thompson v. New England etc. Co.*, 110 Ala. 400, 55 Am. St. Rep. 29, 18 South. 315; *Security L. & T. Co. v. Kauffmann*, 108 Cal. 214, 41 Pac. 467; *Whitlock v. Gasson*, 35 Neb. 829, 53 N. W. 980. Where the power is conferred by statute, its exercise must be strictly guarded: *Jones v. Falvella*, 126 Cal. 24, 58 Pac. 311; *Shields v. Aultman, Miller & Co.*, 20 Tex. Civ. App. 345, 50 S. W. 219.

IV. The Covenant for Quiet Possession.

In this connection our only reason for citing *Welch v. Miller*, 70 Vt. 108, 30 Atl. 749, is to open the question whether it and *Brewer v. Wall*, 23 Tex. 585, 76 Am. Dec. 76, are not in conflict with the more recent decision of *Clark v. Bird*, 158 Ala. 278, 132 Am. St. Rep. 25, 48 South. 359, and *Mailhot v. Turner*, 157 Mich. 167, ante, p. 333, 121 N. W. 804. In *Welch v. Miller*, 70 Vt. 108, 39 Atl. 749, a covenant for quiet enjoyment contained in a lease, invalid because executed by the husband alone, was held to give a cause of action for a breach thereof. The reason assigned was that the lease was executed in August, 1895, and the term was to commence in February, 1896, and the covenant was for quiet enjoyment for one year from February, 1896. The court said: "The covenant may have been entered

into with the expectation that the wife would consent to the plaintiff's occupancy, or with the intention of acquiring another homestead before the time of the performance of the covenant arrived, or under a belief that he could lawfully lease the premises without his wife's consent. There is nothing in the record to show that the defendant contemplated doing an unlawful act. The covenant was that the plaintiff should have the occupancy of the premises at a future day. This was not an illegal undertaking. He could covenant that the plaintiff should have quiet enjoyment of the premises at a future day; and if, when the time of performance arrived, he could not give lawful possession, or preferred not to do so, and did not, there is no good reason why he should not be liable in damages for the breach of his covenant. In *Brewer v. Watt*, 23 Tex. 585, 76 Am. Dec. 76, it was held that a husband's bond to convey title to the family homestead at a future day was valid, and that damages are recoverable for a breach of its condition. The court used very much the same language as in *Welch v. Miller*, 70 Vt. 108, 39 Atl. 749. "It is true that a husband is not at liberty to alienate the homestead, during the wife's life, without her consent. But we cannot perceive that a bond executed by him in his wife's lifetime, conditioned that he will convey his homestead, with a perfect title, at a future time, would be a void instrument in contemplation of law. . . . Such a contract might be entered into, in the confident expectation that the wife would freely make the necessary conveyance; or it might be entered into with the intention to acquire another homestead before the time elapsed for the performance of the bond. It is true that while the premises which the party might so undertake by his bond to convey remained the homestead of the obligor and his wife, the courts would not decree a specific performance of the bond. But if the wife should die before the time expired for performance of the bond, or if, before the expiration of that time, the obligor in the bond and his wife should acquire another homestead, then the courts might decree specific performance of the bond, because every legal obstacle to a specific performance would be removed." The language used in *Clark v. Bird*, 158 Ala. 278, 132 Am. St. Rep. 25, 48 South. 359, is so strong as to lead to the opinion that any instrument such as that in *Welch v. Miller*, 70 Vt. 108, 39 Atl. 749, and *Brewer v. Wall*, 23 Tex. 585, 76 Am. Dec. 76, is for all purposes a nullity. In *Clark v. Bird*, 158 Ala. 278, 132 Am. St. Rep. 25, 48 South. 359, in speaking of a bond signed by the vendor of a homestead, the court said it was void as an obligation to convey, and continues: "Nor does a conveyance of the homestead which does not conform to the statute (section 4161 of the Code of 1907) operate as an estoppel against the husband, notwithstanding he has been paid a valuable consideration. It is simply void—a nullity to all intents and purposes: *Halso v. Seawright*, 65 Ala. 431; *Alford v. Lehman, Dun & Co.*, 76 Ala. 526; *Crim v. Nelms*, 78 Ala. 604. . . . The chancellor therefore properly decreed that the contract was a nullity and not the subject of a specific performance."

In *Mailhot v. Turner*, 157 Mich. 167, ante, p. 333, 121 N. W. 804, the court says: "The lease of the homestead, without the signature of the wife, was absolutely void, just as a deed of the homestead without her signature would have been void. . . . We are therefore of the opinion that the invalidity of the lease as to the one descrip-

tion avoided it as to both" If the instrument was illegal and a nullity for all intents and purposes—a void, as opposed to a voidable, contract—we think that the fair inference to be drawn from these latest utterances on the subject is that its sufficiency to maintain any action is very doubtful or that part of it which may be said not to contravene the statute may be used while the admittedly illegal portion is not to be considered. The question, too, must arise as to how the document is to be made evidence. On production, its illegality is apparent and yet before it can be used it must be admitted. Without going into the question of severance in an ordinary contract, an action on the breach of a covenant for quiet enjoyment necessarily involves the inquiry as to what is to be quietly enjoyed and for how long, and provokes the reply to be found in an admittedly illegal lease. We are, of course, aware of the ability to sever where there is either a distinct promise or a distinct consideration, but in the cases in point the covenants appear to us to be so interdependent that the fall of the one involves the destruction of the other.

FIRST NATIONAL BANK OF DURAND v. SHAW.

[157 Mich. 192, 121 N. W. 809.]

BILLS AND NOTES—Indorsement.—A Guaranty of Payment Indorsed upon a promissory note is equivalent to an indorsement within the meaning of the law merchant. (p. 343.)

BILLS AND NOTES.—A Principal cannot Ratify the Fraud of an Agent by accepting a note, the fruit of such fraud, and claim to be a good faith holder, because the agent failed to acquaint him with the circumstances under which he procured the note, the principal being led to believe that it was taken in the regular course of business. (p. 345.)

BILLS AND NOTES.—The Forgery of Some of the Signatures to a promissory note does not affect the liability to a bona fide holder of the persons whose signatures are genuine. (p. 346.)

Charles R. Henry and De Vere Hall, for the appellants.

Odell Chapman, for the appellee.

¹⁹² OSTRANDER, J. This case has once before been in this court and is reported in 149 Mich. 362, 363, 112 N. W. 904, 13 L. R. A., N. S., 426, 12 Ann. Cas. 437. In the opinion which was filed, after a citation of authorities, it is said: "These cases are not conclusive of the question involved here. An examination of the cases will not show one where part of the signatures were genuine and part forgeries, which had been placed thereon before the note was executed and delivered. Nor will they show a case where the alteration was

made before the note was delivered. We think this is an important distinction."

The opinion concludes as follows: "In the case at bar a joint and several note, purporting ¹⁹³ to have been signed by twenty persons, is before maturity put afloat. There is nothing in its appearance to cast doubt upon any of the signatures. A bank becomes a bona fide holder of the note. It turns out that some of the signatures are forged. If we apply the principles of law stated in the cases to which we have called attention, is it not clear that the signers whose signatures are genuine are liable? We think the answer must be in the affirmative."

A judgment for the defendants was reversed, and a new trial ordered.

The record did not disclose who was responsible for the forged signatures to the note. The case has been again tried. As to the defendants who admittedly signed the note, a verdict was directed in favor of the plaintiff, the court saying to the jury that it appeared beyond dispute that the plaintiff bought the note in due course, before maturity, for value. In answer to special questions, the jury found that the names of five signers of the note were forged, and that none of the makers participated in the forgery or had any knowledge of it. To the question, "Did Comstock & Crawford, the payees named in said note, by themselves, or their agents, procure all the forgeries (if they exist) to said note?" the jury answered, "Yes." It is therefore contended that the forged signatures were not placed upon the note before it was executed and delivered, and that this fact serves to distinguish the case now presented and the case which was presented upon the other record. It also appears, as it appeared upon the former record, that the payees of the note (the note was made in 1901, payable to Comstock & Crawford, or order, with interest at six per cent per annum) transferred the note to the plaintiff before maturity, for value, indorsing upon the back of it their guaranty, as follows:

"For value received, we hereby guarantee the payment of the within note at maturity or at any time thereafter, with interest at six per cent per annum until paid, and ¹⁹⁴ agree to pay all costs and expenses paid or incurred in collecting the same, waiving protest, notice and demand of payment.

"COMSTOCK & CRAWFORD."

No other indorsement appears upon the note. It is contended that this was not a transfer of the note in due course, and that the guaranty written upon the note is not equivalent to an indorsement within the meaning of the law merchant. This last contention is ruled against the appellants by *Green v. Burrows*, 47 Mich. 70, 10 N. W. 111. In *Phelps*

v. Church, 65 Mich. 231, 32 N. W. 30, in which the rule of *Green v. Burrows* is approved without referring to the case itself, an examination of the briefs discloses that appellants relied, as they do here, upon *Central Trust Co. v. National Bank*, 101 U. S. 68, 25 L. ed. 876, and the appellee relied upon *Green v. Burrows*: See, also, 1 *Randolph on Commercial Paper*, 2d ed., sec. 14. We think the profession, generally, have regarded the rule of *Green v. Burrows* as the law of this state upon this subject. We pass, therefore, to the consideration of the question whether the particular note is valid and enforceable in the hands of the plaintiff.

The note is one of a series of notes, the face value of which is two thousand dollars, which the payees sold to the plaintiff for eighteen hundred and eighty dollars. The notes were given for the price of a stallion sold to the makers by Comstock & Crawford, who employed in making the sale one James Morgan. He employed others—whether with the knowledge and consent of the payees is not very clear. The testimony of Gibbs tends to show that he saw each of the men whose names appear upon the note sign the same; that he was engaged to help sell the stallion; that he was to receive one hundred dollars if he sold the horse, and his expenses; that before the note was executed he and Mr. Morgan had procured the signatures of the makers on a contract book in which a contract was printed, to which Comstock & Crawford were parties; that he and Mr. Morgan were in every instance together when the parties signed the note; ¹⁹⁵ that they were a little over a week in getting the names on the book and on the notes; that Morgan, and not he, carried the notes. The testimony of Morgan tends to prove that he saw each of the parties sign the note; that the payees of the note were paying him at the time about one hundred and fifty dollars a month; that he was not acquainted with any of the men whose names appear upon the notes as makers before he visited them in this behalf; that before the notes were executed he and Gibbs had procured the signatures of the men whose names appeared upon the note to a contract which was printed in a book, in which they agreed to sign notes or pay cash for the horse; that the signatures on the notes were those on the book, but whether there were more signatures on the book than on the notes he could not remember. The book was not produced at the trial. It is to be inferred that the plan, originating with Comstock & Crawford, was to induce a number of persons to agree to purchase a breeding stallion, to assist such persons in forming some sort of an organization, and to deliver to each one when a note was signed or cash was paid a certificate reading:

"Capital stock, \$2,000.00 No. 19 No. Shares 20

"CERTIFICATE OF STOCK

"This is to certify that we have received of J. H. Deitrich his notes for one hundred dollars, in full payment for his one share of one hundred dollars, in the Percheran Stallion named Bambin No. 27229.

"Dated at Onaway, county of Presque Isle, State of Michigan, this 18th day of November, 1901.

"COMSTOCK & CRAWFORD."

The testimony of the witness Morgan tends to prove that such a certificate as that was delivered to each of the twenty men whose names appeared upon the note in suit; that after the notes had been procured they were delivered, with the book, to Comstock & Crawford; that besides employing Gibbs he also employed one Olmstead, John Dewitt, and Bryan and Walker to assist him. Just what these gentlemen did in the premises does not appear. It is the claim of appellants that ¹⁹⁶ "in each instance where the note was signed in this case, it was taken immediately after it was signed by one of the twenty makers into the possession of the payee, . . . so that as to the signature of each one of the fifteen who actually signed the note the same was delivered when it passed from their hands."

Upon this theory is built, in part, the contention that there was a fraudulent and material alteration of the note after it was executed and delivered, and it is said that the applicable rule is to be found stated and applied in *Bradley v. Mann*, 37 Mich. 1, and in *Aldrich v. Smith*, 37 Mich. 468, 26 Am. Rep. 536. The alleged forged signatures appear as the third, seventh, twelfth, sixteenth, and eighteenth signatures to the note. It is further contended that this note, when it was uttered, was not the genuine note of any of the makers, that those who signed it before a forged signature was placed upon it are relieved because as to them there was a material alteration of the paper, and those who signed after a forged signature was added are relieved for the same reason, and for the additional reason that the paper presented to them for their signatures was not the paper they agreed to sign and supposed they were signing. It may be admitted that a principal cannot ratify the fraud of an agent by accepting a note, the fruit of such fraud, and claim to be a good faith holder, because the agent failed to acquaint him with the circumstances under which he procured the note; the principal being led to believe that it was taken in the regular course of business: *Johnston Harvester Co. v. Miller*, 72 Mich. 265, 16 Am. St. Rep. 536, 40 N. W. 429. It is not claimed, either, that the payee of a note or any transferee thereof may recover thereon against one who

did not in fact sign it or authorize his signature to be made, or upon a note not delivered by the maker or upon a note materially altered after delivery by the maker or makers, or upon one delivered by the maker supposing it to be a different contract or paper, he acting without any negligence. And it has been held that a material alteration of the contract ¹⁹⁷ of the indorsers, by the maker of the note, before it was discounted, released both indorsers: *Aldrich v. Smith*, 37 Mich. 468, 26 Am. Rep. 536. And where the maker, after the note was indorsed, wrote into the face of the note an interest clause without the consent of the indorser, and discounted the note in due course, it was held the indorser was relieved: *Bradley v. Mann*, 37 Mich. 1. Compare *Weidman v. Symes*, 120 Mich. 657, 77 Am. St. Rep. 603, 79 N. W. 894.

It remains, however, that the note in suit is the genuine note of fifteen of the makers. The indorsement is genuine. The holder is innocent. The makers were vendees, and the payees were vendors of the property in payment for which the note was executed and delivered. The note was not altered before or after its delivery, whether we consider it to have been delivered by each maker or, finally, to the payees. The real complaint of the appellant is that by arrangement between themselves and the payees or their agents or employés there were to have been twenty signatures to the note; whereas, in fact there are but fifteen genuine signatures. They voluntarily intrusted the note with their signatures to the payees or their agent or agents, and complain of a breach of the confidence reposed. The case now presented cannot be distinguished from the case as first presented in this court.

The judgment is affirmed.

Blair, C. J., and Moore, McAlvay and Brooke, JJ., concurred.

A Forged Note is said to be void, even in the hands of an innocent holder for value, unless it has been ratified by the payor named therein: *Vanatta v. Lindley*, 198 Ill. 40, 92 Am. St. Rep. 270. And if a person, without negligence, and by fraud and deceit, is induced to sign a note, not intending to sign it as such, the note is not valid in the hands of a bona fide purchaser: *Biddeford Nat. Bank v. Hill*, 102 Me. 346, 120 Am. St. Rep. 499.

TREAT v. DETROIT UNITED RAILWAY.

[157 Mich. 320, 122 N. W. 93.]

CONDITIONS SUBSEQUENT — Manner of Enforcing Breach.

When real property is conveyed on condition that title shall revert upon failure to perform certain conditions, the grantor cannot declare a forfeiture and recover the premises without giving notice of his intention to claim a forfeiture and of the particular default relied upon, after which the grantee will have a reasonable time within which to comply. (p. 351.)

Brennan, Donnelly & Van De Mark and James H. Lynch, for the appellant.

Aaron Perry, for the appellee.

320 BROOKE, J. Plaintiff, on May 24, 1900, and for some years prior thereto, was the owner of certain lands situated on section 35 of the township of Oxford. On that day he entered into the following agreement with the Detroit, Rochester, Romeo and Lake Orion Railway:

"This contract, made this twenty-fourth day of May, in the year of our Lord one thousand nine hundred, between Joseph A. Treat, of Stuart, State of Iowa, party of the first part, and the Detroit, Rochester, Romeo & Lake Orion Railway, a corporation, existing under the laws of the State of Michigan, party of the second part, witnesseth, that said party of the first part, in consideration of the sum of one dollar to him duly paid, hereby agrees to sell unto the said party of the second part, all that certain piece or parcel of land lying and being situate in the township of Oxford, county of Oakland, and State of **321** Michigan, and more particularly known and described as follows:

"Part of the southeast quarter of the southwest quarter of section thirty-five (35), commencing at a point on the south boundary line of said township sixteen and one-half feet west from where the fence on the west side of Lapeer road now is, and running thence northerly to a point two feet east from the southeast black walnut tree now standing on said forty; thence northerly keeping two feet east along the black walnut row of trees now standing nearest said road to the north line of said forty; thence east along said north line to the road fence aforesaid; thence southerly along said road fence to the said south township line; thence westerly along said line to the place of beginning, reserving to said first party the crossings hereinafter mentioned, for the sum of one dollar, which the said party of the second part hereby agrees to pay the party of the first part, as follows, at this date. Said second party shall build and maintain a good and sufficient woven wire fence fifty-four inches high, with cedar

posts set not to exceed one rod apart, along the above-described west line, with three suitable gates and gateways therein, one large one in front of the south tenant house where the road or lane now is, one small gate in front of the north tenant house, and one field gate further south, and for entrance to the field. It shall also make and maintain suitable crossings from said highway across said second party's tracks, of plank or coarse gravel to and through said gateways to be filled in if necessary so as to make a good drive and passage way and of easy grade with a load; they, second party, shall construct sewers or bridges so as not to impede the flow of water wherever any and all ditches or watercourses now are or which may be crossed by second party's roadbed.

"Said party of the second part hereby agrees to do and perform the same. And to build and operate a line of railway across said lands propelled by electricity or other motive power than steam.

"And the said party of the first part, on receiving such payment, and the fulfilling of all other conditions mentioned at the time and in the manner mentioned, shall at his own proper cost and expense, execute and deliver to the said party of the second part, or to its assigns, a good and sufficient conveyance in fee simple, of said lands, free and clear of and from all liens and encumbrances, except ³²² such as may have accrued thereon subsequent to the date hereof by or through the acts or negligence of said party of the second part, or its assigns, said railway to be built and in operation within six months from the date hereof.

"It is mutually agreed between said parties that the said party of the second part shall have possession of said premises on the delivery of these presents and shall keep the same until the said terms shall be paid and fulfilled as aforesaid; and if said party of the second part shall fail to perform this contract, or any part of the same, said party of the first part shall, immediately after such failure, have a right to declare the same void and retain whatever may have been paid on such contract, and may consider and treat the party of the second part as his tenant holding over without permission, and may take immediate possession of the premises, and remove the party of the second part therefrom and said lands shall revert to said first party.

"And it is agreed that the stipulations aforesaid are to apply to and bind the heirs, executors, administrators and assigns of the respective parties hereto."

The real estate mentioned in the foregoing contract lies on the westerly side of the highway. The grantee entered into possession of the land described, constructed its railway, and began operation within the time mentioned in the con-

tract. It also constructed a fence along the westerly side of the lands occupied by it, crossings leading to the north and south tenant houses and a ditch.

In August, 1901, plaintiff caused to be served upon the grantee a notice as follows:

“To the Detroit United Railway:

“Take notice. You are hereby notified that the contract dated May 24, A. D. 1900, for a right of way, made between the Detroit, Rochester, Romeo & Lake Orion Railway and myself, for the following described lands, viz.: Part of the southeast quarter of the southwest quarter of section thirty-five, township of Oxford, Oakland county, and State of Michigan, commencing at a point on the south boundary line of said township sixteen and one-half feet west from where the fence on the west side of the Lapeer road now is, and running thence northerly to a point two feet east from the southeast black walnut tree ³²³ now standing on said forty; thence northerly keeping two feet east along the black walnut row of trees standing nearest said road to the north line of said forty; thence along said north line of said forty to the road fence aforesaid; thence southerly along said road fence to said south township line; thence west along said line to the place of beginning, has not been performed or fulfilled by and on the part of said Detroit, Rochester, Romeo & Lake Orion Railway. Therefore, I hereby declare said contract void. And I hereby demand possession of the lands above described, and that you yield and surrender up quiet and peaceable possession of said lands pursuant to the provisions of the statutes in such case made and provided.

“Dated this fifth day of August, A. D. 1901, at Orion, Michigan.

(Signed) “JOS. A. TREAT.”

In August, 1906, a second notice was served upon the defendant herein, which had in the meantime become the owner of the property of the Detroit, Rochester, Romeo and Lake Orion Railway. The second notice was as follows:

“Whereas, on or about the 24th day of May, 1900, a certain land contract, of which the annexed is substantially a true copy, was executed and delivered by the undersigned, Joseph A. Treat, by Wm. E. Littell, his agent in fact, and by Detroit, Rochester, Romeo & Lake Orion Railway, a corporation, by Harry M. Lau, its attorney, and the said corporation has refused and neglected to perform each and every one of the terms, conditions, acts, obligations, and things required to be done or performed by it, under and by the terms of said contract, of all of which the undersigned has heretofore given you and said last above named corporation notice, and the said corporation having failed, as aforesaid, to perform said contract and every part thereof, therefore:

"The undersigned, Joseph A. Treat, who has heretofore declared the said contract to be void, does hereby again declare the same to be void and he has therefore and does now hereby give you and said corporation notice of all said facts and of his determination and election to declare said contract void.

"And you are hereby also notified and required immediately to quit and surrender up to the undersigned, all the lands and premises described in the said contract; ³²⁴ and you have also wrongfully taken possession of certain lands belonging to the undersigned and lying westerly of and adjoining said above mentioned and described lands; you are hereby further notified and required to immediately quit and surrender up to the undersigned all the following lands and premises, to wit:

"Part of the southeast quarter of the southwest quarter of section thirty-five and bounded as follows: On the south by the south line of said section; on the north by the north line of the said southeast quarter of the said southwest quarter of section thirty-five; on the west by the wire fence running northerly and southerly and being the first fence westerly from the track of the electric railway now passing through said section; and on the easterly side of the westerly line of the Lapeer road, so called, where it passes across said section as it existed on the said 24th day of May, 1900, being the line of the fence along the westerly line of said highway; as the same existed on the said last-named date; said parcel of land being in the township of Oxford, Oakland county, Michigan.

"Dated this 6th day of August, 1906.

(Signed) "JOSEPH A. TREAT."

Plaintiff brought suit in ejectment for the entire strip of ground described in the contract, claiming the right to forfeit the same because:

(1) The defendant was in possession of more land than was described in the contract (which is not denied).

(2) That the defendant had failed to properly perform its covenants in respect to the construction of the crossings and drains.

(3) That in setting the fence provided for in the contract too far west, the defendant had mutilated the tops of certain walnut trees and excavated about the roots of the same in such a manner as in itself to constitute a material and injurious violation of the contract, warranting its forfeiture.

Between August, 1901, and August, 1906, no negotiations were had between the parties, nor did the plaintiff at any time before suit notify the defendant, or its predecessor, in

what particular it had failed to perform the contract. It will be noticed that the contract is silent as to the time within which the fence, the drain, and the ³²⁵ cross-overs are to be constructed. Nevertheless the defendant or its predecessor in title proceeded seasonably to comply with the contract provisions, presumably in good faith. We are of opinion that, before a forfeiture could be declared by plaintiff, he was bound to give notice of his intention to claim a forfeiture, coupled with a notice to defendant of the particular default of defendant relied upon by him. After such notice the defendant should have reasonable time in which to comply, and thus avoid forfeiture: See Warvelle on Vendors, 2d ed., secs. 138, 256, 815, and cases there cited; Getty v. Peters, 82 Mich. 661, 46 N. W. 1036, 10 L. R. A. 465.

It follows, therefore, that in the action at bar the plaintiff should have been limited in his recovery to so much of the land occupied by the defendant as is in excess of the description contained in the contract. The fact that plaintiff from 1901 to 1906 gave no notice to defendant of his dissatisfaction with the method of performance used by defendant, and pointed out no particular in which it was improper, is significant. If after due notice and a reasonable time for compliance defendant neglects or refuses to remedy the alleged defects, the plaintiff will be in position to maintain his action.

Judgment reversed, and a new trial ordered.

Ostrander, Hooker, Moore and McAlvay, JJ., concurred.

The Manner of Taking Advantage of Breaches of Conditions Subsequent is the subject of a note to Trustees of Union College v. New York, 93 Am. St. Rep. 572. Where a bond for a deed provides that in case of default in payments the vendor may declare the bond void and repossess himself of the premises, the mere default of the vendees does not work a forfeiture of their rights unless the vendor elects to insist on a strict performance, in which case he is required to give timely notice of his intention to cancel the contract: Higinbotham v. Frock, 48 Or. 129, 120 Am. St. Rep. 796. See, also, Weaver v. Griffith, 210 Pa. 13, 105 Am. St. Rep. 783. The question when a vendor may recover possession from a vendee is discussed in the note to Brixen v. Jorgensen, 107 Am. St. Rep. 722.

WILSON v. CLEVELAND.

[157 Mich. 510, 122 N. W. 284.]

MANDAMUS.—Except Where a Specific Right is Involved, not possessed by citizens generally, mandamus will not issue to compel the performance of public duties by public officers. (p. 352.)

MANDAMUS by Mayor to Compel Attendance of Councilmen.—The mayor of a village is not entitled to mandamus to compel members of the common council to attend the meetings and transact the business pertaining to their office. (p. 353.)

LEGISLATIVE BODIES—Compelling Attendance of Members. The power to control and compel the attendance of members of deliberative and legislative bodies is lodged in them, if it exists at all, not in the courts; and if such bodies are not endowed with that power, then it is nonexistent and courts cannot supply it. (p. 354.)

Osborn & Mills, for the relator.

Harry C. Howard, for the respondents.

510 BROOKE, J. John W. Wilson, president of the village of Climax, began these mandamus proceedings against the three respondents, who were three trustees of said village, and members of the village council, duly elected in March, 1909, and qualified as such, charging that these trustees have persistently and purposely absented themselves from regular and other meetings of said council, although duly notified of such meetings, and have not ⁵¹¹ attended any meetings of the council since their election: that respondent Hoyer has filed his resignation, upon which no action has been or could be taken because of the impossibility of holding a meeting; that the whole number of trustees is six, and by the refusal and neglect of respondents to attend meetings of the council it is impossible to transact business for want of a quorum; that urgent public business requires action by said council, and that municipal affairs are at a standstill; that the bond of persons desiring to sell intoxicating liquors, a druggist's bond, and also the bonds of the village clerk and treasurer, have been presented for approval; that action by the council relative to levying the taxes assessed for the current year must be taken; that bills and accounts must be audited and allowed. Petitioner alleges: "That he is a taxpayer of said village, and makes this petition as such, and as president of said village, on his own part and behalf, and on the part and behalf of the village of Climax as its president."

He asked for a peremptory mandamus against respondents requiring them to attend the next regular meeting of the council of said village to be held on a date and hour named, "to perform the said several duties and the duties devolving upon them as trustees of said village." An order to show cause was issued, and, after a hearing before said court, a writ of mandamus was granted.

It has become the settled policy of the court to deny the writ of mandamus to compel the performance of public duties by public officers, except where a specific right is involved not possessed by citizens generally: *People v. Whipple*, 41 Mich. 548, 49 N. W. 922; *People v. Ihnken*, 129 Mich. 466, 89 N. W. 72.

It is contended by relator that the case at bar is distinguishable from the cases cited. If this is so, it must be because the petitioner has made it appear that he has a specific right involved, as distinguished from the right of citizens generally. This must be on account of his official position, for as an ordinary citizen he makes ⁵¹² no showing of any specific right. It is urged that, under the statute, he is chief executive officer of the village, required to preside at council meetings, and be deemed a member, but shall have no right to vote upon any question except in case of a tie; that it is his duty to give the council information as to the affairs of the village and make recommendations, to exercise supervision over the affairs of the village and over public property, and see that the laws relating to the village and the ordinances and regulations of the council are enforced. He is not by the statute vested with any specific right, distinguishable from the rights of citizens generally, which will bring him within the decisions of this court and entitle him to relief by mandamus in this case.

A general violation of a public duty is charged against respondents, and this case is not distinguishable from the case above cited. The statute referred to provides that the council may provide by ordinance for compelling the attendance of its members at its meetings. No action has ever been taken under this provision. It is evident that these respondents have combined to prevent a quorum of the council from meeting. We do not find in this record any justification for such conduct; but, as was said in the *Whipple* case (41 Mich. 548, 49 N. W. 922): "Courts are not created to conduct municipal affairs. . . . The remedy, if there is one, is not judicial."

The judgment of the circuit court is reversed. The order granting a writ of mandamus is vacated and set aside, and the mandamus proceedings dismissed.

Blair, C. J., and Montgomery and McAlvay, JJ., concurred with Brooke, J.

GRANT, J. I concur in the result reached by my Brother Brooke in this case for the sole reason that the power to control and compel the attendance of members of deliberative and legislative bodies and their officers is lodged in those bodies and not in the courts. In the ⁵¹³ present case it ap-

pears that this power is by the municipal charter lodged in the common council. This is not a case of an officer, municipal or other, upon whom is expressly imposed the duty to enforce legislative enactments. There may be many cases where a minority of a legislative body may feel justified in preventing a quorum by their absence, and thus prevent the accomplishment of enactments or the adoption of policies which they deem unwise. Where such bodies, the creatures of the legislature, are not expressly endowed with the power to compel the attendance of their members, the power is non-existent, and courts cannot supply it. Such I understand to be the basis of the cases of *People v. Whipple*, 41 Mich. 548, 49 N. W. 922, and *People v. Ihnken*, 129 Mich. 466, 89 N. W. 72. To supply this power by court decisions would be an act of judicial legislation.

The Question When Mandamus will Issue Against Public Officers is discussed in the note to State v. Gardner, 98 Am. St. Rep. 863.

SAGINAW COUNTY SAVINGS BANK v. DUFFIELD.

[157 Mich. 522, 122 N. W. 186.]

CREDITOR'S BILL—Lien Persists After Death of Debtor.—Where a judgment creditor files a creditor's bill, and obtains an injunction against the transfer of the debtor's property or secures the appointment of a receiver therefor, a lien is thereby acquired which, on the death of the debtor, is superior to the claims of unsecured creditors and the rights of the personal representative. (pp. 358, 359.)

RECEIVER.—The Title of a Receiver and His Right to Possession vest by relation on the date of the order appointing him. (p. 358.)

BILL FOR DISCOVERY—Sufficiency of Description of Property.—Where a bill for discovery sets forth that the defendant has equitable interests in certain property, giving a description of a long list of the same, a lien does not fail to attach for want of a specific description of the property and assets. (p. 359.)

ESTATE OF DECEDENT—Payment of Creditors' Claim.—A Decree in the Alternative in a creditor's suit revived against an executor, allowing him to pay a judgment out of the assets of the estate or deliver them to that amount to the receiver, does not work any hardship against the executor. (p. 359.)

ESTATE OF DECEDENT—Effect of Filing Claim.—One Who by Creditor's Bill obtained a lien on the assets of his debtor releases no right, on the death of the debtor, by filing his claim with the commissioners of claims, giving a complete history of it and the proceedings by which it was obtained. (p. 359.)

L. T. Durand and De Forest Paine, for the complainant.

H. M. & D. B. Duffield, for the defendant.

523 McALVAY, J. Complainant was a judgment creditor of Thomas Pitts and Frank W. Wheeler to the amount of four thousand and fifty-four dollars and six cents damages, and costs of suit taxed at thirty-two dollars and twenty cents upon a judgment rendered in the Wayne circuit court in its favor January 5, 1906. An execution, duly issued for the collection of this judgment, was returned unsatisfied. On or about July 10, 1906, the judgment creditor's bill in this cause was filed against both defendants, asking for a sworn answer from each, and for discovery of property to apply to the satisfaction of the judgment, and praying for an injunction and a receiver. Subpoena and injunction were issued and personally served upon both defendants. On November 20, 1906, defendant Pitts paid two thousand dollars, which was credited. The balance upon the judgment remains unpaid. On April 25, 1907, the bill was taken as confessed by each of the defendants. Copies of the bill of complaint and notice of the application to appoint a receiver were afterward served on defendants, Pitts and Wheeler, and upon a hearing Charles E. Hilton was duly and regularly appointed receiver of all the property of both Pitts and Wheeler. He qualified by giving the required bond, and entered upon the duties of his office. A summons was issued by the circuit court commissioner, directing each of these defendants to appear to be examined and make discovery, as was provided in the order appointing a receiver. **524** It was served on defendant Pitts, who was in poor health, and who through his attorney appeared and obtained adjournments of the hearing from time to time until in July, 1907, when he was compelled to leave the state on account of his health. He died absent from the state October 28, 1907. He left a will, which appointed defendant Duffield his executor. The cause was revived, and proceeded against defendant Wheeler and the executor of Pitts. Complainant filed with the commissioners on claims of the Pitts estate its claim, setting forth its history and the proceedings had in this cause, claiming that by reason thereof it had a lien upon the assets of said estate prior to other creditors, and that its claim should be allowed as a preferred claim. Defendant Duffield filed a plea in abatement to the bill of complaint. The stipulation allowing the amended plea provided that upon filing the same the cause might be set for argument.

"And, the facts stated in the bill and plea being stipulated hereby, the court may make a final decree in the cause, and determine and declare whether or not the complainant has a prior and paramount lien on the assets of the estate of Thomas Pitts, deceased, by reason of the proceedings had and taken on its behalf in this cause."

Under this stipulation a final hearing was had, and a decree granted, sustaining the contention of complainant, decreeing and establishing that by the proceedings taken complainant acquired a good and valid lien upon all the property of every nature belonging to the defendants, Pitts and Wheeler, to secure the payment of the judgment indebtedness to said complainant, including all costs, and the receiver's costs herein, which lien continues a prior lien thereon as against the general creditors of the estate of defendant Pitts, and decreed and established said lien, and ordered that the same be certified to the probate court as a judicially established and allowed claim against the estate of defendant Pitts, and that an execution might issue against the property of defendant Wheeler. It was further decreed that defendant Duffield, **525** as executor, discharge such lien out of the assets of the estate of defendant Pitts, or that he deliver to the receiver the assets of said estate, now or hereafter in his hands, sufficient to satisfy the amount of this lien, and further authorized the receiver to institute all necessary proceedings to insure the recovery of any assets of said estate to satisfy the same, and ordered a copy of said decree to be filed in said estate in the probate court. From this decree the executor has appealed.

The questions raised by him before this court are:

"1. Had the complainant established a lien at the time of the death of Pitts on all his property of every name and nature, or did the cause abate as to the executor as the representative of his other creditors?

"2. In case the court finds such a lien to have been established, can the receiver take all the property of the estate out of the hands of the executor, and out of the control and jurisdiction of the probate court, and into his possession, and collect the complainant's debt therefrom?"

Defendant executor urges that no lien was established at the time of the death of defendant Pitts upon his property by the proceedings relied upon, and contends that the rule had been settled by this court to that effect in the following cases: *Jones v. Smith*, Walk. Ch. (Mich.) 115; *German American Seminary v. Saenger*, 66 Mich. 249, 33 N. W. 301; *Beith v. Porter*, 119 Mich. 365, 75 Am. St. Rep. 402, 78 N. W. 336. It must be conceded that, if the case at bar cannot be distinguished from the cases cited, complainant has no lien upon any of the assets of this estate, and the decree in his favor must be reversed and the bill dismissed. The proceedings in this case had proceeded upon personal service, duly had upon both defendants, of the subpoena and injunction. The bill had been taken as confessed by both. The receiver was appointed after personal service of the notice of the application and of copies of the bill of complaint, and immediately

after such appointment the receiver qualified and entered upon the duties of his office. The summons to ⁵²⁶ appear for examination and disclosure was duly served on defendant Pitts, and by request of his attorney, on account of his sickness, adjournments were had. He never recovered, and no disclosure was made.

The case of *Jones v. Smith*, Walk. Ch. 115, was a petition to revive a judgment creditor's suit against the personal representatives of a deceased debtor, and it was held that the filing of a judgment creditor's bill, without answer or the appointment of a receiver, creates no lien upon the debtor's property, and the case may not be revived against the personal representative. The court held that this was so because "the suit had not progressed so far as to create a lien." The court said: "The statute does not make the filing of the bill a lien on the property of the debtor. It authorizes the court to decree a satisfaction of the amount remaining due on the judgment out of any personal property, money or thing in action belonging to the debtor, and arms the court with power to compel a discovery of the debtor's property, and to prevent his transferring it."

In *German American Seminary v. Saenger*, 66 Mich. 249, 33 N. W. 301, the case of *Jones v. Smith*, Walk. Ch. 115, was cited and approved. The question decided was whether a lien had attached in the case of a judgment creditor's bill where no injunction or receiver had been prayed for or granted, and whether the action survived. The court said: "The usual practice in suits by judgment creditors is to obtain in due season, where the facts warrant it, the appointment of a receiver, who is to collect and apply the assets. The statute does not, and the rules do not, declare any lien to be created by merely filing a creditor's bill. Until the debtor is enjoined from dealing with his property there is nothing in the law to prevent any honest disposition of it, and until a receiver is appointed, there is nothing which will act upon the property itself. Except for the statute, a judgment creditor's bill is, like any other suit, a mere personal litigation. Until the assets are arrested and held in some way, the death of the defendant leaves them subject to administration."

In *Beith v. Porter*, 119 Mich. 365, 75 Am. St. Rep. 402, 78 N. W. 336, the question as to the abatement ⁵²⁷ of a judgment suit upon the death of the debtor was again before the court, and it was said, relative to the two cases just discussed: "If we are to construe those cases as authority for the broad doctrine that all proceedings upon a creditor's bill abate upon the death of the debtor, except when execution has been levied, or the property taken in charge by the court, they are conclusive in this case, and only by overruling those cases can the bill be sustained."

In approving these cases the court declared that they established the doctrine in this state. These cases go to this extent, and no further: "That all proceedings upon a creditor's bill abate upon the death of the debtor, except when execution has been levied, or the property taken in charge by the court."

In all of them the intimation by the court is strong that the issuing and service of an injunction, or the regular appointment of a receiver, would create a lien upon the assets of the decedent, and the suit would survive his death. These cases have been considered somewhat at length, in order that the distinction between them and the case at bar may be apparent. In this case the proceedings held by the court to be necessary to create a lien upon assets and to prevent the abatement of the suit were had. An injunction was prayed for, granted, issued and personally served upon defendant Pitts. The bill also prayed for a receiver, who was appointed and qualified during Pitts' lifetime, and of which he had notice, as well as notice to appear for examination and disclosure of assets. Inferentially the cases relied upon by the executor are authority for holding that in this case a lien had been created, and the suit did not abate.

By the injunction defendants were prohibited and restrained from interference with, or making disposition of, any and all property whatever. The order appointing the receiver established a receivership over the entire effects, clothed him with the usual powers of a receiver, ⁵²⁸ authorized him to take immediate possession of such effects, and commanded each of the defendants to deliver over to the receiver all of such property, interests and effects. By either or both of these proceedings the assets of the defendants were impounded and held by the court. Authorities need not be cited to the proposition that any interference with, or transfer of, the defendants' assets by them, or either of them, would be punishable as for a contempt of court. It is the law that the title of the receiver and his right to possession vest by relation back to the date of the order appointing him.

"It is sufficient that the court has assumed jurisdiction over the property in controversy by appointing a receiver, and it is, therefore, as much in the possession of the court as if already in the hands of its receiver": *High on Receivers*, 3d ed., sec. 136.

It is claimed that, even if a lien had been established by the proceedings which complainant had taken, nevertheless a lien would not attach, because no specific property and assets were described in the bill of complaint. These proceedings were taken under our statute (sections 436, 437, 1 Compiled Laws), providing for judgment creditors' bills, authorizing filing the same to compel the discovery of any prop-

erty or things in action belonging to defendant, or money, etc., due to him, and to prevent the transfer of any such property (with certain exceptions). Complainant has followed the requirements of the statute, and chancery rule 30. This was a bill for a discovery. The bill set forth that defendant Pitts had equitable interests in certain property, giving a description of a long list of the same, and prayed discovery, etc. The description was as specific as would be possible in a majority of these cases. The statute provides, not only for compelling discovery by the court, but also power to decree satisfaction of the judgment out of any property, money or other things belonging to defendant. This authorizes payment out of the property found. To hold as contended by defendant executor would defeat the purpose of the suit and ⁵²⁹ of the disclosure, and would take from the statute the beneficial effect it intended to give suitors. Under this statute the lien would attach to the effects which might be ascertained, to the amount of the judgment.

The lien of complainant upon the assets of this estate is certainly superior to the claims of all unsecured creditors; and if this property, upon disclosure in this case, would have been turned over to the receiver, then it logically follows that this lien is superior to the rights of the personal representative. In effect it can be no different from a mortgage lien on property. Death of a mortgagor, and the administration of his estate, would not operate to make the mortgagee contribute to the expenses of last sickness, etc. In this case the same rule would apply, except as to property exempted by this statute.

We do not think that the terms of the decree, in the alternative, allowing the executor to pay complainant's judgment out of the assets of the estate, or deliver the assets to that amount to the receiver, work any hardship against the executor. If the estate should prove to be solvent to the extent of complainant's judgment and the claims which the executor would be required to pay before distribution, the question could not arise. If the estate is not sufficient for such purposes, the court cannot take from complainant that which rightfully belongs to it. By filing this claim with the commissioners on claims, giving a complete history of it and of all the proceedings, complainant released no right. The record shows that it gave a full statement of the judgment relied upon, the amount paid thereon, and the history of the proceedings under its creditor's bill, as herein fully set forth.

The decree of the circuit court is affirmed, with costs.

Blair, C. J., and Grant, Montgomery and Brooke, JJ., concurred.

The Lien Acquired by Filing a Creditor's Bill is not, according to *First Nat. Bank v. Shuler*, 153 N. Y. 163, 60 Am. St. Rep. 601, defeated by the death of the debtor before judgment. But in *Beith v. Porter*, 119 Mich. 365, 75 Am. St. Rep. 402, it is affirmed that the death of the debtor extinguishes the right of the creditor to prosecute a pending creditor's bill, when no lien exists.

LACY v. PIATT POWER AND HEAT COMPANY.

[157 Mich. 544, 122 N. W. 112.]

MECHANIC'S LIEN—Amendment Changing Name of Contractor.—A statement of a mechanic's lien is ineffectual if it names the wrong person as contractor, and it cannot be cured by amendment in proceedings to enforce the lien. (p. 361.)

MECHANIC'S LIEN—Amendment of Statement.—Section 10736 of 3 Compiled Laws, providing for amendments in actions to enforce mechanics' liens, refers, not to the statement of liens, but to the process, pleadings, or proceedings in actions for their enforcement. (p. 361.)

Morse & Davis, for the complainant.

Rollin H. Person, for the defendants.

545 BROOKE, J. In November, 1905, complainant furnished one hundred and ten loads of gravel and fifty-five and three-fourths barrels of Portland cement, which were used in repairing defendants' dam in the city of Lansing, or for filling in a hole below the dam caused by the falling waters. On January 12, 1906, he filed his sworn statement of lien, asserting therein that he furnished the said materials in pursuance of a contract between himself and the Hydro-Electric Development Company, the contractor. On the first day of February, 1906, the dam was sold by the defendant the Piatt Power and Heat Company to the defendant the Michigan Power Company, and on the fifth day of July following a bond was given to release said mechanic's lien. Some time after the filing of said claim of lien by the complainant, he learned that there was no such corporation as the Hydro-Electric Development Company, and that the contractor with whom he had done business was Frank McKean. In August, 1906, he filed his bill of complaint in the present cause, praying that he be declared to have a valid lien upon the property described in his statement of lien for the sum of two hundred and three dollars and fifty-three cents. His fifth prayer for relief is as follows: "That your orator may be allowed to amend his said statement of lien by striking out the name 'Hydro-Electric Development Company' now named therein as contractor and inserting in its place and stead the name 'Frank McKean' as contractor."

As authority for making the desired amendment, the complainant relies upon section 10,736, 3 Compiled Laws, which reads in part as follows: "This act is hereby declared to be a remedial statute and to be construed liberally to secure the beneficial results, intents and purposes thereof; and a substantial compliance with its several provisions shall be sufficient for the validity of the lien or liens hereinbefore provided for, and to give jurisdiction to the courts to enforce the same. Amendments to any process, pleadings or proceedings in such actions to enforce the liens given by this ⁵⁴⁶ act, either in form or substance, shall be allowed at any time before final decree is rendered, on application of either party upon such terms and conditions as justice may require."

In discussing the effect of the statute in the case of *Smalley v. Terra-Cotta Co.*, 113 Mich. 141, 71 N. W. 466, this court said: "It seems to me, however, that the rule is correctly stated in 2 *Jones on Liens*, second edition, section 1554, where it is said: 'The rule of construction applicable to questions arising under these liens may be strict at one stage of the proceedings, and liberal at another. Mechanics' liens are in derogation of the common law, depending for their existence wholly upon statutes, and therefore, upon the question whether a lien attaches at all, a strict construction is proper.'

"Section 1556 of the same author reads: 'But, after the lien has once attached, a liberal construction should be put upon the statute for the purpose of fulfilling its objects. The statute is highly remedial in its nature, and should receive a practical and reasonable construction to effect its objects.'"

The last portion of section 10,736 refers, in our opinion, not to the statement of lien, but by its very terms relates to the process, pleadings or proceedings in an action for its enforcement. Again, in *Waters v. Johnson*, 134 Mich. 436, 96 N. W. 504, where the lienor claimant had named another person as the owner of the property it is said: "The statute, in our judgment, imperatively requires that said owner be named in the claim, save when his name is unknown, in which case it need not be stated, and that service be made upon said owner within ten days. It follows, therefore, that when the lien claimants proceed against a certain person as the owner, and positively swear in their claim that he is the owner, they will not be permitted to excuse this mistake by pleading ignorance, unless, as hereinafter pointed out, that ignorance is justly chargeable to the owner himself."

Upon principle we are unable to distinguish the case of ⁵⁴⁷ *Waters v. Johnson*, 134 Mich. 436, 96 N. W. 504, from the case at bar. The notice of the lien in question served upon the defendant Piatt Power and Heat Company served no purpose, because it conveyed no information to them that

the complainant was furnishing labor or material for any person or corporation with whom it held contractual relations. Decree affirmed.

Ostrander, Hooker, Moore and McAlvay, JJ., concurred.

As to Whether the Statement or Notice of a Claim for a Mechanic's Lien is sufficient if it omits or misstates the name of the person for whom the labor or materials were furnished, see *Madera Flume & Trading Co. v. Kendall*, 120 Cal. 182, 65 Am. St. Rep. 177; *Getty v. Ames*, 30 Or. 573, 60 Am. St. Rep. 835; and as to whether it is sufficient if it misstates or omits the name of the owner, see *Mivelaz v. Johnson*, 124 Ky. 251, 124 Am. St. Rep. 398; *De Klyn v. Gould*, 165 N. Y. 282, 80 Am. St. Rep. 719; *McPhee v. Litchfield*, 145 Mass. 565, 1 Am. St. Rep. 482. The notice of a claim is held not susceptible of amendment or reformation in *Madera Flume & Trading Co. v. Kendall*, 120 Cal. 182, 65 Am. St. Rep. 177; *Fernandez v. Burleson*, 110 Cal. 164, 52 Am. St. Rep. 75.

FIRST NATIONAL BANK v. UNION TRUST COMPANY.

[158 Mich. 94, 122 N. W. 547.]

CERTIFIED CHECK—Effect of Absence of Funds of Drawer.

A certified check is enforceable by a bona fide holder although the drawer had no funds on deposit when it was certified, and certification in such a case is prohibited by law. (p. 366.)

COURTS—Opinions and Dicta.—No Case is Considered Authority except upon the questions actually decided. (p. 366.)

CERTIFIED CHECK—Bona Fide Holder.—The Original Holder of a Check, who procures its certification, may be a bona fide holder for value. (p. 367.)

CERTIFIED CHECK—Absence of Funds—Bona Fide Holder.—The Burden is upon the payee of a check, certified when the drawer had no funds in the bank, to show by a preponderance of evidence that he is a bona fide holder. (p. 368.)

CERTIFIED CHECK—Absence of Funds.—If the Payee of a Check has Notice that the drawer had no funds on deposit when the check was certified, he is not a bona fide holder. (p. 368.)

CERTIFIED CHECK—Deposit of Collateral.—If the Payee of a Check has Notice that it is certified simply because the drawer has collateral deposited in the bank, not because he has money actually deposited there, he is not a bona fide holder. (p. 368.)

INSTRUCTION—Emphasizing Certain Testimony.—An Instruction is rightly refused if it improperly calls attention to and emphasizes certain testimony. (p. 369.)

INSTRUCTION—Singling Out and Stating Effect of Testimony. An instruction is properly refused which singles out certain testimony and states its effect. (p. 370.)

A NEW TRIAL on the Ground of Newly Discovered Evidence is properly refused, if it appears that with ordinary diligence this evidence might have been produced at the original trial. (p. 370.)

Bowen, Douglas, Whiting & Murfin, John C. Donnelly and Frederick W. Whiting, for the appellant.

Stevenson, Carpenter & Butzel and Harrison Geer, for the appellee.

95 McALVAY, J. Plaintiff recovered a judgment in this suit brought by it against the City Savings Bank of Detroit upon the certification of a check for the sum of \$175,662.50, drawn on defendant bank by Frank C. Andrews payable to plaintiff. Frank C. Andrews was a heavy customer of plaintiff bank. He dealt largely in stocks and bonds upon the New York and eastern markets through his brokers in Detroit, Cameron Currie & Co. Usually, when he made purchases, drafts on Detroit would be made for the amount of the purchase, and to these drafts were attached the certificates of stock purchased, to be delivered to him when the drafts were paid. The transaction which occurred on February 5, 1902, when this check in suit was given and certified, was of this nature; the plaintiff on that date wired for Mr. Andrews to New York, cash to the amount of \$75,000. It delivered to him three drafts drawn on his brokers amounting to \$338,162.50, to which were attached certificates of stock of equal value. Total, \$413,162.50. In payment of this indebtedness it received from Mr. Andrews:

96 Check of C. Currie & Co. on First Nat. Bank	\$137,500 00
Check of Frank C. Andrews on Preston Nat.	
Bank	55,000 00
Check of same on same bank.....	45,000 00
Check in suit drawn by Andrews on City Sav-	
ings Bank	175,662 50
	<hr/>
	\$413.162 50

There is no dispute about the amount of the cash and stock charged in the above statement, or that he delivered to plaintiff the checks credited to him. When Mr. Andrews parted with possession of the check, it was not certified. It was immediately handed to a messenger of the bank with instructions to procure its certification. These instructions were at once obeyed and the certification procured. These transactions were conducted between Mr. Frank G. Smith, assistant cashier of plaintiff bank, and Mr. Frank C. Andrews. Both were witnesses in the case. They do not agree as to the time the transaction occurred, and as to whether the check was certified when the drafts and attached certificates of stock were delivered by the bank to Mr. Andrews. The assistant cashier testifies that the transaction occurred after 12 o'clock, noon; Mr. Andrews that it was 11 o'clock A. M. The assistant cashier testified that, in accordance with imperative orders from the cashier of the bank, and in ac-

cordance with what plaintiff claims is shown by the testimony was a custom known to Mr. Andrews, the check was certified before the drafts and stock attached were delivered. Mr. Andrews testified that the drafts and certificates of stock were delivered to him before the check was certified.

Transactions previous to the one of this date, and of a similar character, in every essential particular, had occurred between these parties on each and every banking day from and after December 3, 1901. The actual time over which they had extended was longer than this; but by agreement this date was fixed as covering a sufficient length of time for the purposes of this case. The transactions ⁹⁷ during that period were many and of large amounts; the total aggregating six and one-half millions of dollars. They occurred after 12 o'clock noon, when the clearing-house closes. They were settled each day, usually by checks of different parties, as shown in the transaction of February 5th, above. The balance of the indebtedness of Mr. Andrews was paid by a check on the City Savings Bank, which, if more than \$20,000, was by the orders of the cashier of plaintiff bank always certified before the securities for which it paid were delivered to Mr. Andrews. All checks on local banks were required by the clearing-house agreement to pass through it, and to be paid only by taking that course. All such checks received after 12 o'clock, noon, would not pass through the clearing-house until the following day. If no other arrangement was made, each of the checks referred to, so given by Andrews to plaintiff bank, was passed through the clearing-house and paid on the following day. In most instances some other arrangement was made on the morning of the day after such checks were taken. During the morning of the next day usually Andrews would call at the plaintiff bank and make an arrangement to take up the certified check and pay it to a large extent by giving plaintiff New York Exchange, which was desirable and of benefit to plaintiff to the amount of fifty cents per \$1,000. Between the dates above mentioned plaintiff remitted to New York for Mr. Andrews \$6,531,312.19. It received exchange from him amounting to \$5,242,000, all good and paid. The majority of these certified checks taken up by Andrews were returned by him to the City Savings Bank. On the day of the transaction in dispute at 12 o'clock the only check at that time given by Andrews and held by plaintiff was paid through the clearing-house. Plaintiff, at the time the check in this suit was taken, was not a creditor of Andrews or the City Savings Bank. The jury to which the case was submitted by the court returned a verdict for plaintiff for the amount claimed.

⁹⁸ Of the errors claimed by defendant and assigned, the first which requires consideration is the refusal of the court

to direct a verdict against plaintiff upon the legal propositions stated in the defendant's second request to charge, which was denied. Condensed by defendant in its brief, this request is stated as follows:

"(1) That the manner in which the plaintiff obtained the certification of the check under dispute made the contract of certification one solely between the plaintiff, the First National Bank, and the City Savings Bank, and that the two banks are the original and only parties to such contract of certification.

"(2) That, consequently, the question of bona fide ownership of the First National Bank of the check, or of the contract of certification, does not arise in the case. The action brought by the plaintiff is not based upon the check, but is based necessarily upon the contract of certification between it and the City Savings Bank, and therefore the circumstances surrounding the making of the contract of certification, in our view of it, control the disposition of the case, and the conduct of the First National Bank or its treatment of the certification after the completion of said certification and their dealings with Andrews or Currie, or any other person, in relation to the securities, cannot change the legal effect of the contract of certification."

It is asserted repeatedly in defendant's brief that neither the disputed fact as to whether the stocks were delivered before or after certification, nor the question of the bona fide ownership of the check or certification, have any material bearing upon the case. In taking this position it would appear that defendant is relying upon the prohibition of the statute against certifying checks in the absence of funds to the drawer's credit. In support of the position taken, this statute as construed by this court, and authorities cited in support of such construction, are cited and discussed. Reliance is had upon the case of *Union Trust Co. v. Preston Nat. Bank*, 136 Mich. 460, 112 Am. St. Rep. 370, 99 N. W. 399, 4 Ann. Cas. 347. In that case plaintiff brought suit against the defendant to recover a balance claimed to be "due. Defendant sought to set off against this indebtedness the sum of \$100,000, represented by a check of F. C. Andrews drawn on plaintiff payable to defendant and duly certified. At the time of certification Andrews was overdrawn \$405,000. Defendant offered to show that on the day it was drawn, and after certification, it received this check in the usual course of business, and paid the maker full value, and at the time had no notice or knowledge of any infirmity, or that Andrews' account was overdrawn. This evidence was excluded, the trial court holding that the certification was invalid in the hands of a bona fide holder, and directed a verdict for plaintiff, for the amount of the deposit

in defendant's hands. The opinion states: "The sole question presented by this record relates to the correctness of this holding."

This was the question decided. This court held that a certified check in the hands of a bona fide holder for value is valid, although the maker had no funds in the bank when it was certified.

It is claimed that the case decided that, as between the original parties to the certification, the contract of certification, in the absence of funds, is absolutely void. The opinion discusses at considerable length the construction of prohibitory statutes, and the legislative intent in enacting the section of the banking act construed. In the opinion it is stated: "The fact, however, that the certification is forbidden and made a crime, compels the inference that the legislature intended to avoid such certification between the original parties; and this, it is almost unnecessary to say, avoids it in the hands of every one not a bona fide holder."

Upon the face of the opinion it shows that this question was not before the court. There is no rule better settled than that which holds that no case is to be considered authority except upon the questions actually decided. The case relied upon settles the one question above stated.

¹⁰⁰ It is claimed by plaintiff that Andrews was one of the original parties to this certification. Evidence was offered and received tending to show that, in these dealings between the parties, the securities, which were to be released to Andrews on the payment of the drafts to which they were attached, were never released until the checks given in payment therefor were certified by the defendant bank, tending to establish a custom known to Andrews, and that such custom was followed in this case, and the check certified before the stocks were delivered to Andrews, the effect of which evidence was claimed by plaintiff to show an implied request on the part of Andrews to the plaintiff to procure certification for him. The jury decided the question as to the time of release and delivery of the stocks in favor of plaintiff. This was a material fact as bearing upon the question of consideration passing, and who were the original parties to the certification, and one which, in view of the evidence in the case upon that question, could not well have been decided otherwise. If the facts are found as claimed by plaintiff, that it procured this certification for Andrews, wherein can such procurement be distinguished from a case where the certification is procured by the maker himself, if it is shown that plaintiff is in fact a bona fide holder for value? We think there can be no distinction made, and that the case comes within the rule laid down in *Union Trust Co. v. Preston Nat. Bank*, 136 Mich. 460, 112 Am. St. Rep. 370, 99 N. W.

399, 4 Ann. Cas. 347. In such view of the case the question of bona fides is necessarily of the greatest importance.

It is urged by defendant that, even conceding the certification of the check to have been procured by plaintiff at the request of the maker, express or implied, such fact would not operate to change the status of plaintiff as one of the original parties to the certification. Cases are cited in support of this proposition. An examination of these shows that they were cases brought against the drawers of certified checks, and were decided against the holders when the certifications were procured by them,¹⁰¹ and in their favor when procured by the drawers. In other words, they are some of the leading cases, establishing and affirming the doctrine indicated, about which there can be no dispute in this state since the decision of *First Nat. Bank of Detroit v. Currie*, 147 Mich. 72, 118 Am. St. Rep. 537, 110 N. W. 499, 9 L. R. A., N. S., 698, 11 Ann. Cas. 241. In none of these cases was the suit against the certifying bank nor was there any dispute as to whose request procured the certification. No cases are cited which decide that the original holder procuring the certification may not be a bona fide holder for value. This court, in *First Nat. Bank of Detroit v. Currie*, 147 Mich. 72, 118 Am. St. Rep. 537, 110 N. W. 499, 9 L. R. A., N. S., 698, 11 Ann. Cas. 241, has decided that he may be such a holder. That case arose from a transaction between Andrews and these banks similar to the transaction in the case at bar and on the following day. The suit was by the holder against the indorser. Frank C. Andrews drew his check of \$50,000 payable to Currie & Co., who indorsed it to plaintiff, who secured its certification, and, relying upon it, wired \$50,000 to New York. It was presented for payment at the certifying bank, payment refused, and the indorser notified within the time he would have received notice if the check had not been certified. In deciding that this certification released the indorser, the question now under consideration was necessarily involved. At the time the check was certified, Andrews' account was overdrawn \$600,000, and the certification was claimed to be fraudulent and criminal. To hold that contract legal and binding it necessarily followed that the payee and indorsee was held to be a bona fide holder for value. Counsel for defendants cite this case as correctly stating the law upon the questions involved, but do not agree that this question was necessarily decided.

It is claimed that plaintiff charged Andrews bonuses and interest, because checks were taken up by him instead of going through the clearing-house. The record does not sustain the claim. No bonuses were charged or interest paid for that reason. The items of interest charged¹⁰² were upon the items of cash of which he received the immediate use in

exchange for checks which could not be cashed until the day following.

It is claimed that the court committed error in his charge in submitting the question in good faith to the jury. A careful examination of this part of the charge shows that the court stated the law correctly. The following upon this question is taken from the charge:

"That the burden is upon the plaintiff in this case to show by a preponderance of the evidence that it is a bona fide holder of the check and the certification thereon for value. . . . If, after careful consideration of all the evidence, you are satisfied that the First National Bank, at the time it took the check, understood or believed that the certification was not valid, but, on the contrary, that it was made when Frank C. Andrews did not have money on deposit in the City Savings Bank to the credit of his account on the books of the bank sufficient to meet the amount of the check, then your verdict should be for the defendant. . . . If you are satisfied from all the evidence in this case bearing upon this question that on the fifth day of February, 1902, the First National Bank, or its officers, and more especially Frank Smith, its assistant cashier, had notice or knowledge of facts which would render the act of taking the certification of the City Savings Bank with the intention to rely upon it and collect it an act of bad faith, or in effect dishonest, then the First National Bank was not a bona fide holder of the certified check, and your verdict should be for the defendant. . . .

"Under these circumstances, a man may take a piece of commercial paper, relying upon its being good, and he is not bound to inquire of the maker of said paper as to the facts and circumstances surrounding its making, nor as to whether there are possible defenses; but, if he have knowledge of facts and circumstances which would make it dishonest or an act of bad faith for him to take the paper with the intention to enforce the collection thereof, then he is not a holder in good faith. So, in this case, if the officers of the First National Bank, or either of them, had knowledge that the City Savings Bank was certifying these checks of Frank C. Andrews simply because he had deposited collateral in the bank, and were not certifying ¹⁰³ upon money actually deposited in the bank and to his credit on its books, the First National Bank would not be a bona fide holder of this certified check."

The complaint defendant makes is, not that the law is not correctly stated, "but that there was failure in making the proper application of the principle to the case by explaining to the jury how such notice and knowledge might be established," etc.

Complaint is also made to this part of the charge, that the court did not charge as requested in three of the requests submitted, and that the jury were only permitted to consider facts and circumstances which in themselves were evidence showing actual notice and knowledge. These requests were as follows:

“(12) If the jury find that, at the time of the certification of the checks in question, Frank C. Andrews did not have actually standing to his credit upon the books of the bank the amount of said certifications, but that, on the contrary, at the times of said certification the account of the said Frank S. Andrews in the City Savings Bank was actually overdrawn in a large amount, then the jury are instructed that the certification, under the circumstances, is in violation of the provision of the state banking law, and is therefore illegal and void, and there can be no recovery thereon by the plaintiff, unless the jury find that it became the holder thereof in good faith, for full value, in the usual course of business, without notice of the defect or infirmity of the certification or the illegality thereof, and the burden is upon the plaintiff, the First National Bank, to show by a preponderance of proof that it became a holder in good faith of the said certification, for full value, in the usual course of business, without any notice of the illegality of the certification or of any defect or infirmity therein, before it is entitled to a verdict.

“(13) The jury are further instructed that if they find the facts and circumstances attending the use of certified checks, drawn by Andrews upon the City Savings Bank and purporting to be certified by it, and the manner in which the plaintiff used and treated such certified checks, were such as to invite inquiry, they will be sufficient upon which to base a finding or conclusion that the plaintiff bank did not receive the certification in question in good ¹⁰⁴ faith, providing the jury think that the plaintiff abstained from making the inquiry with reference thereto from a belief or a suspicion that such inquiry would disclose the invalidity and illegality of the certifications.

“(14) Notice and knowledge of the invalidity and illegality of said certification do not mean express notice or direct knowledge, but knowledge or the means of knowledge to which the party willfully shuts his eyes, and either actual knowledge of the illegality of the certification, or a course of conduct upon the part of the bank in its dealings with Andrews and the certified checks, from which the jury may find that it remained willfully ignorant thereof, will defeat the claim of good faith ownership by the plaintiff.”

In so far as the substance of these requests was refused, they were not proper to be given, as either not being in

point, or improperly calling attention to and emphasizing certain testimony.

Errors are also alleged for the refusal to give two certain charges relative to a scrap-book of plaintiff's vice-president, in which were pasted statements of the local banks, including the December statement of the City Savings Bank, showing a small amount of outstanding certified checks. It did not appear that either the vice-president or Mr. Smith examined the book or the statements. The first of these requests asked the court to charge that the jury might consider this testimony as tending to show notice of illegal certification. The second request stated that the jury might consider this testimony as showing actual notice of such illegal certification. The first was properly refused, for the reason that the request singled out certain testimony and stated its effect. The second was not a correct statement of law, and should not have been given.

As to the court's ruling on the admission or exclusion of testimony, it is claimed by plaintiff that no exceptions were taken to the rulings complained of. An examination of the record, as far as the pages cited are concerned, confirms this claim. It is not denied in defendant's reply brief.

¹⁰⁵ Error is assigned upon the denial of the motion for a new trial upon the ground of newly discovered testimony, and because of improper publications in a local newspaper. As to the first ground, it appears that with ordinary diligence this evidence might have been produced, as it relates to matters which were within defendant's knowledge prior to the last trial. Defendant's attorneys were then in possession of transcripts of testimony of former trials as to the time when the drafts were paid; the witness now desired being one of the firm who drew the drafts. As to improper and prejudicial publications, those printed in the record were examined by the learned trial judge when the motion was decided. We agree with his conclusion that the publication did not influence the jury.

The judgment is affirmed.

Blair, C. J., and Montgomery, Hooker and Moore, JJ., concurred.

The Law Relating to Certified Checks is the subject of a note to Blake v. H. after Dime Sav. Bank Co., 128 Am. St. Rep. 691. A certified check is valid in the hands of a bona fide holder, although the drawer has no funds in the bank, and the certification of a check is prohibited and made a crime by statute, "unless the amount thereof actually stands to the credit of the drawer upon the books of the bank": Union Trust Co. v. Preston Nat. Bank, 136 Mich. 460, 112 Am. St. Rep. 370. See also, First Nat. Bank of Detroit v. Currie, 147 Mich. 72, 118 Am. St. Rep. 537.

BANNIGAN v. WOODBURY.

[158 Mich. 206, 122 N. W. 531.]

NEGLIGENCE—Unsafe Premises—Injury to Traveler.—Where a window remains out of repair until the glass falls into the street to the injury of a traveler, an action therefor lies against the person in possession and control of the premises. (pp. 371, 372.)

ESTATE OF DECEDENT—Liability to Action for Negligence. A cause of action for negligence which arose after the death of an intestate cannot be maintained against his estate. (p. 372.)

ADMINISTRATOR—Duty to Keep Property in Safe Condition.—An administrator lawfully in possession of the property of the intestate is bound to keep it in a safe condition so as to prevent injury to travelers along the street. (p. 372.)

ADMINISTRATOR—Liability for Unsafe Condition of Premises.—Where the administrator in possession of an estate allows a window to remain out of repair so that the glass falls into the street injuring travelers, he is personally liable therefor; and an allegation in the complaint that he is administrator, and as such in possession of the property, does not negative his personal liability, and may be treated merely as *descriptio personae* and surplusage. (p. 372.)

ADMINISTRATOR—Pleading in Action Against for Negligence.—In an action against an administrator for negligence, an allegation that he is administrator may be treated as *descriptio personae* and surplusage, and does not negative his personal liability. (p. 372.)

Jackson & Fitzgerald, for the appellant.

A. M. & E. H. Stearns, for the appellee.

²⁰⁶ GRANT, J. Plaintiff in her declaration complains of defendant, ²⁰⁷ Edward Woodbury, administrator of the estate of Jeremiah P. Woodbury, deceased, and Edward Woodbury, individually. She alleges that defendant was, and had been for a long time, prior to July 7, 1908, the administrator of said deceased; that he had the charge and control of a building situated on the west side of South Burdick street in the city of Kalamazoo, belonging to said estate; that it is a three-story structure composed of brick, stone and wood, used for a store and business purposes; that the glass windows in the third story of said building were negligently permitted by defendant to become out of repair and unsafe; that the glass in said windows had become loose; and that on said day, while walking along the street, glass fell out of the windows, striking her upon the head and face and injuring her. The declaration also alleges negligence on the part of Woodbury individually as well as in his capacity as administrator. The defendant demurred to the declaration on the ground that no judgment can be obtained against the estate under the cause of action set out in the declaration or against him individually. The demurrer was sustained.

The unsafe condition of the windows is sufficiently described in the declaration, and constitutes a cause of action

for which somebody should be held responsible. No action can be sustained against the estate because plaintiff's cause of action arose after the death of Jeremiah P. Woodbury. The heirs are not made parties. Whether they are liable for the unsafe condition of the building is not before us. It is true that the administrator is not usually entitled, under our statute, to the possession of the real estate. The demurrer, however, admits that he is in charge and control of the building. It will be assumed that he is legally in control and possession until the contrary is shown. An administrator may be lawfully in the possession of the real estate of the intestate. If so, it would be his duty to keep it in a safe condition, so as to protect travelers along the streets. The allegation that he is administrator, and that ²⁰⁸ as such he is in possession of the property, does not necessarily negative his personal liability. Such allegation may be treated merely as *descriptio personae* and surplusage: *Ferrier v. Trepannier*, 24 Can. S. C. 86; *Shepard v. Creamer*, 160 Mass. 496, 36 N. E. 475; *Belvin's Exrs. v. French*, 84 Va. 81, 3 S. E. 891.

An agent in the control of property is responsible for his own tortious acts: *Ellis v. McNaughton*, 76 Mich. 237, 15 Am. St. Rep. 308, 42 N. W. 1113. *Ferrier v. Trepannier*, 24 Can. S. C. 86, is very similar to this case. A window fell and killed a traveler. The cause of the fall was the same as in this case. The declaration was framed in a similar manner, and the court say: "They [the defendants] were, at the time, in actual possession of this building. It was under their exclusive control and superintendence, whether as trustees or executors, as depositaires or sequestrators, or in any other fiduciary capacity whatever, does not make the least difference, or lessen in any way their own personal liability for tortious negligence whereby a third party suffered damages."

In *Shepard v. Creamer*, 160 Mass. 496, 36 N. E. 475, suit was brought against the defendant as trustee, where the plaintiff, a traveler on the highway, was injured by a fall of snow and ice from the roof on an abutting building of which the defendant had control as trustee. It was held that the description of the defendant as trustee was surplusage, and the defendant was held individually liable. In *Belvin's Exrs. v. French*, 84 Va. 81, 3 S. E. 891, defendants were sued as executors for negligence in failing to keep a hotel property in proper repair. Held that, while they were not liable as executors, they were liable individually, and the allegation that they were executors was held merely a *descriptio personae* and surplusage.

The judgment should be reversed, and the case remanded for further proceedings according to the rules and practice of the court.

Montgomery, Ostrander, Hooker and Moore, JJ., concurred.

ADMINISTRATOR'S OR EXECUTOR'S LIABILITY TO THIRD PERSONS FOR NEGLIGENCE.**I. General Nature of Liability of a Representative, 373.****II. The Personal Liability of the Representative for Negligence, 373.****III. Pleading, 375.****I. General Nature of Liability of a Representative.**

It is remarkable that there still survive popular errors—popular legal errors made seriously and in all good faith. None seem to die a harder death than that of attributing liability for negligence in a general way to the representatives of a deceased person. "The estate is responsible," "the executor is liable," "the administrator or other representative, as the case may be, must make good this loss," are expressions to be heard, not only from the man on the street, but from the man in the halls of learning.

It does not lie within our province to trace the evolution of these fallacies, but it will be sufficient for the purpose of this note to lay stress upon the fact that it is the neglect, so to speak, of learning the primary colors of the legal rainbow—the lost opportunity of acquiring a grasp of those elementary principles of the laws which should be absorbed by the growing man for the formation of a judgment founded on common sense—which are responsible for the growth of legal fallacies.

Thus, in considering the result of negligence with the view of holding responsible him who was the cause of it, people are prone to attribute liability to the estate of a decedent, either because the tort happened or was committed upon it, or in some transaction connected with it, and having arrived at that conclusion they travel easily the next stage, which is, that the legal representative of that estate, the executor or administrator of it, is to be sued and is liable as such, so that the wrong shall be remedied. The real question, "Who—what person—is responsible for this failure of duty," does not compete with their illogical conclusion—an acquiescence in what they regard as the wisdom of the ages—a complacent self-satisfaction that though deadends are abolished, the law can still reach the impersonal estate through the personal representative! While that is undoubtedly the law with regard to contract in certain cases, it is not so with the tort of negligence which is founded on a personal dereliction of a duty owed to some one—an absence of care according to circumstances—the failure to observe, for the protection of the interests of another person, that degree of care, precaution and vigilance which the circumstances justly demand, whereby such other person suffers injury: Cooley on Torts, 630. The mere fact that the tort-feasor is a trustee, executor or administrator affects the question of personal liability no more than the color of the clothes he wore at the time of the creation of that liability. We conclude this brief introduction to the case law of the subject with an exclamation of surprise that the question should still be submitted for judicial opinion in the face of the innumerable decisions—all one way, viz., the personal, as opposed to the fictional, character of the liability to indemnify for injury committed.

II. The Personal Liability of the Representative for Negligence.

The rule of law applicable here is well stated by a learned writer to be that: "An executor or administrator cannot be sued in his rep-

representative character for his own wrongful act committed, so as to inflict personal injury upon another while administering the estate; for, if liable at all, the act is outside the scope of his official authority, and he must be sued and held responsible as an individual": *Schouler on Executors*, sec. 385. This rule is adopted in *Belvin's Exrs. v. French*, 84 Va. 81, 3 S. E. 891, which was an action for negligence in that the executors kept a cellar hole defectively covered and the plaintiff was injured by falling through it. In that case the court said that an action in form *ex delicto* was not maintainable against executors as such, the general principle undoubtedly being that, unless authorized by statute, a personal representative cannot be sued, as such, for his own tort. The estate cannot be held liable for a tort committed by an executor or administrator: *Brown v. Floyd* (Ala.), 50 South. 995; *Eustace v. Jahns*, 38 Cal. 3; *Sterret v. Barker*, 119 Cal. 492, 51 Pac. 695. And the rule applies as well where injuries are caused by the negligence of an executor as by his own intentional wrong: *Boston Beef Packing Co. v. Stevens*, 20 Blatchf. 443, 12 Fed. 279. In this latter case, Wallace, C. J., said: "Upon what theory the defendants were sued in their representative character, and by what rule of law their liability in such character can be sustained, is not satisfactorily shown. . . . An action cannot be maintained against an executor or trustee in his representative character for a wrongful act which was not and could not be committed by him in his official capacity." In *Bannigan v. Woodbury*, 158 Mich. 206, ante, p. 371, 122 N. W. 531, Mr. Justice Grant says: "No action can be sustained against the estate because plaintiff's cause of action arose after the death of Jeremiah P. Woodbury. The allegation that the defendant was administrator and in possession of the property did not necessarily negative his personal responsibility."

Negligence being a tort, the cases that have been decided upon the general question of the fiduciary's personal responsibility are to be looked for under that class heading, inasmuch as the general principle is applied to the various subdivisions. In an action of replevin to recover the possession of a promissory note from an administrator who claimed it in that capacity, his claim could not be sustained. He, having it in his possession, and unlawfully detaining it, was the proper person to be sued, whether he claimed it as owner, agent, administrator, trustee, custodian or in any other capacity. "Replevin is an action of tort. An administrator cannot commit a tort, as an administrator; if he commits a tort, he commits it as an individual, and is liable as an individual": *Rose v. Cash*, 58 Ind. 278. In an action for trespass against executors it is said: "It is not against them for any wrongful acts of their testator. It is for their own wrongdoings. But their wrongdoings were not official as executors. It was no part of their duty to commit trespass upon the rights of others. If they did, they would be liable as individuals. It would be monstrous to hold that judgment and execution should issue against the estate of their testator for torts which they could have no authority by virtue of their executorship to commit. If an executor commits a trespass, it is his individual and personal act, not his representative act as the executor of his testator": *Plimpton v. Richards*, 59 Me. 115. If an administrator takes possession of property as that of his intestate which another person claims has been given to him by the decedent, such donee may sustain an action against the admin-

istrator personally, because if the property did not belong to the decedent at his death, it could not be held by anyone as his administrator: *Goulding v. Horbury*, 85 Me. 227, 35 Am. St. Rep. 357, 27 Atl. 127. In an action for negligence against the executor and devisees under a will, where damage was caused to certain tenants through want of care in the management of overflow pipes in a building owned by the decedent, and where the executor's power was limited to collecting and receiving the income for the beneficiaries until the appointment of guardians, and he was not otherwise connected with the act complained of, no action was maintainable against him in either capacity: *Robbins v. Mount*, 4 Rob. 553, 33 How. Pr. 24. Where executors are in possession and control of premises, it is their duty to keep them in repair, when intended for use as in a tenement house, and they are personally liable for damages caused by their want of care: *Donohue v. Kendall*, 50 N. Y. Sup. Ct. (18 Jones & S.) 386.

The conclusion to be drawn from the rule stated and these cases is that in no case and under no circumstances is an executor or administrator liable, as such, for negligence; or, in other words, that an executor or administrator is always personally liable for his negligence resulting in injury to third persons.

III. Pleading.

Where at the head of the complaint the defendants were described as executors, etc., but in the body of it were named personally, a judgment against them personally will be upheld, the words at the head of the complaint being descriptive only: *Donohue v. Kendall*, 50 N. Y. Sup. Ct. (18 Jones & S.) 386. This was the same conclusion as will be found in *Belvin's Exrs. v. French*, 84 Va. 81, 3 S. E. 891, in which the court said: "It is true they are described as executors, but this is merely *descriptio personae*, and may be stricken out as surplus, inasmuch as no cause of action is set forth in the declaration for which, under any circumstances, they can be held responsible as executors. Besides, there is no well-founded objection of the declaration as it is, for by describing the defendants as executors, it merely sets forth their relation to, and consequent duties respecting the property mentioned therein, and then it further alleges, that for their failure to perform those duties . . . they are answerable personally to the plaintiff in this action."

Almost the same language is used in *Bannigan v. Woodbury*, 158 Mich. 206, ante, p. 371, 122 N. W. 531.

SHOWEN v. J. L. OWENS COMPANY.

[158 Mich. 321, 122 N. W. 640.]

FOREIGN CORPORATION—Process and Actions.—The tendency of the statutes and decisions has been toward putting corporations on the same footing as natural persons in regard to the jurisdiction of suits by or against them. (p. 383.)

FOREIGN CORPORATION—Process, Remedies and Actions.—The provisions of section 10,442 of 3 Compiled Laws, that actions may be commenced against foreign corporations by service of process within the state on any agent or officer of the company, applies only to foreign corporations transacting interstate commerce business in the state; the effect of other statutes of the state regulating the transaction of local business therein by foreign corporations is to make them, as to such business, domestic corporations, entitled to and subject to the same remedies as such corporations in the courts of the state. (p. 385.)

FOREIGN CORPORATION—Effect of Failure to Comply With Law.—A foreign corporation transacting local business in a state without complying with its laws is estopped to set up the unlawfulness of its transactions in bar of remedies which would exist were it doing business lawfully. (p. 385.)

FOREIGN CORPORATION.—The Service of a Writ of Attachment upon the resident agent of a foreign corporation confers jurisdiction in personam under 3 Compiled Laws, section 10,477 et seq. (p. 385.)

ATTACHMENT — Breach of Contract—Unliquidated Damages. If damages alleged for a breach of warranty of quality on a sale of machines, although unliquidated, are susceptible of ascertainment by a standard referable to the contract, the remedy by attachment is available. (p. 386)

ASSIGNMENT—Claim for Breach of Warranty.—The assignee from a foreign corporation of a claim based on a breach of warranty of quality on the sale of machines may sue thereon. (p. 386.)

Sweet & Eastman, for the appellant.

Clapperton & Owen, for the appellee.

322 BLAIR. C. J. On May 13 and December 26, 1904, the Arbuckle-Ryan Company, an Ohio corporation, and the J. L. Owens Company, a Minnesota corporation, executed written contracts at Toledo, Ohio, by the terms of which 323 the Ohio corporation agreed to purchase Owens bean and pea threshing machines, to be delivered f. o. b. cars Minneapolis, the Owens Company "to guarantee the machines to be free from inherent and mechanical defects." By the contract of May 13th the Ohio company is given the exclusive sale of the machines in certain counties in this state. By the agreement of December 26th the Ohio company was given the exclusive right of sale in the entire state of Michigan. On the fourth day of April, 1908, the plaintiff filed an affidavit for a writ of attachment in the circuit court for the county of Kent, stating:

"That the J. L. Owens Company, a foreign corporation, the defendant named in said writ, is justly indebted to deponent in the sum of eight thousand five hundred dollars, as near as may be, over and above all legal setoff, and that the same is now due and upon express contract.

"And this deponent further says that he has good reason to believe, and does believe, that the said defendant is a foreign corporation."

A writ of attachment was issued against defendant, by virtue of which the sheriff returned that he seized certain machines of defendant: "I served on Benjamin F. Long in the city of Grand Rapids, in said county, who was represented to me to be the agent of the defendant in said attachment named, the J. L. Owens Company, residing in the said city of Grand Rapids and doing business for said defendant company within the state of Michigan, a copy thereof, together with a copy of the inventory of said property, duly certified, as I am commanded, by delivering the same to the said Benjamin F. Long, in the said city of Grand Rapids."

On the eighteenth day of April, 1908, the plaintiff, as assignee of the rights and interests of the Arbuckle-Ryan Company under its said contracts with defendant, filed his declaration claiming damages for breach of warranty of said contracts. The first count alleges, as to the machines purchased under the agreement of May 13th:

"That the said machines at the time of the making of said promise and undertaking of the said defendant, and ³²⁴ at the time of the delivery of said machines, were not free from inherent and mechanical defects, but, on the contrary thereof, were inherently and mechanically defective, and were constructed from poor and rotten wood, and poor and defective castings and materials, and were unsuitable for the purposes for which they were intended.

"And the said plaintiff avers that the said the Arbuckle-Ryan Company, confiding in the said promise and undertaking of the defendant as aforesaid, had, through its salesmen and agents, sold and delivered said machines to its customers in, to wit, the state of Michigan, and elsewhere, extending credit to its said customers for the purchase price of the machines so sold to them; that for the reasons aforesaid the said machines became and were of no use or value to the said Arbuckle-Ryan Company, or to its said customers, and were rejected by its customers, and settlement therefor refused by its said customers, and it, the said the Arbuckle-Ryan Company, was put to great charges and expenses of its moneys in and about the repairing of said machines, and the returning of said machines for repair, with the necessary and incidental costs of freight, cartage, and of new materials, and the expense of making the necessary re-

pairs on said machines; that said the Arbuckle-Ryan Company had sold said machines to its said customers at a large profit over and above the price at which it had purchased same from said defendant; that said the Arbuckle-Ryan Company, in order to induce its said customers to retain and keep said machines, and to dispose of said machines, was compelled to resell said machines after making said repairs at a reduced price, and thereby lost large gains and profits; that the loss and damage to the said the Arbuckle-Ryan Company, as aforesaid, in whole amounts to a large sum of money, to wit, the sum of four thousand five hundred dollars."

The second count alleges as to the machines purchased under the agreement of December 26th:

"The said defendant undertook, and then and there faithfully promised the said the Arbuckle-Ryan Company, to deliver to said the Arbuckle-Ryan Company said machines within a short, reasonable time thereafter, and faithfully promised the said the Arbuckle-Ryan Company that said machines and equipment so sold were, and would be, free from inherent and mechanical defects, and suitable for the purposes for which they were intended; . . . that ³²⁵ the said machines at the time of the making of said promise and undertaking of said defendant, and at the time of the delivery of said machines, were not free from inherent and mechanical defects, but, on the contrary thereof, were inherently and mechanically defective, and were constructed from poor and rotten wood, and poor and defective castings and materials, and were unsuitable for the purposes for which they were intended. And the said plaintiff avers that, the said the Arbuckle-Ryan Company, confiding in the said promise and undertaking of the defendant as aforesaid, it, the said the Arbuckle-Ryan Company, had through its salesmen and agents sold and delivered said machines to its customers in, to wit, the state of Michigan and elsewhere, extending credit to its said customers, for the purchase price of the machines so sold to them; that for the reasons aforesaid the said machines became and were of no use or value to the said the Arbuckle-Ryan Company, or to its said customers, and were rejected by its said customers, and settlement therefor refused by its said customers, and it the said the Arbuckle-Ryan Company was put to great charges and expenses of its moneys in and about the repairing of said machines, and the returning of said machines for repair, with the necessary and incidental costs of freight, cartage and of new materials, and the expense of making the necessary repairs on said machines, and other expenses; that the said the Arbuckle-Ryan Company had sold said machines to its said customers at a large profit to it over and above the

price at which it had purchased same from said defendant; that said the Arbuckle-Ryan Company in order to induce its said customers to retain and keep said machines, and to dispose of said machines, was compelled to resell said machines after making said repairs at a reduced price, and thereby lost large gains and profits; that on account of the delay and refusal of said defendant to ship said machines as it had promised, it, the said the Arbuckle-Ryan Company, lost divers sales and the gains and profits which it would have made thereon; that the loss and damage to the said the Arbuckle-Ryan Company, as aforesaid, in whole amounts to a large sum of money, to wit, the sum of four thousand five hundred dollars."

The third count covers purchases under both agreements, and contains, among other allegations, the following:

326 "The said defendant undertook, and then and there faithfully promised the said the Arbuckle-Ryan Company, to furnish all the necessary new material to fix up and repair said defective and broken machines, and to send men to each place where said machines had been sold and were located to thoroughly repair said machines, so that they would be satisfactory to the customers to whom they had been sold by the said the Arbuckle-Ryan Company, and then and there faithfully promised the said the Arbuckle-Ryan Company to deliver to said the Arbuckle-Ryan Company said machines within a short, reasonable time thereafter, and faithfully promised the said plaintiff that said machines then and there ordered and purchased and their equipment were and would be free from inherent and mechanical defects, and suitable for the purposes for which they were intended; . . . that nevertheless the said defendant, contriving and fraudulently intending to injure the said the Arbuckle-Ryan Company, did not perform its said promises and undertakings by it so made as aforesaid, and did not deliver said machines within a short, reasonable time as it had promised, and did not furnish all the necessary new materials to fix up and repair said defective machines, and did not send men to repair said beaners, or repair them to the satisfaction of said customers, but neglected and refused to keep its said promise in this regard, and thereby craftily and subtly deceived and defrauded the said the Arbuckle-Ryan Company, in this, to wit: That the said machines which were delivered after the time of the making of the said promises aforesaid, at said time and at the time of the delivery of said machines, were not free from inherent and mechanical defects, but, on the contrary thereof, were inherently and mechanically defective, and were constructed from poor and rotten wood, and poor and defective castings and materials, and were unsuitable for

the purposes for which they were intended. And the said plaintiff avers that the said the Arbuckle-Ryan Company, confiding in the said promise and undertaking of the defendant as aforesaid, had through its salesmen and agents sold and delivered to its customers in, to wit, the state of Michigan and elsewhere, extending credit to its said customers for the purchase price of said machines so sold to them: that, for the reasons aforesaid, the said machines became and were of no use or value to the said the Arbuckle-Ryan Company, or to its said customers, and were ³²⁷ rejected by its said customers, and settlement therefor refused by its said customers, and it, the said the Arbuckle-Ryan Company, was put to great charges and expenses of its moneys in and about the repairing of said machines, and the returning of said machines for repair, with the necessities and incidental costs of freight, cartage and of new material, and the expense of making the necessary repairs on said machines and other expense: that the said the Arbuckle-Ryan Company had sold said machines to its said customers at a large profit to it over and above the price at which it had purchased same from the said defendant; that the said the Arbuckle-Ryan Company, in order to induce its said customers to retain and keep said machines, and to dispose of said machines, was compelled to resell said machines, after making said repairs, at a reduced price, and thereby lost large gains and profits: that, on account of the delay and refusal of said defendant to ship said machines as it had promised, the said the Arbuckle-Ryan Company lost divers sales, and the gains and profits which it would have made thereon, and, on account of the depreciated value and the worthlessness of said machines, said the Arbuckle-Ryan Company suffered the loss of large sums of money which it paid the said defendant in the purchase of said machines; that the loss and damage to the said the Arbuckle-Ryan Company, as aforesaid, in whole amounted to a large sum of money, to wit, the sum of nine thousand dollars."

On the twenty-sixth day of May, 1908, defendant filed a plea in abatement, setting forth, in substance, that the cause of action set forth in plaintiff's declaration did not accrue within the state of Michigan, but in the state of Minnesota or Ohio, and that therefore the circuit court for the county of Kent had no jurisdiction over said cause of action. On the fifteenth day of May, 1908, the defendant filed a petition in said circuit court asking for a dissolution of the writ of attachment, denying that there was any indebtedness whatever existing between the defendant and the said Arbuckle-Ryan Company or its assignee, the said John L. Showen, and that the sole and only rights of the said John L. Showen

are such as he may have by reason of his assignment of the interest and title of the said ³²⁸ Arbuckle-Ryan Company in the aforementioned contracts, and that the nature of the indebtedness, if any, due from the defendant to the said Arbuckle-Ryan Company or its assignee is wholly and entirely speculative, unliquidated and indefinite in its character and amount, and is not capable of being made certain or definite, and is not such a claim of indebtedness as is contemplated by the statute in attachment proceedings.

In answer to the plea in abatement, plaintiff filed his own affidavit, stating, among other things, as follows:

"Affiant further says that he is acquainted with Benjamin F. Long, the party referred to in the third paragraph of said plea, and has been acquainted with him for some years, and knows the business in which he has been engaged; that at the time said suit was commenced, and for some time theretofore, the said Benjamin F. Long resided with his family in the city of Grand Rapids, in said county, and was at that time and for some months at least before the commencement of said suit engaged as the agent or representative of the J. L. Owens Company of Minneapolis, Minnesota, in the sale of its bean threshers, and the handling of its business in the state of Michigan; that he knows from his association with and observation of the business done by said Long, affiant being engaged in a similar line of business as agent and representative, that the business of the said Long, as agent and representative of the J. L. Owens Company as aforesaid in the state of Michigan, was to make sales and take orders for bean threshers sold by the said J. L. Owens Company in the usual manner and upon the usual terms and custom in relation to such business, and that it was also a part of the business of the said Long as the agent and representative, as aforesaid, to negotiate and make contracts with local agents in towns in the state of Michigan on behalf of the said J. L. Owens Company for the sale of bean threshers in local territories, and in a general way to look after the business of said J. L. Owens Company as such agent and representative, in accordance with the general custom of such agents."

The issue raised by the plea in abatement and the petition to dissolve the attachment were submitted to the court, and the court dismissed the petition and overruled ³²⁹ the plea. On defendant's application, a writ of certiorari was issued out of this court, and the record is before us for review. The return of the circuit judge in part is as follows:

"I further show and return to said writ that at the time of the hearing and argument upon the plea to the jurisdiction in said cause, and upon the petition for the dissolution of the writ of attachment in said cause, it appeared from

the pleadings and affidavits, all of which are attached hereto, and I found therefrom, as a matter of fact, that at the time of the commencement of said suit and the service of the writ of attachment therein the said defendant company had goods and property in said county and state for sale in the regular course of its business; that one Benjamin F. Long, upon whom the said writ was personally served, as shown by the return thereto, was a resident of the city of Grand Rapids, in said county, and was acting generally as the agent and representative of the said defendant company in the sale of its goods and the handling of its business in said county and state, and that at the time of the service of said writ the said defendant company was, and for a considerable period of time had been, through its said agent and otherwise, doing business generally with the citizens of said county and state in the sale of its products, and had merchandise and property, consisting of bean threshers manufactured by it, in said county and state, for the purpose of carrying on its said business therein.

"I thereupon held that the court by the service of said writ acquired and had jurisdiction in said cause, as shown by the orders duly made and filed therein."

Two principal questions are presented for our consideration by the briefs of counsel:

1. Did the court acquire jurisdiction over the defendant, a foreign corporation, the cause of action having accrued outside of the state?

2. Is the amount of the indebtedness or damages as stated in the declaration so uncertain, speculative and conjectural as to exclude the remedy by attachment?

1. Since there was no method for suing a corporation at common law outside of its home jurisdiction, it is argued that the right to maintain the present action must ³³⁰ depend upon statutory authority. Defendant contends that such authority can be found only in section 10.442. 3 Compiled Laws, which provides as follows:

"(10442) Section 1. The People of the State of Michigan enact, That suits may be commenced at law or in equity in the circuit court for any county of this State where the plaintiff resides or service of process may be had and suits at law, before justices of the peace in such county; and in cases where the plaintiff is a nonresident in any county of the State, against any corporation not organized under the laws of this State in all cases where the cause of action accrues within the State of Michigan, by service of a summons, declaration or chancery subpoena within the State of Michigan, upon any officer or agent of the corporation, or upon the conductor of any railroad train, or upon the master of any vessel belonging to or in the service of the corpora-

tion against which the cause of action has accrued: Provided, That in all cases, except before justices of the peace, no judgment shall be rendered for sixty days after the commencement of suit, and the plaintiff shall, within thirty days after commencement of suit, send notice by registered letter to the corporation defendant at its home office."

Counsel for plaintiff argue that section 10.442, 3 Compiled Laws, should be construed as applying only to foreign corporations engaged in interstate commerce transactions within the state, and not to foreign corporations doing business in the state through resident agents and really domiciled in a business sense within the state. It is further contended that the provisions of section 10.468, 3 Compiled Laws, are applicable to foreign corporations actually doing business in this state as well as to domestic corporations. Defendant insists that this latter contention is disposed of by our previous decisions: *Grand Trunk R. Co. v. Wayne Circuit Judge*, 106 Mich. 248, 64 N. W. 17, and cases cited therein. We do not regard these decisions, however, as necessarily disposing of the question under consideration. In *People v. Hawkins*, 106 Mich. 479, 64 N. W. 736, decided soon after the decision in *Grand Trunk R. Co. v. Wayne Circuit Judge*, 331 106 Mich. 248, 64 N. W. 17, it was held that the section of the act relating to the incorporation of manufacturing and mercantile associations, which provided that foreign corporations organized for any of the purposes of the act, upon recording their articles of association and appointing a resident agent for service of process, might carry on business in this state and enjoy all the rights and privileges and be subject to all the restrictions and liabilities of corporations existing under said act, did not prohibit foreign corporations from doing business in this state until they had complied with such conditions or invalidate their contracts. As said by Justice Gray in *Barrow Steamship Co. v. Kane*, 170 U. S. 100, 18 Sup. Ct. Rep. 526, 42 L. ed. 964: "The constant tendency of judicial decisions in modern times has been in the direction of putting corporations upon the same footing as natural persons in regard to the jurisdiction of suits by or against them": See, also, *Reeves v. Southern Ry. Co.*, 121 Ga. 561, 49 S. E. 674, 70 L. R. A. 513, 2 Ann. Cas. 207. We think this tendency is reflected in our statutes upon this subject enacted since the decision in 106 Mich. 248, 64 N. W. 17.

By Act No. 206, Public Acts of 1901, the terms and conditions on which foreign corporations might be admitted to do business in Michigan were prescribed, and, among other things, they were required to appoint an agent in this state to accept service of process, and failure to comply with the

provisions of the act subjected the offending corporation to heavy penalties. Upon compliance with the provisions of the act, the corporation was authorized to carry on its business for the time set forth in its charter or articles of association, unless longer than contemplated by the laws of this state. This act (section 1) was amended in 1903 (Act No. 34, Pub. Acts 1903) and at the regular and special sessions of 1907 (Act No. 310, Pub. Acts 1907; Act No. 3, Ex. Sess. 1907). By the amendatory act passed at the regular session of 1907, it was made unlawful for any foreign corporation to transact its business in this state ³³² "until it shall have procured from the Secretary of State of this state a certificate of authority for that purpose."

Among other things necessary to the procurement of such certificate, it must file evidence of the appointment of an agent in this state to accept service of process on behalf of the corporation. The certificate of authority authorizes the corporation to carry on its business in this state for the period of its corporate existence, but not to exceed thirty years. "And the Secretary of State shall in the certificate which he issues state under what act such corporation is to carry on business in this state and such corporation shall have all the powers, rights, and privileges, and be subject to all the restrictions, requirements, and duties granted to or imposed upon corporations organized under such act."

By section 6 a failure to comply with the act invalidates all contracts. By section 7 it is made unlawful for any person to act as agent for an unauthorized company and any person violating this provision is made guilty of a misdemeanor. By section 5 of the amendatory act passed at the special session of 1907 failure to comply with the provisions of the act subjects the corporation to a penalty of not less than one hundred dollars nor more than one thousand dollars per month. Section 10 reads as follows:

"Sec. 10. No such corporation having appointed an agent to accept service of process shall have power to revoke or annul such appointment until it shall have filled (filed) notice of appointment of some other person in this state as such agent. Service of process may also be made upon any officer or agent of such corporation in this State, or service may be made upon the Secretary of State, who shall immediately notify the corporation thus served, by mailing notice thereof and a copy of such process to its address. There shall be paid to the Secretary of State at the time of such service a fee of five dollars, which sum may be taxed as costs to the plaintiff in case he prevails in the proceeding."

Section 13, Act No. 232, Public Acts of 1903, being the act ³³³ to revise and consolidate the laws providing for the

incorporation of manufacturing and mercantile companies, etc., reads as follows:

"Sec. 13. Every corporation organized or existing under this act shall have power to have succession by its corporate name for the period limited in its charter, or by this act; to sue and be sued in any court of law or equity, with the same rights and obligations as a natural person; to make and use a common seal and alter the same at pleasure; to ordain and establish by-laws for the government and regulations of its affairs, and to alter and repeal the same; to elect all necessary officers and to appoint and employ such agents as the business may require."

The effect of the statutes regulating the transaction of local business in this state by foreign corporations is to make such corporations, as to such business, domestic corporations organized under the act specified in the certificate of the Secretary of State entitled to, and subject to, the same remedies as such corporations in the courts of this state. We are of the opinion, therefore, that section 10,442, 3 Compiled Laws, should be limited in its application to foreign corporations transacting interstate commerce business in this state: *Barow Steamship Co. v. Kane*, 170 U. S. 100, 18 Sup. Ct. Rep. 526, 42 L. ed. 964. The court found, and the evidence warranted the finding, that the defendant through its agent was transacting local business in the state, and the fact that such business upon the showing made was unlawful should not relieve the defendant, but it should be held to assent to the same remedies which would have attached if it had done the business lawfully. It is estopped to set up in its defense the unlawfulness of its transactions: *Ehrman v. Teutonia Ins. Co.*, 1 McCrary, 123, 1 Fed. 471; *Hagerman v. Empire Slate Co.*, 97 Pa. 534; *Sparks v. National Masonic Acc. Assn.*, 100 Iowa, 458, 69 N. W. 678; *La Fayette Ins. Co. v. French*, 18 How. (U. S.) 404, 15 L. ed. 451. Under our attachment statutes, also, service of the writ upon defendant's resident agent conferred jurisdiction in personam: 3 Comp. Laws, secs. 10,474, 10,555, 10,556, 10,559, 10,560, 10,571, 334 10,576; *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. Rep. 354, 27 L. ed. 222; *Davidson v. Fox*, 120 Mich. 386, 79 N. W. 1106.

2. It was said in *Roelofson v. Hatch*, 3 Mich. 277: "There may be cases of contracts not within this remedy, as for example a breach of promise to marry, where the damages rest so entirely in opinion that it would be a solecism to say the amount of indebtedness could be sworn to. But, again, there are many contracts where, although the damages are not liquidated in the contract, yet by well-established rules of law they are capable of being ascertained definitely upon proof of the facts, and to hold that in all this class of cases

the plaintiff is debarred of this remedy would be to defeat in a great measure the purposes sought to be secured by its enactment. The plaintiff is required to swear that the defendant is indebted to him upon contract, express or implied, and to state the amount of such indebtedness, as near as may be, over and above all setoffs. What is an indebtedness? It is the owing of a sum of money upon a contract or agreement, and, in the common understanding of mankind, it is not less an indebtedness that such sum is uncertain. The result of a contrary doctrine would be to hold any liability which could only be the subject of a general indebitatus assumpsit, quantum meruit, or quantum valebat count in a declaration, such an indebtedness as could not be the subject of this remedy by attachment. Without fully deciding this point, which is not necessarily raised in this case, we see no reason why a demand arising *ex contractu*, the amount of which is susceptible of ascertainment by some standard referable to the contract itself, sufficiently certain to enable the plaintiff, by affidavit, to aver it 'as near as may be,' or a jury to find it, may not be a foundation of a proceeding by attachment: See *Fisher v. Consequa*, 2 Wash. C. C. 382, Fed. Cas. No. 4816; *Clark v. Wilson*, 3 Wash. C. C. 560, Fed. Cas. No. 2841."

We are unable to find that this question has since been presented to this court. We hold, however, that the views of the court stated *arguendo* in the *Roelofson* case (3 Mich. 277) correctly state the law, and justify the ruling of the circuit court. The amount of the damages in this case, ³³⁵ while unliquidated, is susceptible of ascertainment by a standard referable to the contract. The standard established by the contract was that specified machines sold for a specified price should be free from inherent and mechanical defects. The declaration alleges that the machines were not free from, but possessed, such defects, that they were sold at a profit, but on account of the defects were returned, were repaired, and resold at a reduced price. While some of the damages claimed in the declaration were probably too indefinite and speculative to admit of the remedy by attachment, in the main, the damages claimed were susceptible of definite ascertainment by testimony: *Baumgardner v. Dowa-giac Mfg. Co.*, 50 Minn. 381, 52 N. W. 964; *Lawton v. Kiel*, 51 Barb. (N. Y.) 30; *Weaver v. Puryear*, 11 Ala. 941; *New Haven Steam Sawmill Co. v. Fowler*, 28 Conn. 103; *Hyman v. Newell*, 7 Colo. App. 78, 42 Pac. 1016.

We are also of the opinion that, under the showing made in this case, the plaintiff was entitled to maintain his suit as assignee: *McBride v. Farmers' Bank*, 26 N. Y. 450; *Had-den v. Dooley*, 92 Fed. 274, 34 C. C. A. 338; *Felt v. Reynolds*

R. F. Evaporating Co., 52 Mich. 602, 18 N. W. 378; Henderson v. Detroit & M. Ry. Co., 131 Mich. 438, 91 N. W. 630.

The orders of the circuit court are affirmed, and the writ dismissed, with costs to plaintiff.

Montgomery, Ostrander, Hooker and Brooke, JJ., concurred.

Jurisdiction of Foreign Corporations is the subject of a note to Abbeville etc. Co. v. Western etc. Co., 85 Am. St. Rep. 905.

GALLON v. HOUSE OF GOOD SHEPHERD.

[158 Mich. 361, 122 N. W. 631.]

CHARITABLE INSTITUTION—Whether a Governmental Agency.—An institution of a charitable character, such as the "House of the Good Shepherd," maintained for the reformation and preservation of girls and women, does not take on the character of a state institution or governmental agency, with consequent immunity from private suit, by reason of a statute which permits certain magistrates and courts under some circumstances to commit offenders to the institution. (p. 390.)

CHARITABLE INSTITUTION—Liability for Unlawful Detention of Girl.—An institution of a charitable character, such as the "House of the Good Shepherd," maintained for the reformation and preservation of girls and women, is liable in damages to a girl taken there under the false impression that a position will be found for her and thereafter unlawfully detained against her will. (pp. 390, 394.)

CHARITABLE INSTITUTION—Liability for Unlawful Detention of Girl.—An institution of a charitable character, such as the "House of the Good Shepherd," cannot escape responsibility for unlawfully detaining a girl against her will, by the plea that to pay damages for the wrong will divert a trust fund. (p. 392.)

CHARITABLE INSTITUTION—Unlawful Detention of Girl—Respondeat Superior.—The duty of an institution of a charitable character, such as the "House of the Good Shepherd," not to imprison a girl therein without lawful authority, is not one which may be delegated to servants or agents so as to relieve the principal from responsibility. (p. 392.)

CHARITABLE INSTITUTION—Release of Action for Unlawful Detention.—Where a girl who has been reclaimed by her relatives from the "House of the Good Shepherd," where she has been unlawfully detained without their knowledge and against her will, a document signed by her, releasing the institution from liability and stating that while there she was treated with kindness and left reluctantly, does not necessarily bar her action for the unlawful detention. (p. 394.)

CHARITABLE INSTITUTION—Unlawful Detention of Girl—Motive.—An institution of a charitable character, such as the "House of the Good Shepherd," cannot justify its unlawful detention of a girl, on the ground that the persons in control believed they were acting for her best interests; and to prove a motive other than a charitable one for the detention, it is proper to show that the girl

was required to work at labor profitable to the institution, and that after her disappearance her relatives tried to find her by advertising and employing detectives. (p. 395.)

CHARITABLE INSTITUTION—Measure of Damages for Unlawful Detention.—A judgment of two thousand five hundred dollars for unlawfully detaining a girl in the "House of the Good Shepherd" for seven years is not excessive. (pp. 390, 394.)

Franz C. Kuhn, Seth W. Knight, Allan H. Frazer and Edwin Henderson, for the appellant.

Thomas A. Conlon and J. G. Tucker, for the appellee.

362 OSTRANDER, J. Defendant was incorporated in the year 1884 under the provisions of Act No. 20, Laws of 1855 (3 Comp. Laws, secs. 8264-8270), under the name "The Monastery and Asylum of the Good Shepherd." Amended articles of association were filed in the year 1889 in which the name of the society is "The House of the Good Shepherd." and the object of the organization is stated to be: "The moral reformation of girls and women, and the preservation in a state of purity of girls and women whose virtue is exposed to danger."

The property of the association embraces some four acres of land, with buildings, situated on West Fort street in the city of Detroit, valued, according to reports filed with the Secretary of State, in 1905 at \$200,000, in 1906 at \$100,000, in 1907 and 1908 at \$50,000. The religious order in charge, a cloistered order, is that of "Our Lady of Charity of the Good Shepherd." It is one of three hundred houses maintained in different places throughout the world, and the Mother House, so called, is at Angiers, in France. The institution is supported by contributions and by the earnings of the inmates. The women who are in charge receive no pay—no wages or salary—for services, their lives being devoted to charity. The rules of the order are promulgated from the Mother House, to which reports are made, but each house is, in business management and financial condition, independent. The institution admits, ³⁶³irrespective of the religious training or beliefs of the applicant, three classes of women. A more accurate statement is that it classifies those received as: (a) Magdalens; (b) reformatory class, which includes wayward girls in danger of being led to evil; (c) preservation class, or innocents, children two years old and upward. Inmates reach the institution through various channels. Some go there voluntarily. Some are received upon the request of parents, or those standing to them in the relation of parents. Officers of the law, as policemen and truant officers, bring some. By Act No. 271, Public Acts of 1887 (1 Comp. Laws, sec. 2222), it is provided that police justices of the city of Detroit, justices of the peace of the

county of Wayne, and the recorder's court of the city of Detroit shall have power, after the conviction of a girl over seven and under seventeen years of age of an offense for which she might be sent to the state industrial school for girls, when requested by a parent or guardian, to commit her to imprisonment in the House of the Good Shepherd, but not at the expense of the state. In such cases, except where sentence is imposed in the recorder's court, the commitment must be approved by a circuit or probate judge of the county, and the approval be indorsed upon the commitment before it is executed. Authority is conferred upon those in charge of the house to determine whether reformation warrants the discharge of the girl so committed, and to bind her out for the term of her commitment to suitable persons, reporting their action in the premises annually to the recorder's court. The number committed to the institution by the orders of the courts is very small. It does not appear that otherwise than as just stated is there reposed anywhere any public visitatorial power, or that reports are required to be made, or are made, to any state or other public authority, of the number, condition, cause or time of detention of girls received into the institution. The real name of an inmate is not divulged, unless by herself, to other inmates, but upon entering the institution each is given a name by ³⁶⁴ which she is called so long as she remains there. Since the institution was opened, some two thousand girls have been received in the reformatory class, and at the date of the trial of this case there were about two hundred and thirty in that class. A rather extensive business is done in the laundry of the institution and in sewing. Four wagons are employed in collecting and distributing the work of the laundry to persons outside the institution. More than two hundred girls and women are employed in the laundry. The inmates are not paid for their labor.

In her declaration the plaintiff avers that her ward and sister, Mabel Wellington, in June, 1898, being then sixteen years of age, strong, well and of good character and reputation, was induced by a person named in the declaration, under promise of procuring for her a place to work as a domestic in a small family, to go to the House of the Good Shepherd, in which institution, against her will and notwithstanding her repeated protests and requests, without the knowledge of her relatives, she was confined until some time in October, 1905, when her release was procured by her sister and brother, both of whom had during the period lived in Detroit, they having learned of her whereabouts from an escaped or discharged girl acquainted with the family. It is alleged, also, that she was compelled to work, was ill-treated in various

ways, and her physical and mental health much impaired. To the declaration the defendant pleaded the general issue.

Upon the trial the jury were instructed to allow no damages for impaired health, nor for injuries inflicted by other inmates of the house, and to give nothing by way of punishment of defendant or exemplary damages. They were told, in substance and effect, that the issue to be determined by them was whether Mabel was unlawfully restrained of her liberty by the defendant (*Smith v. Sisters of Good Shepherd*, 27 Ky. Law Rep. 1107, 87 S. W. 1083), either from the time she entered the institution, or, if she entered voluntarily, then from a later time, and, if she was unlawfully restrained, to give her such damages ³⁶⁵ as she had suffered for loss of time, physical discomfort, mortification, disgrace, as they found the facts to be. The jury returned a verdict of \$4,000 in her favor, upon which judgment was entered. A motion for a new trial was made and heard. It was ordered that a new trial be awarded unless plaintiff would consent to remit \$1,500 of the judgment. Plaintiff consented. Errors are assigned upon rulings refusing a directed verdict for defendant, admitting and rejecting testimony, upon the conduct of counsel for plaintiff, upon the charge given and refusals to charge as requested by defendant, and upon the refusal to order a new trial. As they are considered, and as is necessary, references will be made to the testimony.

A contention is made which goes to the right of the plaintiff to recover, assuming it to be established that her ward was unlawfully deprived of her liberty—imprisoned—by defendant. It is said (a) that defendant is a governmental agency; (b) that it is a public charitable institution. If it is either, it is not liable to plaintiff for the torts of its officers or servants. The notion that it is a governmental agency is predicated of the statute which has been referred to, which permits certain magistrates and courts to commit offenders to the institution. Assuming that defendant might legally detain a girl committed to its institution by one of the magistrates or courts named in the statute, it does not follow that the institution becomes, by force of this statute, a state institution, or, within any definition applicable in this discussion, a governmental agency. In a sense, girls so committed are wards of the state (*Hunt v. Wayne Circuit Judges*, 142 Mich. 93, 105 N. W. 531, 3 L. R. A., N. S., 564, 7 Ann. Cas. 821), confided to the custody of the defendant, upon the request of a parent or guardian, as they might be committed by state authority to the custody and care of an individual. Whatever the relation thus created between the state and the institution may be called, and whatever rights and duties would or ³⁶⁶ might arise out of such relation of the institution to the girl, it is clear that the general character of the

institution is not changed. It remains, in fact and in law, the institution described in its articles of association.

The statute under which defendant is organized does not define a charitable purpose, but only that any three or more persons who may desire to become incorporated for any charitable purpose may do so. Societies organized under the provisions of the act, whose purposes are charitable, are charitable societies. The avowed object of the defendant is charitable. For the purpose of this case, it may be treated as occupying, in the view of the law, the position of a public charitable institution, administering a charitable fund: *Bruce v. Methodist Episcopal Church*, 147 Mich. 230, 110 N. W. 951, 10 L. R. A., N. S., 74, 11 Ann. Cas. 150. It administers the fund according to rules of its own adoption, by methods of its own choosing. It shelters, clothes, feeds and instructs the inmates, requiring of them such labor in return as they can perform. Its buildings and premises are erected and arranged with the purpose of detaining those whom it desires to detain. It is intended that girls confided to the institution shall remain until discharged. While it appears that avenues are sometimes open by which an inmate may go out, it also appears that one who thereby goes out escapes. It is a place of detention. Concerning these matters, the record leaves no one in doubt. The rule that one who enters voluntarily may leave at pleasure, said to be in force in the institution, is a rule in recognition of the duty not to detain one not authoritatively committed to the care of defendant.

Upon the facts, the question presented is not one of the responsibility of defendant to those who voluntarily accept the shelter of the institution, to those committed to it by magistrates or courts, or to those detained at the request or by the consent of parents or guardians. It is not pretended that Mabel Wellington was there by order of court or by consent or at the request of parents or of relatives. It is admitted that after she went to the institution ³⁶⁷ she was not outside its inclosing wall or fence until her release was applied for by her relatives. The jury were instructed that if she voluntarily entered the institution, or voluntarily remained there, thereby subjecting herself to its rules and discipline, she could not recover, and a verdict must be returned for defendant. The question, then, is one of the liability of defendant to one unlawfully detained in its institution—to one deprived of liberty without authority of the law.

To this question there can be but one answer. And liability may not be affirmed or denied upon any application of the doctrine of *respondet superior*, if, indeed, upon the facts there is room for its application. The duty not to imprison a citizen in defendant's institution without lawful authority is not one which may be delegated to servants or agents so

as to relieve the principal from responsibility. The argument that a trust fund will be diverted if used to indemnify the injured person, and therefore the defendant is not liable, was answered in *Bruce v. Methodist Episcopal Church*, 147 Mich. 230, 110 N. W. 951, 10 L. R. A., N. S., 74, 11 Ann. Cas. 150. See, also, *Kellogg v. Church Charity Foundation*, 128 App. Div. 214, 112 N. Y. Supp. 566.

We come, then, to the consideration of errors alleged to have been committed in the conduct of the trial and in refusing a new trial. It was the theory of plaintiff, first, that Mabel was an involuntary inmate of the institution, held there against her will; second, that her treatment while there was improper and resulted in injury. As to the second proposition, it should be said that the specific objections to the admission and the exclusion of testimony upon that subject have become unimportant, for the reason that the whole matter was withdrawn from the consideration of the jury. Whether it should be said that defendant was prejudiced generally by receiving some of the testimony offered, the prejudice being reflected in the verdict which was rendered, is a separate matter, which will be later referred to. As to the first proposition, and whichever way one may conclude the ³⁶⁸ truth to lead, the testimony presents a very unusual condition of things. Assuming the girl to have been healthy, moral, of good reputation, with relatives in the city of Detroit interested in her welfare, to whose house she was free to go, a Protestant, with no particular religious tendencies, a girl who had by her own efforts found employment at various places, receiving and disposing of her earnings, the natural inference would be that she did not willingly immure herself in this institution for seven years as one of a class of girls supposed to need reformation. The facts assumed were supported by the testimony produced by plaintiff. We find nothing in this testimony which requires particular notice. None of these facts are seriously disputed by defendant, although testimony was offered tending to prove that upon entering she stated that she was a Catholic, and it is claimed, upon the whole record, that plaintiff is now manifesting an interest in her ward which is in marked contrast to the lack of interest displayed in her sister before she entered defendant's institution. A peculiar circumstance is that the relatives of Mabel who were witnesses discredit her mental soundness while presenting her, as they are obliged to do, as the principal witness for plaintiff. The sister discredits, not her truthfulness, but her mental competency, in having herself appointed to be her guardian. The brother discredits her in testimony such as the following: "At present her mind is not what it should be, though she is improving. She is not completely competent to take care of herself, but far

from it, and in some particulars she does not know the difference between right and wrong. I cannot say whether she knows the difference between the truth and a lie."

Whether, having proved the character of Mabel and her detention for seven years in an institution arranged and used as a place of detention, it was incumbent upon plaintiff to prove an involuntary detention, or whether it was then incumbent upon defendant to prove that she was a voluntary inmate, was a question not debated at the trial. ³⁶⁹ Plaintiff assumed, and it seems was compelled to carry, the burden of proving an involuntary detention. It is admitted that she went to the institution with Mrs. Goldsmith, who was at the time in charge of St. Mary's Home. Mrs. Goldsmith testified, in substance, that Mabel Wellington came to the home with a man whom she said she had met in a park, and had asked to show her the way, gave her name as Mabel Wright, said she had neither home nor relatives, and that the man she was with had agreed to get her a position in some hotel if she would go that evening; that she considered that the girl was not very bright; that she needed protection, and told her she would take her to a home where she would be protected. She took her to the defendant's institution, and turned her over to one of the sisters, saying: "Here is a child I have brought to be looked after." She gave them no further information. Mary Howe has first charge of the reformatory class. Mabel, she says, was brought to her in the classroom by one of the sisters, and gave her name as Mabel Wellington. Later she talked with her, and made an entry of facts in a memorandum-book. The entries are her name, the name of her father and mother, who she said were dead, and the name of her oldest sister, Mrs. A. H. Gallon, residence, 977 Russell street, Toronto, religion, Catholic. Mabel testified that Mrs. Goldsmith promised to give her a place as domestic in a family of three, that she took her to the defendant's institution, on a street-car, late in the afternoon. Nothing was said to her there, and no one told her the name of the institution. She was taken to the classroom about supper-time, was invited to eat, did so, went out in the yard after supper, and with other girls sat for an hour. Prayers were said, and she went to bed. She heard no conversation between Mrs. Goldsmith and those in charge of the institution. Two or three days later questions were asked her, and she signed her name in a book. She told where she was born; that her father and mother ³⁷⁰ were dead; the name of her sister, Mrs. Gallon; her address on Riopelle street in Detroit. She was asked nothing about her past life. In Canada, Mabel had gone to school to a convent. She knew that those in charge of the institution to which she was taken were members of some religious order. She dis-

agrees with Mrs. Goldsmith in many respects, among others in respect to the time she was at St. Mary's Home. She says she had been there some days, and, having no money to pay for board and lodging, she assisted about the work; that her trunk was there, and she afterward sent for it, and it was brought to defendant's institution.

If Mabel had known the character of this institution, and that she would not be permitted to leave it at her pleasure, there would be reason for the conclusion that she entered, and for a time, at least, remained voluntarily—at least she did not enter protesting or because forced to do so. The point is not controlling here, however much the fact, if it exists, may be thought to explain or excuse the subsequent conduct of the defendant. There is abundant testimony, met by counter testimony on the part of defendant, tending to prove that, being there, those in charge proposed that she should remain whether she desired to remain or not, and her own testimony is to the effect that she soon sought to go away, and discovered the purpose of those in charge to prevent her doing so. Without entering into details, it is sufficient to say that the jury were warranted in finding that she was restrained of her liberty against her will. It is true that, after leaving the institution, and after an attorney had advised defendant that a claim for damages would be made, she signed and attested a document in which it is stated that while there she was treated with kindness; left at the request of her sister, and reluctantly; held the sisters in high regard; and released the convent and the order from "any claim whatsoever I might have by reason of remaining or being detained prior to my majority." But the manner in which this writing was procured, and the evidence as to whether it was voluntarily and intelligently made, was all ³⁷¹ before the jury. The court was not in error in refusing to direct a verdict for defendant, and the verdict rendered was supported by testimony. The recovery is not excessive. If it is assumed that the persons in control of this institution believed they were acting for the best interests of this girl, it is nevertheless intolerable to the law that a person, *sui juris*, shall be restrained of liberty, without authority of law, by a stranger, because, in the judgment of the stranger, such person will thereby be morally or financially improved. The charge of the court was favorable to defendant, and neither in requests to charge refused nor in the charge as given do we discover any error.

The errors based upon rulings admitting and rejecting testimony have been examined, with the result that we find none of them well assigned. We are of opinion, and this answers most of the objections not already answered, that plaintiff was entitled to testimony which tended to prove a

motive other than a merely charitable one upon the part of defendant for receiving and detaining this girl, and that it was proper to show the labor to which she was put, and the fact, if it was a fact, that her work was profitable to the institution. It was proper, also, to show that the disappearance of this girl was soon known to her relatives, and that persistent and continued efforts were made, by employing detectives and by advertising in the Detroit daily papers, without success, to ascertain her whereabouts. We have examined the record, too, to learn if it is probable that, in admitting testimony relating to issues of fact finally withdrawn from the jury, the defendant was prejudiced, and whether the conduct of counsel for plaintiff which is complained about should result in granting a new trial. We are not satisfied that prejudice to defendant resulted.

Finding no reversible error, the judgment of the court below must be, and it is, affirmed.

Hooker, Moore, McAlvay and Brooke, JJ., concurred.

Charitable and Eleemosynary Hospitals have been held not responsible for negligent injuries to patients therein: *Downes v. Harper Hospital*, 101 Mich. 555, 45 Am. St. Rep. 427. As to what institutions are not within this rule of exemption, see *University of Louisville v. Hammock*, 127 Ky. 564, 128 Am. St. Rep. 355; *Phillips v. St. Louis etc. R. R. Co.*, 211 Mo. 419, 124 Am. St. Rep. 787; *Sawdey v. Spokane Falls etc. Ry. Co.*, 30 Wash. 349, 94 Am. St. Rep. 880. In *Bruce v. Central M. E. Church*, 147 Mich. 230, 110 N. W. 951, 10 L. R. A., N. S., 74, 11 Ann. Cas. 150, a religious corporation is held liable for injuries sustained by one while repairing its property through the negligence of its employé in furnishing unsafe scaffolding.

A Suit Against a Public Corporation, such as "The National Home for Disabled Volunteer Soldiers," having no other powers than the performance of a function of government, and accomplishing no other object, is a suit against the government, which cannot be maintained unless it has consented to be sued: *Overholser v. National Home*, 68 Ohio St. 236, 96 Am. St. Rep. 658. And a state industrial school, being a component part of one of the departments of the state, is within a constitutional prohibition against the state being made a party defendant to any suit: *Alabama Industrial School v. Addler*, 144 Ala. 555, 113 Am. St. Rep. 58. The question when public officers are subject to suit although they assume to be acting for the state or the United States is the subject of a note to *Sanders v. Saxton*, 108 Am. St. Rep. 830.

SAMBERG v. KNIGHTS OF THE MODERN MACCABEES.

[158 Mich. 568, 123 N. W. 25.]

DEATH—Presumptions from Absence, Letters from Wife to Strengthen.—Where a man has been absent and unheard of for seven years, letters from his wife are admissible to strengthen the presumptions of death, by showing that his relations with his family were such as not to be a cause for his disappearance. (p. 397.)

TRIAL—Error cannot be Assigned upon Misconduct of Counsel in Argument, where the court declares it improper and it is not further pursued, and the opposing counsel, evidently satisfied with such course, makes no request for further instructions to the jury. (p. 397.)

BENEFIT SOCIETY.—A Change in the By-laws of a Beneficial Association, which has the effect of nullifying the statute raising a presumption of death from seven years' absence of the insured, is unreasonable and invalid as to a policy executed before such change. (p. 398.)

BENEFIT SOCIETY.—Whether the Presumption of Death Arising from Seven Years' absence of an insured is overcome by testimony of a witness that he met the insured and talked with him within that period is a question for the jury. (p. 398.)

Frank E. Jones, for the appellant.

Norman I. Miller and Hovey & Baird, for the appellee.

569 **MOORE, J.** Defendant is a fraternal beneficiary association. On the tenth day of March, 1889, Charles A. Samberg, then a resident of Port Huron, became a member of defendant order, and had issued to him a benefit certificate for one thousand dollars. On or about November 24, 1894, this certificate was surrendered, and, in lieu thereof, a certificate in which Anna Samberg, his wife, was named as beneficiary, was issued. Mr. Samberg continued in the order, paid his assessments, and was in good standing until on or about March 16, 1900, when he left his home for Seattle, Washington. His wife continued to pay the dues and assessments until June, 1908. Mrs. Samberg received letters from her husband until on or about October 16, 1900, since which time she claims not to have heard from him or been able to gain any knowledge of his whereabouts. On November 1, 1907, plaintiff, as beneficiary, filed her claim with defendant order for the amount of said benefit (one thousand dollars), in which she sets up the facts in regard to the absence and disappearance of her said husband for the period of seven years, "and alleges that the amount of said certificate is now due and payable to her as beneficiary of the insured, her said husband." The defendant order at its Great Camp Review in June, 1904, amended its by-laws by adding thereto section 88, which reads as follows: "The absence or disappearance of a member of this order from his last known

place of residence for any length of time, shall not be presumptive evidence of the death of the member and no right shall accrue under the certificate of membership to the beneficiary, nor shall any benefits be ⁵⁷⁰ paid until satisfactory proof has been made of the death of the member, aside from any presumption that might arise by reason of his absence."

The claim made by plaintiff was disallowed by the executive committee, and upon appeal was disallowed by the Great Camp, and suit was then brought by plaintiff, and from a judgment in her favor the cause is brought here by writ of error.

The first question that arises under the assignments of error is whether or not the letters written by Mr. Samberg to his wife were admissible in evidence. Objections were made to these letters when offered "as incompetent and immaterial, and for the reason that it is a communication between husband and wife, and therefore privileged and not admissible in evidence." Section 1225, 1 Compiled Laws, provides: "If any person shall disappear and his whereabouts remain unknown, for the space of seven years, and no knowledge of such person can be procured for such space of seven years, he shall be presumed to be dead."

The letters were introduced for the purpose of strengthening the presumption of death created by the statute, by showing that at the time of his disappearance his relations with his wife and family were such as not to be a cause for his disappearance. We think they were competent.

Errors are assigned upon the argument of counsel. Some of the argument criticised was a fair argument in reply to statements made by opposing counsel. Some of it was clearly improper, and should not have been made. Upon the attention of the trial judge being called to the argument, he at once declared it to be improper, and that line of argument was not pursued further. Counsel for defendant was evidently satisfied with the course pursued, for he made no request to the judge for further instructions to the jury: See *People v. De Camp*, 146 Mich. 533, 109 N. W. 1047; *Davis v. City of Adrian*, 147 Mich. 300, 110 N. W. 1084.

The important question in the case is as to the effect of ⁵⁷¹ the by-law adopted in 1904, fifteen years after the insured became a member of the order, four years after his disappearance, and three years before the beneficiary ceased to pay assessments to defendant organization. The application for membership contained the following: "That these statements with this application and the constitution of the Great Camp K. O. T. M. for Michigan shall form the basis for the contract for endowment."

The certificate issued under this application was payable on condition that "All agreements and warranties made by

him in his application are found to be true, and he continues to comply with the laws, rules and regulations of the Great Camp for Michigan which are now or may hereafter be in force."

This certificate is made payable to the beneficiary named therein "upon satisfactory proof of the death of the said member."

We have already quoted the statute in relation to the presumption arising from a seven years' absence without intelligence concerning the person. It was undoubtedly enacted to meet a necessity growing out of the experiences of men. This rule has also been recognized in the absence of a statute: See *Heagany v. National Union*, 143 Mich. 186, 106 N. W. 700, and the many cases cited therein. It cannot be said that the insured in subscribing to his application contemplated the adoption of a by-law that would have the effect to render the provisions of a wholesome statute nugatory, and to have the further effect of making it practically impossible to make proofs of death in cases within the occasional experience of men.

There is a discussion of the rights of defendant association to enact by-laws in an opinion written by Justice Ostrander (*Wineland v. Knights of Maccabees*) found in 148 Mich. 608, 112 N. W. 696, in which it is recognized that a by-law to be valid must be reasonable. We hold that the by-law, so far as this case is concerned, is an unreasonable one.

⁵⁷² The remaining question calling for discussion is stated by counsel as follows: "Whether the presumption of the death of Charles Samberg was overcome by the testimony of witnesses who claim to have seen him alive after the seven years, so that it became the duty of the court to direct the verdict for defendant."

Upon that feature of the case the jury were instructed as follows: "You are further instructed that you are carefully to weigh the proofs concerning the presence of Charles A. Samberg in the city of Petoskey in 1908. Of course, you will understand that if the witnesses for defendant saw Charles A. Samberg alive in Petoskey, as claimed, then the plaintiff cannot recover, whether his absence has been explained or unexplained. It is not the duty of the defendant to pay the amount of the certificate held by a member, unless it is shown that the member is dead, either actually or presumptively, as I have explained. If Charles A. Samberg was alive and in Petoskey as claimed, then it is established that the payment of his assessments had made him a living member of the order, in good standing, and nothing more. His wife would have no more claim for the payment of this certificate than the beneficiary of any other living member of the order in good standing. There is no evidence that directly

contradicts the evidence of the witness Frank E. Bowen to the effect that he was acquainted with Charles A. Samberg, and that he saw him, recognized him, and talked with him September 28 or 29, 1908. If you believe that either Bowen or the witness Paul saw Mr. Samberg in 1908, then that ends the case, and your verdict must be for the defendant. The evidence of Bowen can be overcome only upon the finding by you that he was either mistaken in his identification of Samberg, or that he is falsifying. I shall leave it for you to determine whether he did see and know Samberg as he claims. This is to be considered by you in connection with all the other proofs of the plaintiff and defendant in the case respecting the disappearance, absence and all other matters that will enable you to determine whether Mr. Samberg was seen alive in Petoskey in 1908, as claimed. As I have explained, if the defendant has ⁵⁷³ shown by proof that Mr. Samberg was alive in 1908, then your verdict should be for the defendant."

This is as favorable a charge as to the law upon that feature of the case as the defendant is entitled to.

Judgment is affirmed.

Grant, Montgomery, Ostrander and McAlvay, JJ., concurred.

The Effect of Changes in the By-laws of Beneficial Associations as against pre-existing members is discussed in the note to *Strauss v. Mutual Reserve etc. Assn.*, 83 Am. St. Rep. 706. The general rule is, that members of an association who have stipulated in their contract of membership to comply with the laws of the society then in force, or thereafter adopted, are bound by subsequent reasonable amendments to a by-law in force when they became members. However, the power reserved by an association to make changes in its by-laws warrants only reasonable variances in its contracts with members, and not such as are destructive of vested rights: *Lange v. Royal Highlanders*, 75 Neb. 188, 121 Am. St. Rep. 786; *Olson v. Court of Honor*, 100 Minn. 117, 117 Am. St. Rep. 676; *Gilmore v. Knights of Columbus*, 77 Conn. 58, 107 Am. St. Rep. 17, and cases cited in the cross-reference note thereto.

HOOPER v. MUELLER.

[158 Mich. 595, 123 N. W. 24.]

SALOON LEASE—Subsequent Statute Forbidding Sale of Liquor.—The enactment of a local option law after a lease of premises for hotel and saloon purposes has been made, which renders performance by the lessee unlawful, discharges the contract. (p. 401.)

Stone & Watson, for the appellants.

Walsh & Pardee, for the appellees.

596 McALVAY, J. Plaintiffs on June 3, 1903, leased to defendants a certain building in Alma, Michigan, and the hotel furniture and fixtures therein for a term of eight years after May 1, 1903, to be occupied for hotel and saloon purposes, for a rent of six hundred dollars a year payable at the rate of fifty dollars every month in advance. The written instrument contained other ordinary provisions of a lease, and also the following: "The said first parties further agree that in case they are unable to furnish, that is secure, for the said second parties, or the tenant of said parties, two sufficient bondsmen required by law in case of retail dealers in malt and spirituous liquors, at second parties' own proper expense, however, then this lease shall be and become void."

Defendants took possession and occupied and used the premises for the purposes mentioned in the lease until May 1, 1908, on which date, by reason of regular proceedings, the provisions of the "local option law" became operative in Gratiot county, and the sale of intoxicating liquors thereby was prohibited. This suit was brought to recover the rent unpaid, for a period including the months of May and June, 1908. Defendants gave notice with their plea that the adoption of local option in that county avoided the lease after such law went into effect. The facts are all stipulated. Upon the trial the court held with the defendants, and rendered a judgment for the amount of rent due to May 1, 1908, holding that this lease on that date became void and not enforceable. This is the only question in the case. Plaintiffs have brought the case to this court for review, having assigned error upon the holding of the court above stated.

597 It is contended by appellants (1) that the contract did not provide for its abrogation in the event of the adoption of local option, consequently (2) the law would not operate to avoid it on the happening of that event.

It is not argued by either party that the contract was not such a one as the parties at the time could not undertake to perform, and which could not be enforced. The local option law which went into effect in that county during the term of this lease rendered the performance of the contract on the part of plaintiffs impossible. They had agreed that in case of failure to furnish and secure bondsmen for defendants as retail liquor dealers, the lease should be and become void. It may well be said that they contracted with reference to this contingency which has arisen, as well as to any other circumstance which would intervene, either from their own acts or otherwise. This was a part of the consideration which induced defendants to enter into the lease.

In a recent well-considered case decided by the supreme court of Maine, the question involved in the case at bar was before the court. It was held that the enactment of a law

after a lawful contract is made which renders its performance unlawful, discharges the contract: *American Mercantile Exchange v. Blunt*, 102 Me. 128, 120 Am. St. Rep. 463, 66 Atl. 212, 10 L. R. A., N. S., 414, 10 Ann. Cas. 1022, notes, and cases cited. In the case noted it is stated: "The authorities are almost unanimous in holding that, where the act contracted for is rendered unlawful by the enactment of a statute before the expiration of the time for performance, the obligation is thereby discharged"—citing, among other cases, *Cordes v. Miller*, 39 Mich. 581, 33 Am. Rep. 430.

We agree with the trial court that the lease became void for the reasons stated. The findings of the court support the judgment. The rent for which a recovery was allowed became due at stated periods. By an apparent oversight in computing interest to be allowed plaintiffs on the amount they were admittedly entitled to recover, ⁵⁹⁸ the interest on each payment from the time it became due was not included. It is merely a matter of computation. No error is assigned upon this. It was not discovered until after the record was printed.

The judgment, including interest as above suggested, is affirmed, with costs to defendants.

Blair, C. J., and Grant, Moore and Brooke, JJ., concurred.

The Effect of Statutes Making Pre-existing Contracts Illegal is the subject of a note to *American Mercantile Exchange v. Blunt*, 120 Am. St. Rep. 468.

MIDLAND COUNTY SAVINGS BANK v. T. C. PROUTY COMPANY.

[158 Mich. 656, 123 N. W. 549.]

VENDOR AND VENDEE.—The Assignment by the Vendee of an Executory Contract for the sale of land does not relieve him from liability thereunder nor create any liability on the part of his assignee to the vendor's assignee holding the legal title. (p. 402.)

VENDOR AND VENDEE.—Assignment by Vendor.—If an Executory Contract for the sale of land contains no provision for a forfeiture, and creates no lien for unpaid purchase money and no security therefor except insurance on the buildings, the demand of the vendor's assignee who holds the legal title is an ordinary money debt secured by the contract. (p. 402.)

VENDOR AND VENDEE.—Remedies of Vendor's Assignee.—The assignee of the vendor in an executory contract for the sale of land, who holds the legal title, has a remedy at law against those whose promise to pay he holds, or the remedy to foreclose the vendor's lien. (p. 402.)

VENDOR AND VENDEE—Lien on Chattels of Vendee on Premises.—The vendor in an executory contract for the sale of land acquires no lien, in the absence of agreement, upon property which the vendee, in taking possession, moves upon the premises. (p. 402.)

CORPORATION—Effect of Transfer of Assets to Partnership. If the assets of a corporation transferred to a partnership exceed the corporate debts assumed by the partnership, a creditor of the corporation may make his debt out of the transferred assets, and is entitled to a lien thereon enforceable if the partnership does not pay, but he cannot hold the firm "personally responsible." (p. 403.)

William D. Gordon, for the complainant.

E. P. Rice, Alfred J. Mills and S. F. Master, for the appellant.

657 OSTRANDER, J. Complainant holds the legal title to certain premises and is the assignee of the former owner, the vendor in an executory contract for the sale of the premises to T. C. Prouty Company, a corporation. The T. C. Prouty Company, Limited, a partnership, is, it is claimed, the assignee of the vendee in the land contract. This fact would not relieve the corporation (*Foley v. Dwyer*, 122 Mich. 587, 81 N. W. 569), nor create any liability to the complainant on the part of the assignee.

The land contract contains no provision for a forfeiture.

658 It creates no lien for the unpaid purchase money, and no security therefor, except insurance upon the buildings. The demand of complainant is, therefore, an ordinary money debt secured by the contract: *Fitzhugh v. Maxwell*, 34 Mich. 138. Complainant had its remedy at law against those whose promise to pay it holds (*Foley v. Dwyer*, 122 Mich. 587, 81 N. W. 569), or the remedy it has chosen, to foreclose the vendor's lien: *Fitzhugh v. Maxwell*, 34 Mich. 138; *Gray v. Hill*, 105 Mich. 189, 63 N. W. 77; *Walker v. Casgrain*, 101 Mich. 604, 60 N. W. 291.

The court below determined and stated the amount due, and the amount to become due upon the land contract, ordered a sale of the premises described in the contract, found the defendant the T. C. Prouty Company, Limited, to be "personally liable for the debt secured by said contract," and ordered it to pay any deficiency arising from the sale. It also found and stated and made provision for the enforcement of a lien "in the nature of a chattel mortgage in favor of said complainant" and against a large quantity of personal property and machinery belonging to and in the possession of said partnership. It is clear that the vendor in a land contract, in the absence of agreement, acquires no lien upon the property which the vendee in taking possession moves upon the premises. It might be that the failure to place the property on the premises and the removal of it from the premises would in a particular case be a violation

of the contract, but I do not perceive how it would create a lien for the purchase money upon the property so removed.

There is no evidence of a promise of the defendant partnership to the complainant to pay the debts of the corporation. Complainant can reach the assets of the corporation which were transferred to the partnership only upon the theory that it is a creditor of the corporation out of whose assets it was and is entitled to make its debt. It may do this, and may be held to have a lien upon the assets of the defendant corporation which were transferred ⁶⁵⁹ to the defendant partnership, to be enforced if the defendant partnership does not pay the debt.

It appears that the assets of the corporation transferred to the defendant partnership were valued at a considerable sum over and above the debts of the corporation which were assumed by the partnership. But I do not think the defendant partnership can be held to be "personally liable for the debt," and that the decree in this respect should be modified. The effect of the change may be inconsiderable in fact. It will at least save the rights of the defendant partnership as against those stockholders whose interest in it was paid for by the assets of the corporation.

The decree should also provide that the complainant convey to the purchaser if a sale is made, or to the defendant partnership if it pays the debt. In other respects the decree should be affirmed.

Grant, Montgomery, Hooker and Moore, JJ., concurred.

An Assignee of a Contract for the Purchase of Land is not personally liable for the unpaid purchase price, though the contract of sale and purchase provides that its stipulations shall apply to and bind the heirs, executors, administrators and assigns of the respective parties. The covenant on the part of the purchaser is personal, and hence the assignee cannot be charged with its performance: *Lisenby v. Newton*, 120 Cal. 571, 65 Am. St. Rep. 203. See, also, *Myers v. Stone*, 128 Iowa, 10, 111 Am. St. Rep. 180; *Montgomery v. De Picot*, 153 Cal. 509, 126 Am. St. Rep. 84; *Cutting Packing Co. v. Packers' Exchange*, 86 Cal. 574, 21 Am. St. Rep. 63, on the effect of the assignment of his contract by the vendee of land. As to the effect of the assignment by the vendor of his contract of sale, see *Lamm v. Armstrong*, 95 Minn. 434, 111 Am. St. Rep. 479.

GOLDEN STAR LODGE NO. 1 v. WATTERSON.

[158 Mich. 696, 123 N. W. 610.]

BENEFIT SOCIETY—Revocation of Charter for Misconduct.—The failure of a subordinate lodge to convict one of its members charged with defalcation of funds while treasurer of the grand lodge does not warrant a revocation of its charter on the ground of improper conduct. (p. 407.)

BENEFIT SOCIETY—Revocation of Charter.—A Grand Lodge cannot Summarily revoke the charter of a subordinate lodge without opportunity for hearing and defense. (p. 407.)

BENEFIT SOCIETY—Right of Subordinate Lodge to Resort to Courts.—The rule that the remedies within a beneficial association must be exhausted before resort may be had to the courts does not bar a subordinate lodge from resorting to the courts to effect the restoration of its charter which has been revoked wrongfully by the grand mistress, where no appeal is provided for subordinate lodges, the only appeal being for aggrieved members, and members of the injured lodge cannot gain membership in other lodges as a matter of right. (p. 407.)

BENEFIT SOCIETY—Revocation of Charter—Remedy by Mandamus.—Where the charter of a subordinate lodge has been revoked without authority by the grand mistress of the association, as a result of which the members will be deprived of a large amount of insurance unless they gain admittance to other lodges, the subordinate lodge is entitled to a writ of mandamus to compel the officers of the association to vacate the order revoking the charter. (pp. 407, 408.)

BENEFIT SOCIETY—Jurisdiction of Action.—The Migratory Headquarters of a beneficial association organized under the laws of the state cannot control the jurisdiction of the courts when the rights of citizens of the state are involved; the domicile of the association, not the domicile of its officers, controls the jurisdiction of the courts. (pp. 408, 409.)

APPEARANCE.—Nonresident Parties Who Voluntarily Appear and Answer thereby submit themselves to the jurisdiction of the court. (p. 409.)

BENEFIT SOCIETY—Revocation of Charter—Assessments.—Where the action of the grand mistress of an association is illegal in revoking the charter of a subordinate lodge, it is the duty of the grand treasurer to receive the assessments which the subordinate lodge is legally obligated to pay. (p. 409.)

MANDAMUS—PARTIES.—In Mandamus Against the Grand Lodge of a beneficial association it is proper to make parties all its officers who have a duty to perform in maintaining the legal rights of the relator. (p. 409.)

John B. McIlwain, for the relators.

Cady & Crandall, for the respondents.

697 GRANT, J. The Grand Lodge of the Ladies' Auxiliary of the Brotherhood of Railroad Trainmen is a fraternal beneficiary society, organized under Act No. 119, Public Acts of 1893. The relator in this case, Golden Star Lodge No. 1, was the first lodge organized under its charter. The grand

lodge adopted a constitution of fifty sections, and adopted by-laws and general rules to the number of eighty sections. The organization extends into other states. Among its officers is the grand mistress, who, during the transactions covered by the record, held that office. Section 45 of the constitution provides: "The charter of any subordinate lodge may be suspended or revoked by the grand mistress for any of the following reasons"—specifying the reasons; and among them is that of "improper conduct." It is unnecessary to state the other reasons, as they have no bearing upon the controversy. The relator here is composed of fifty-two members, each of whom has a certificate of insurance to the amount of five hundred dollars. The constitution provides also for a grand secretary and treasurer,⁶⁹⁸ and this office was held by the respondent Augusta M. Statzer. One Amy Downing, a member of the relator, had been, for several years, the grand secretary and treasurer of the grand lodge. No place is fixed by the constitution for the headquarters of the grand lodge, but the home of the grand lodge officers has been its customary headquarters. Prior to Mrs. Downing's removal, the headquarters had been at Port Huron, where is located the relator.

Mrs. Downing was charged with the defalcation of funds intrusted to her to the amount of three thousand two hundred and forty-two dollars and twenty-three cents. An examination and an audit, by the grand executive board, of her accounts, showed a deficit of the above amount. This board reported that she either knowingly, negligently, or willfully failed to account for the same. She was thereupon removed from office.

On November 17, 1908, one Minnie Standtlander, mistress of Lodge No. 261, Aurora, Illinois, sent a communication to relator, charging Mrs. Downing with defrauding the grand lodge. As required by the rules of the order, relator appointed a committee of five to investigate the charge. The committee reported to the relator that they found no evidence of fraud on the part of Mrs. Downing, meaning, as they expressed it, that "she had no guilty intent." Mrs. Downing was thereupon acquitted by a vote of the members of the relator. Upon the record of this meeting appears the following: "Sister Rigney asked permission of the lodge to publish their findings in the case they had just tried. Moved by Sisters Gee and Sutherland that permission be granted. Carried. After some discussion it was decided to let it stand as it was, and not give anything for publication."

This action of the relator was published in a newspaper at Port Huron. The action of the relator acquitting Mrs. Downing, with a clipping from the newspaper announcing the action, was sent to the respondent Mrs. Watterson.

On February 17, 1909, Mrs. Watterson sent a communication ⁶⁹⁹ "to the officers and members of Golden Star Lodge No. 1," notifying them that the charter of Golden Star Lodge No. 1 would be revoked for failure to convict Mrs. Downing, and for violating the rules of the order in publishing an account of her acquittal. This communication further stated: "Golden Star Lodge No. 1 is hereby given opportunity, in accordance with section 45, Constitution Grand Lodge, to answer the within charges before March 1, 1909."

The relator answered this communication, alleging that the trial was in strict accord with the rules of the order, and that the finding was not published by its authority. On March 1, 1909, respondent Watterson, as grand mistress, sent a communication to the relator revoking its charter for failure to convict Mrs. Downing, and because it had failed to give excuse "for publishing the report of the committee or proof that it was not published by the members of Golden Star Lodge No. 1." Meanwhile the respondent the grand treasurer had refused to receive the relator's dues, evidently for the reason that its charter had been revoked, and it was no longer a member of the order. Thereupon the relator filed its petition in the circuit court for the county of St. Clair to compel the respondent Watterson to set aside the order revoking its charter and compel the respondent Statzer to receive the assessments of its members, and that the relator be restored to its rights and benefits in the grand lodge. An order to show cause was issued, the respondent answered, issues were framed, testimony taken, and the writ issued, and the case is now before us for review upon certiorari.

Respondents object to the order of the court for the following reasons:

"(1) Because the action of the grand mistress in revoking the charter of Golden Star Lodge No. 1 was in accordance with the constitution, laws, and rules governing the society.

"(2) Because the members of Golden Star Lodge No. 1 ⁷⁰⁰ are required to exhaust their remedies within the order before appealing to the courts. This they have not done. They might have: (a) Appealed to the grand lodge. (b) Applied for a dispensation transferring them to a sister lodge.

"(3) Because a writ of mandamus will not issue against officers of an unincorporated society.

"(4) Because a writ of mandamus will not issue out of our courts against citizens of another state.

"(5) Because the order is erroneous, in that it authorizes the issuance of a writ of mandamus directing two separate and distinct officers to perform certain and distinct duties which are not joined in character."

1. The failure of the relator to convict Mrs. Downing constitutes no ground for revoking the charter. This is con-

ceded in respondents' brief. The member convicted has an appeal to the grand lodge, but there is no provision for an appeal in case of acquittal. Rule 2 of general rules governing subordinate lodges provides: "Secret work and all business of the lodge shall be kept inviolate; and any member who shall reveal any of the secrets of this lodge shall, upon conviction thereof, be expelled, suspended, or reprimanded, as the lodge may determine."

The learned circuit judge held that this rule had no relation to this issue. He furthermore found, as a matter of fact, that there is no testimony in the record to show that any particular member of the lodge thus violated this rule of secrecy. There was testimony upon the subject, and we will not review the finding of the fact made by the circuit judge. It follows that both reasons for revoking the charter have no foundation in fact. The proceeding on the part of the grand mistress was summary, and without any attempt at a hearing. It is true she accorded the relator the right to answer her letter of notification. She received the answer, which denied the charges made. Without giving a chance for argument, proofs, or hearing, she assumed authority to revoke the charter. The only defense to this action made by her attorneys is that the charter confers the right to this summary procedure. ⁷⁰¹ It is contrary to every principle of justice and fair play. Such authority would result in conferring upon the grand mistress the arbitrary power to revoke the charter of any subordinate lodge, without any good reason, and without a hearing.

2. There is no provision in the charter of this society for an appeal by a subordinate lodge. The only appeal provided is by an aggrieved member; and, even in that case, the charter does not make the determination of the appellate tribunal final. Consequently *Fillmore v. Knights of Maccabees*, 103 Mich. 437, 61 N. W. 785, and like cases have no application to the facts of this case. It is, however, insisted that it was the duty of the members of the relator to apply for admission to some other subordinate lodge; but such applicant cannot become a member of some other lodge as a matter of right. Four black balls will defeat her election; and, besides, she is required to pay a fee of fifty cents as a condition to admission. The law will not leave property rights of members to such an uncertain remedy. The fifty-two members composing the relator are one body of individuals, just as much as are the stockholders of a corporation. Their organized body is authorized to represent them in controversies which involve the rights of all. In these controversies they have chosen certain officers to speak for them and to protect their rights. One suit can settle the rights of all; but respondents' contention would leave each

member to fight her own battle. I find no authority sustaining this contention.

3. It is next insisted that the writ of mandamus will not issue against officers of an unincorporated society. The grand lodge and the relator are organized under the laws of this state, above cited. The grand lodge insures its members by and under the authority of the state, and by no other right. It cannot organize under the laws of the state, and then deny to its members the right of the state, by its proper officers and tribunals, to compel those incorporated under it to perform the duties imposed upon ⁷⁰² them by law, and to restrain their illegal action. The act (section 1) declares that fraternal benefit associations organized under it are corporations, societies, or voluntary associations organized and carried on for the sole benefit of their members and their beneficiaries, and not for profit. To deny the wronged members of this association the remedy by mandamus would in effect deprive them of any remedy. The relator cannot proceed by injunction, for the wrong has been accomplished. Neither the relator nor its members can proceed in an action at law for damages, because the organization provides no funds for the payment of such damages, and the damages are too indefinite to be estimated: *Lavalle v. Société St. Jean Baptiste de Woonsocket*, 17 R. I. 680, 24 Atl. 467, 16 L. R. A. 392. The only remedy left is the restorative remedy by writ of mandamus, which reinstates the member and does justice to all concerned: *Lavalle v. Société St. Jean Baptiste de Woonsocket*, 17 R. I. 680, 24 Atl. 467, 16 L. R. A. 392; *Allnutt v. Subsidiary High Court A. O. F.*, 62 Mich. 110, 28 N. W. 802; *Attorney General v. American Express Co.*, 118 Mich. 682, 77 N. W. 317. Such organizations are endowed by the law with a legal entity, and may sue or be sued: 3 Comp. Laws, sec. 10,025; Pub. Acts 1907, Act. No. 175.

Important and tangible property rights are involved. By the act of the grand mistress the entire membership, comprising the relator, is deprived of twenty-six thousand dollars of insurance, unless by grace its members may be admitted into other lodges. In *Burt v. Grand Lodge F. & A. M.*, 66 Mich. 85, 33 N. W. 13, no property rights were involved, and the court found that the relator, Burt, was not, and never had been, a member of the grand lodge, or of the lodge that originally undertook to expel him. Such cases do not affect the question in the instant case.

4. Respondents are citizens of another state, and it is urged that the writ of mandamus will not issue against them. Migratory headquarters of an association like this, ⁷⁰³ organized under the law of Michigan, cannot control the jurisdiction of the courts when the rights of the citizens of

Michigan are involved. The domicile of the association, not the domicile of its officers, controls the jurisdiction of the courts. Under the respondents' contention, an aggrieved subordinate lodge in Michigan, the home of the association, or one of its members, would be compelled to resort to the courts of California or Texas if the grand mistress of the order should be located and have her home in either of those states. It appears that the grand lodge had made no provision for a state agent upon whom service could be made. Service of the order to show cause was therefore made, under a proper showing, upon another subordinate lodge located in St. Clair county. The validity of this service is not contested. The respondents, it appears, were notified of such service and voluntarily appeared and answered. They, therefore, submitted to the jurisdiction of the court. Further discussion is unnecessary.

5. The last contention is that the respondents were improperly joined in this proceeding, and therefore the suit must fail. It is claimed that the respondents were acting in unison, and if they were, they were properly joined. Undoubtedly the action of the grand treasurer was based upon the order of the grand mistress in revoking the charter. Each had a duty to perform. The action of the grand mistress being illegal, it was the duty of the grand treasurer to receive the assessments which relator was legally obligated to pay. The objection is purely technical, and does not affect the substantial rights of the parties. It was entirely proper to make all the officers of the defendant parties who had a duty to perform in maintaining the legal rights of the relator.

The learned circuit judge wrote an elaborate opinion, setting forth in full the correspondence between the parties, the facts found, and his legal conclusions. Without ⁷⁰⁴ publishing it, we refer to it, as those who have similar questions will find it a valuable opinion.

The judgment is affirmed.

Montgomery, Ostrander, Hooker and Moore, JJ., concurred.

The Jurisdiction of Courts Over Voluntary Unincorporated Associations is discussed in the notes to *Otto v. Journeyman Tailors' P. & B. U.*, 7 Am. St. Rep. 160; *Kearns v. Howley*, 68 Am. St. Rep. 856; *Morris St. Baptist Church v. Dart*, 100 Am. St. Rep. 734.

CASES
IN THE
SUPREME COURT
OF
MINNESOTA.

KOLARS v. BROWN.

[108 Minn. 60, 121 N. W. 229.]

ESTATE OF DECEDENT—Rights of Judgment Creditor of Heir.—A judgment recovered against an heir after the death of his ancestor attaches to the heir's interest in the estate subject to the condition that the land may be sold to pay the debts of the decedent and the expenses of administration. (By the editor.) (p. 411.)

EXECUTOR'S SALE—Whether Converts Land into Personalty. A probate sale of real property changes the character thereof only so far as is necessary to effect the purpose of the sale, and any surplus after such purpose has been effected should be treated as real estate. (By the editor.) (p. 411.)

EXECUTOR'S SALE—Heir's Right to Surplus Proceeds.—When land is sold in proceedings in the probate court for the payment of debts and expenses of administration, the surplus proceeds, if any, go to the heir who would have taken the land. (p. 411.)

EXECUTOR'S SALE—Right to Proceeds of Judgment Creditor of Heir.—When real estate is sold under the direction of the probate court for the purpose of paying debts and expenses, the conversion of the real estate into money is complete only to the extent and for the purpose for which the sale was authorized. So far as these purposes do not extend, the property retains its former character in respect of the rights of the owner. Therefore any surplus must be applied to the payment of a judgment obtained against the heir, and duly docketed after the death of the ancestor and before the sale. (p. 412.)

(Syllabi by the court except when stated to be by the editor.)

Charles C. Kolars, pro se.

M. R. Everett, for the respondent.

⁶⁰ ELLIOTT, J. On September 22, 1901, Minerva Brown died intestate, leaving certain real estate in the county of Le Sueur, Minnesota. An administrator was not appointed until April 10, 1906. On December 7, 1903, B. C. Hughes recovered a judgment in the district court ⁶¹ of Le Sueur county against William W. Brown, who was the son and one of the heirs of Minerva Brown. It became necessary to sell the real estate for the purpose of paying the debts of the decedent and the expenses of administration. After these

claims were paid there remained of the proceeds of the sale the sum of fifteen hundred and twenty-seven dollars and ninety-five cents, of which one hundred and thirty-eight dollars and ninety cents was assigned as the share of William W. Brown. C. C. Kolars, who had a claim against William W. Brown, brought suit against him, and on December 19, 1907, served garnishment papers upon the administrator for the purpose of reaching Brown's share of the estate. The trial court held that the judgment creditor was entitled to the money.

Upon the death of Minerva Brown the title to the real estate vested in the heirs, subject to the condition that it might be sold, if necessary, to pay the debts of the deceased and expenses of administration: *State v. Probate Court of Ramsey County*, 25 Minn. 22; *Noon v. Finnegan*, 29 Minn. 418, 13 N. W. 197; *Hill v. Townley*, 45 Minn. 167, 47 N. W. 653; *Hanson v. Nygaard*, 105 Minn. 30, 127 Am. St. Rep. 523, 117 N. W. 235. The lien of the judgment attached to the judgment debtor's interest in the real estate, subject to the same conditions.

A sale of real property under proceedings in the probate court changes the character of the property only so far as is necessary to effect the purpose for which the sale was made, and any surplus made after the purpose of the sale has been effected should be treated as real estate. As said by Judge Woerner: "The conversion is complete and effectual only to the extent and for the purposes for which the sale was authorized, whether by the will, or by the order of the court. So far as these purposes do not extend, and in so far as any of them do not take effect in fact or in law, the property retains its former character in respect of the rights of its owner, and passes accordingly. The surplus of the proceeds of a sale ordered for the payment of debts remaining after the debts and expenses of administration have been discharged retains the character of real estate for the purpose of determining who is entitled to receive it, and goes to the persons to whom the real estate would have gone but for the conversion": 2 Woerner on American Law of Administration, sec. 481. As sustaining this rule, see *Hovey v. Dary*, 154 Mass. 7, 27 N. E. 659; *Allen v. Trustees*, 102 Mass. 262; *Griswold v. Frink*, 22 Ohio ⁶² St. 79; *Garner v. Wood*, 71 Md. 37, 17 Atl. 1031; *Cronise v. Hardt*, 47 Md. 433; *Williamson v. Mason*, 23 Ala. 488; *Read v. Bostick*, 6 Humph. (Tenn.) 321; *Sears v. Mack's Assignees*, 2 Bradf. Sur. (N. Y.) 394; *Pennell's Appeal*, 20 Pa. 515; *Ackerman v. Gorton*, 67 N. Y. 63; *Denton v. Tyson*, 118 N. C. 542, 24 S. E. 116; *Ball v. Green*, 90 Ind. 75; *Coombs v. Jordan*, 3 Bland (Md.), 284, 22 Am. Dec. 236; *Erb v. Erb*, 9 Watts & S. (Pa.) 147. It has been held that, although the fund goes to the person

who would have taken it as real estate, he takes it as money, and not as real estate, which means no more than that, after the death of the heir, the money thus received goes to his personal representative as personal property.

The rule to which we have referred is supported by *Ness v. Davidson*, 49 Minn. 469, 52 N. W. 46, although the facts of that case are not exactly the same as those we are now considering. It follows that, as the real estate would have gone to Brown and been subject to the lien of the judgment against him, the proceeds of the sale of the land must follow the same course. The judgment creditor's rights had attached even before the appellant's action was commenced, and neither justice nor reason requires that the change of form resulting from the necessities of administration should be allowed to prejudice his rights. This fund was the proceeds of the sale of the real estate upon which Hughes had a lien, and should go to those who were beneficially interested in the real estate: See *Culbertson v. Cox*, 29 Minn. 309, 43 Am. Rep. 204, 13 N. W. 177.

Judgment affirmed.

A Conversion of Land into Money by mere act of the law, as by sale under an order of court, is said to work a conversion into personalty only so far as is necessary to accomplish the particular purpose of the sale: *Picken's Executors v. Kniseley*, 36 W. Va. 794, 15 S. E. 997. Surplus proceeds of the land of an heir, sold by order of the probate court to pay debts of the ancestor, have been held to remain real estate: *Fidler v. Higgins*, 21 N. J. Eq. 138.

As to the Estates and Interests to Which Judgment Liens will attach, see the note to *Flint v. Chaloupka*, 117 Am. St. Rep. 776.

HENDERSON v. MURRAY.

[108 Minn. 76, 121 N. W. 214.]

TRUST—Statute of Frauds.—A Mere Verbal Promise by a Grantee to hold the legal title to land in trust for the benefit of the grantor and to reconvey it on demand, where there is no bad faith except that which arises from a mere refusal to carry out the promise, is void within the statute of frauds and uses and trusts, and the trust cannot be enforced. (p. 415.)

TRUST—Title to Land Inequitably Acquired.—Where, however, a party obtains the legal title to land from another by fraud, or by taking advantage of confidential or fiduciary relations, or in any other unconscientious manner, so that he cannot justly retain the property, equity will impress a constructive trust upon it in favor of the party who is equitably entitled to it. (p. 415.)

TRUST—Intention of Grantor to Create — Instructions. — The trial court erred in charging the jury to the effect that if the grantor in the deed here in question, and under which the plaintiff claims, executed it simply for the purpose of investing the grantee with the

legal title, intending to retain the dominion and ownership of the land, the defendant was entitled to a verdict. (p. 416.)

TRUST—Promise of Grantee to Reconvey—Intention of Grantor.—Where the legal title to land is conveyed upon the oral promise of the grantee to hold in trust and reconvey on demand, the intention of the grantor is immaterial, though it is otherwise when the conveyance is made under such circumstances that equity will raise a constructive trust, for if there is no bad faith, except that which arises merely from refusing to carry out the promise, the verbal trust is void and the absolute title vests in the grantee. (By the editor.) (pp. 416, 417.)

(Syllabi by the court except when stated to be by the editor.)

Alva R. Hunt and Charles H. March, for the appellant.

Foster & Stites, for the respondent.

77 **START, C. J.** This action was brought in the district court of the county of Meeker against Michael Murray to recover the possession of eighty acres of land which the plaintiff alleged that he owned in fee and that the defendant was in possession thereof. The answer admitted that the defendant was in possession, denied the plaintiff was the owner of the land, and alleged title and possession in himself for more than twenty years next before the commencement of this action. Michael Murray died pending the litigation, and his son and executor, Thomas Murray, was substituted as defendant. Verdict for the defendant, and the plaintiff appealed from an order denying his motion for judgment notwithstanding the verdict or for a new trial.

1. The first claim made by the plaintiff is to the effect that there is no evidence to support the verdict, but, on the contrary, the evidence conclusively shows that the plaintiff is the owner and entitled to the possession of the land, and therefore the trial court should have directed a verdict in his favor as requested. The evidence as to many material matters was conflicting; but it was sufficient, if satisfactory to the jury, to establish facts relevant to this question as follows:

On March 23, 1903, Michael Murray was the owner and in possession of the land in question, and had been since 1868, and on that day he made in form a deed of the land to Rev. Patrick J. McCabe, who for several years prior thereto, and until a short time before the making of the deed, was the priest in charge of the church of which Michael Murray was a member, during which time he confided in Father McCabe, was accustomed to consult with him when he was in trouble, also as to business matters, and to follow his advice. At the time the deed was so made, Murray was a widower, over seventy years of age, ill and childish, and was having some trouble with his children. He then consulted his former spiritual and temporal adviser, Father McCabe, and told

him his troubles, and that his children wanted to take the land away from him, who repeatedly advised and urged him to deed the land to him (McCabe), and he would deed it back to him whenever he requested it, and would keep him out of trouble with his family. ⁷⁸ Murray thereafter, without the knowledge of Father McCabe, but relying upon such advice and promise, and believing that if he acted upon them he would be relieved of his troubles, and that the promise would be fulfilled, made in form a deed of the land, in which Father McCabe was named as grantee, and caused it to be recorded and returned to himself, and always kept it in his exclusive possession. The grantee, McCabe, never had the deed at any time in his possession; but he gave testimony tending to show that he had notice of the making of the deed and accepted it.

Murray so made the deed without any consideration, although it was recited in the deed that it was made in consideration of one dollar and love and affection, and without any intention of vesting in the grantee any beneficial interest in the land, or any dominion or control thereof. He continued in the actual and exclusive possession of the land until his death, which occurred after the sale of the land on execution as hereinafter stated. He requested the grantee, McCabe, to deed the land back to him; but he never did. On July 15, 1899, the firm of Wheaton, Rogers & Dennis recovered and docketed a judgment in the county of Meeker for two hundred and four dollars against James C. McCabe, which was amended by order of the district court, dated September 15, 1903, by inserting therein the judgment debtor's true name, Patrick J. McCabe, the grantee named in the deed. Execution was thereafter issued on the judgment, and the land levied upon and sold to plaintiff on November 23, 1903, for two hundred and thirty-seven dollars and sixty cents, the amount of the judgment and costs of sale. The plaintiff was not present at the sale, and the land was bid off in his name by the attorney of the judgment creditors by their direction. No money was paid by anyone to the sheriff, who, by direction of the attorney, executed a certificate of sale of the land, which was recorded, and the execution satisfied. The attorney of the judgment creditors was informed, before the levy was made, that Michael Murray simply deeded the land to McCabe pursuant to his advice to hold in trust, and that the grantor was still in possession. No redemption was made from the execution sale.

The plaintiff claims that he is a bona fide purchaser of the land without notice, and protected by our registry act: Rev. Laws 1905, sec. 3357. The record does not justify the claim, for the grantor was ⁷⁹ at all times, until after the plaintiff's alleged purchase at the execution sale, in the ac-

tual possession of the land, and the attorney, who represented the judgment creditors at the execution sale and by their direction bid off the land in the name of the plaintiff, was expressly advised of Murray's rights in the land before the sale was made: *Baker v. Thompson*, 36 Minn. 314, 31 N. W. 51. Again, the burden was on the plaintiff to show that he was a purchaser without notice for value: *Roussain v. Patten*, 46 Minn. 308, 48 N. W. 1122. See, also, *School District No. 10 v. Peterson*, 74 Minn. 122, 73 Am. St. Rep. 337, 76 N. W. 1126. The plaintiff offered no evidence tending to show that he was in fact a bona fide purchaser for value.

This case, then, is to be considered as if it were one between the grantor, Murray, and the grantee, McCabe. If McCabe had brought this action, the question is whether he would have been entitled, as a matter of law, upon the facts we have stated, to recover the possession of the land from the defendant. It is the contention of the plaintiff that he would be entitled so to recover the possession of the land because the trust agreement was void. It is true that a mere verbal promise by a grantee to hold the legal title to land in trust for the grantor and return it on demand, where there is no bad faith, except that which arises from a mere refusal to carry out the promise, is void within the statute of frauds and of uses and trusts, and the trust cannot be enforced: *Randall v. Constans*, 33 Minn. 329, 23 N. W. 530; *Connelly v. Sheridan*, 41 Minn. 18, 42 N. W. 595; *Mercantile Nat. Bank v. Parsons*, 54 Minn. 56, 40 Am. St. Rep. 299, 55 N. W. 825; *Luse v. Reed*, 63 Minn. 5, 65 N. W. 91. But it is equally true that where a party obtains the legal title to land by fraud or bad faith, or by taking advantage of confidential or fiduciary relations, or in any other unconscientious manner, so that he cannot justly retain the property, equity will impress a constructive trust upon it in favor of the party who is equitably entitled to it. Such trusts for convenience are termed *ex maleficio*, or *ex delicto*, and are practically without limit: 3 Pomeroy's Equity Jurisprudence, sec. 1053.

The evidence, if satisfactory to the trial court and jury, was sufficient to bring this case within the class of cases in which the ⁸⁰ court declares a trust *ex maleficio* by reason of the inequitable conduct of the grantee. The answer alleges facts which, if found true, would raise such a trust and defeat the plaintiff's claim for the possession of the land. It also alleges that the deed was never delivered. The record shows that the case was not determined upon the equities alleged in the answer, nor upon the issue whether the deed was ever delivered, which was a question of fact under the evidence. If the deed was never delivered, no title passed. This question was not submitted to the jury. It follows that the

plaintiff is not entitled to judgment notwithstanding the verdict; for, if reversible error was committed on the trial, this is a case for a new trial, and not for judgment absolute.

2. This brings us to the question whether the plaintiff, upon the record, was entitled to have his motion for a new trial granted. The trial court instructed the jury as follows:

"I think the only facts for you to determine from all of the evidence, the facts and circumstances in evidence in the case, are these: At the time that Michael Murray executed and delivered the deed of the land in question to Patrick J. McCabe, did he do so with the intent to invest the grantee, McCabe, with the ownership and title of the land in question? If he did, and you so determine from the facts in the case, plaintiff is entitled to your verdict. On the other hand, if you are unable to so find, there is another question in the case, and that is: Did the grantor, Murray, deed this land simply for the purpose, here claimed, of investing McCabe with the legal title, and did he intend to retain the dominion and ownership of the land? If he did, and you so determine from all of the facts and circumstances in evidence in the case, it follows as a matter of course that the defendant is entitled to your verdict." And, further, that:

"If McCabe only held the bare legal title in trust for Murray, without any beneficial personal interest in the land, the sale under the execution did not give the plaintiff any title to the land."

The giving of the foregoing instructions is assigned and urged as error. The instructions were, in effect, that if Murray made the deed for the purpose of vesting in McCabe the legal title in trust for himself, with the intention to retain dominion and the beneficial ownership of the land, then the defendant was entitled to a verdict. ⁸¹ That this is a correct summary is apparent from a mere reading of the instructions, which make the intention of Murray in executing the deed the controlling question in the case. That this was the understanding of counsel for the defendant is apparent from his brief, in which he says: "The intent of Murray in executing the deed was the principal question in the case. All the other questions were merely incidental to it."

It is too obvious to justify any extended argument that the instructions were radically erroneous. In every case of the transfer of the legal title to land, to be held by the grantee upon a verbal promise to hold it in trust for the grantor and to reconvey it on demand, there is never any intention on the part of the grantor to part with the beneficial ownership or control of the land. In such a case the intention of the grantor is immaterial; but it is otherwise when the land

is conveyed under circumstances where equity will raise a constructive trust, for if there was no bad faith, except that which arises merely from refusing to carry out the promise, the verbal trust is void, and the absolute title vests in the grantee, if the deed is in fact delivered. It follows that the plaintiff is entitled to a new trial on account of the erroneous instructions.

With reference to a new trial, it is proper to state that the judgment in an action between Murray, as plaintiff, and McCabe, as defendant, adjudging that Murray was the owner of the land, rendered after the judgment through which the plaintiff herein claims was duly docketed, was not competent evidence against such plaintiff for any purpose.

Order reversed and a new trial granted.

The Creation of Trusts in Land by Parol is the subject of a note to Insurance Co. of Tennessee v. Waller, 115 Am. St. Rep. 774.

CAMPBELL v. CHICAGO GREAT WESTERN RAILWAY COMPANY.

[108 Minn. 104, 121 N. W. 429.]

NEGLIGENCE.—Attempt to Stop a Driverless Horse Near Railroad.—Plaintiff saw a horse and wagon without a driver approach the railroad tracks at a constantly used crossing of a busy city street. He took hold of the reins suspended from the top of the vehicle. Defendant's railroad train, while the engine whistle was being blown and the train was running at the rate of thirty-five miles an hour, came suddenly into view around a sharp curve some two hundred feet away. The horse became frightened, plunged forward, and jerked plaintiff on the track. The oncoming train struck him, and produced the injuries for which the jury awarded damages. Its verdict is sustained, despite objection based on the absence of proof of defendant's negligence, on plaintiff's contributory negligence, on the instructions given by the trial court, and on other grounds. (pp. 418, 419.)

NEGLIGENCE.—One Who Goes Near Enough to a Railway Track to be in danger from any cause is required by law to exercise due care to avoid harm. This rule does not, however, amount to a hard-and-fast requirement that such a person must stop, look, and listen, and continue to look under all circumstances and at all times; nor is such person bound to anticipate negligence on the part of persons operating trains on such a track. (p. 418.)

Lafayette French, A. G. Briggs and H. Loomis, for the appellant.

S. D. Catherwood and Dunn & Carlson, for the respondent.

¹⁰⁵ JAGGARD, J. Plaintiff saw a wagon with a horse attached, but without a driver, approaching defendant's rail-

road tracks at a constantly used crossing of a busy city street. As the horse was about to step on the tracks, plaintiff took hold of the reins, which were suspended from the top of the wagon by a hook. At this point, if he had looked, he could not have seen up defendant's tracks toward the north more than about two hundred feet, because the tracks there curved sharply as they passed "a little wooden building" about that distance from the crossing. While plaintiff was backing this horse away from the railroad track, and when he was safe under ordinary circumstances, defendant's train, running thirty-five miles an hour, burst into view some two hundred feet to the north. Sharp blasts of the whistle were blown, the horse became frightened, plunged forward, jerked ¹⁰⁶ plaintiff upon the track, and ran on across the tracks. Defendant's train hurled plaintiff aside and inflicted the injury for which recovery is here sought. The jury found a verdict for him in the sum of fifteen hundred dollars. This appeal was taken from the order of the trial court denying the defendant's usual motion in the alternative.

1. The facts have been stated, as they must be under the circumstances, in accordance with the construction of the testimony introduced most favorable to the plaintiff. On argument in this court, defendant's negligence was frankly admitted for the purposes of this appeal. The speed at which the train was running the jury might have found was wrongful. It was contended, however, that the affirmative testimony that the bell was ringing so overbalanced plaintiff's testimony that he did not hear the ringing of the bell as to exclude this consideration from the determination of negligence. This, however, is a consideration which, under the present circumstances, affects plaintiff's contributory negligence, not defendant's actionable wrong.

2. The gist of this appeal upon the merits is that plaintiff was shown to have been guilty of contributory negligence as a matter of law, or that the circumstances in connection with this contributory negligence were such as to require a new trial to be granted. We are of opinion that the trial court properly refused to accept either of these views. Plaintiff was engaged in caring for the property of another, then in a position of peril to itself and of probable danger to defendant's property and to the passengers it was engaged from time to time in transporting. According to his testimony—which for present purposes must be assumed to be true—he was not standing on the railroad track, nor near enough to be struck by the train, before the train came into view. He did not intend to go dangerously near it. He expected to back the horse to a place of safety.

Plaintiff was not required to exercise the care of a person approaching and about to cross the railroad tracks. It will be assumed that, under the circumstances of this case, plaintiff was within the rule of law requiring one who goes near enough to a railroad track as to be in danger from any cause to exercise due care to avoid harm. That obligation must, however, vary with circumstances. It does not amount to a hard-and-fast requirement that such persons must stop, ¹⁰⁷ look, and listen, and continue to look at all times and under all circumstances. Plaintiff's testimony on direct examination as to looking and listening the jury might have found exonerated him from contributory negligence. His cross-examination was not so favorable to his interests. The result was for the jury.

The jury might properly have found from the testimony that plaintiff had glanced up the track at one time and had seen nothing. The train would have covered in four or five seconds the distance he could have seen it, because of the curve previously stated. The duty to exercise care is in the nature of things continuous, but due vigilance did not require plaintiff to keep his eye fixed in the direction from which the train came. If stress be laid upon the signals which defendant insists plaintiff should have heard, then the emergency element becomes conspicuous. In any view, the situation of the horse and the vehicle constituted to a limited extent a distraction of his attention, the effect of which as a justification was for the jury.

Finally, plaintiff put himself in no position of danger. He could have safely accomplished his humane purpose if it had not been for the negligence of the defendant. He did not anticipate, and as a matter of law was not required to have anticipated, that negligence. He was not bound to have foreseen that defendant would run its train around the sharp curve which prevented its observation at an unlawful and dangerous rate of speed across a much used thoroughfare. He had the right to rely upon the exercise of commensurate care on defendant's part, in exposing either persons or property to unnecessary and great peril from so dangerous an instrumentality as a rapidly moving train. On principle, the question of contributory negligence was for the jury. Its conclusion is sustained by the record.

The authority most nearly resembling the present case is *Lorenz v. Burlington*, 115 Iowa, 377, 88 N. W. 835, 56 L. R. A. 752. There deceased was struck by a train on defendant's road at a street crossing. At the time he was attempting to head off and drive back a cow. In considering the question of contributory negligence, McClain, J., said: "In determining what constitutes contributory negligence, . . . only whether the person injured did use the care which

the circumstances required of him. Now, while the ¹⁰⁸ rule is well settled in this state, and generally elsewhere, that it is contributory negligence for a person to go upon a railway track without looking or listening to ascertain whether there is danger from an approaching train, yet his duty in that respect is to exercise the care which reasonably prudent persons would exercise under such circumstances. The duty to look and listen is not an absolute one, but one the exercise of which is dependent on conditions." A verdict for plaintiff was affirmed.

The authorities cited by defendant to sustain the contention that "the obligation to exercise care is not alone upon one who expects to cross a railway, but is equally upon one who goes near to it, so as to be in danger therefrom from any cause," without exception involve circumstances so different from the circumstances in the case at bar that they are not controlling. In *Flagg v. Chicago etc. Ry. Co.*, 96 Mich. 30, 55 N. W. 444, 21 L. R. A. 835, plaintiff, instead of alighting, remained in a wagon to which a young horse was attached while a train was approaching. In *Moore v. Kansas City & I. R. T. Co.*, 126 Mo. 265, 29 S. W. 9, plaintiff drove a team of horses, which he knew were easily frightened by the cars, on defendant's right of way, while there was nothing to prevent him from driving down a safe street. In *Ft. Worth D. C. Ry. Co. v. Taliaferro* (Tex. App.), 19 S. W. 432, plaintiff attempted to drive in front of an engine which he saw coming. In *Olson v. Chicago etc. Ry. Co.*, 81 Wis. 41, 50 N. W. 412, 1096, plaintiff left, unhitched and unattended, within nineteen feet of the track, a young, high-lived team of horses. In *Hargis v. St. Louis, S. & T. Ry. Co.*, 75 Tex. 19, 12 S. W. 953, plaintiff, having crossed the track in safety, voluntarily and unnecessarily stopped. In *Illinois Cent. R. Co. v. Buckner*, 28 Ill. 299, 81 Am. Dec. 282, a deaf person drove an unmanageable horse across a track and when a train was approaching. In *Deville v. Southern Pac. R. Co.*, 50 Cal. 383, plaintiff left a span of horses unhitched at train time. In *Cornell v. Detroit E. Ry. Co.*, 82 Mich. 495, 46 N. W. 791, plaintiff drove a young horse along a street railway for the purpose of testing the horse. In *Louisville & N. R. Co. v. Schmidt*, 81 Ind. 264, plaintiff attempted to lead his horse across a track in front of an engine. In these cases plaintiff's own conduct initiated the peril. In the case at bar the plaintiff had no connection with the original presence of the horse ¹⁰⁹ and wagon on the track. He should not be penalized for undertaking an errand of mercy.

3. Defendant has laid especial stress upon the instruction by the court to the effect that as plaintiff was not on the crossing, but was jerked upon it by the action of the horse,

then plaintiff was not negligent, and defendant was liable if it was negligent. If stress were laid upon the emergency feature of this case, it might be that this instruction was correct in itself. The charge of the trial court must be approved, however, on other grounds; for, after the court had practically completed its charge, it inquired whether counsel desired to call attention to other matters. Counsel for the plaintiff then suggested that the ruling as to plaintiff's contributory negligence in the respect here involved was "stated a little broader than might be warranted." The court thereupon charged that the plaintiff was bound to exercise ordinary care at all times up to the time of the accident, and that if he had notice or knowledge that the train was approaching, or in the exercise of ordinary care should have taken notice, it would have been negligence for him to have gone upon the railroad track, and that in such event he would be guilty of contributory negligence and could not recover. This instruction appears to be as favorable to defendant as properly might be. If defendant thought otherwise, it should have then pointed out its impropriety to the court.

We have examined the other assignments of error, and have found them to be without merit.

Affirmed.

To Pass in Front of a Rapidly Moving Train to save the life of a child is not negligence per se, although the person thus risking his life is under no legal obligation to rescue the child: *Pennsylvania Co. v. Langendorf*, 48 Ohio St. 316, 29 Am. St. Rep. 553. And if a train approaches when two persons are crossing a railroad bridge, and, as they are attempting to reach the other end, one falls between the ties, it is the legal right of the other to remain with and seek to rescue his companion, and in doing so he is not guilty of contributory negligence: *Becker v. Louisville etc. R. R. Co.*, 110 Ky. 474, 96 Am. St. Rep. 459, and see cases cited in the cross-reference note thereto.

THOMAS v. ROGERS.

[108 Minn. 132, 121 N. W. 630.]

STATUTE OF FRAUDS—Authority of Agent to Sell Land.—

To render valid and enforceable a contract by an agent for the sale of real property of his principal, his authority to make the same must, under the statute of frauds, be in writing. (p. 422.)

STATUTE OF FRAUDS—Authority of Agent to Sell Land.—

The fact that the principal verbally authorizes the agent to accept by telegram an offer of purchase does not, in the absence of facts or circumstances creating an estoppel, obviate the lack of written authority in the agent, where the acceptance is in the agent's name. (p. 423.)

STATUTE OF FRAUDS—Doctrine of Part Performance.—A

contract so entered into by an agent stands in the position of an oral

contract, and enforceable only when there has been a substantial part performance. (p. 424.)

STATUTE OF FRAUDS—Doctrine of Part Performance.—

Facts stated in the opinion held not to constitute part performance, within the rule applicable to such cases. (p. 424.)

(Syllabi by the court.)

Harlan P. Roberts and W. W. Bardwell, for the appellant.

Kingman, Crosby & Wallace and Norton N. Cross, for the respondent Rogers.

Jay W. Crane, for the respondent Friedman.

133 BROWN, J. Action for the specific performance of a contract for the sale of real property, which was dismissed at the conclusion of the trial in the court below, and plaintiff appealed from an order denying a new trial.

Defendant, a resident of the state of New Jersey, was the owner of a large amount of real property situated in the city of Minneapolis, this state, including the property here in controversy, of all which P. D. McMillan & Co., real estate dealers, were prior to May 1, 1908, in charge and control as her agents. Defendant had given an exclusive agency of this particular property for the month of May, 1908, to Thorpe Brothers, and had authorized them to make a sale thereof. On May 26th, McMillan & Co. telegraphed to H. B. Rogers, defendant's son, who was in general charge of her affairs, also residing in New Jersey, that they had an offer of forty thousand dollars for this property and advised an acceptance thereof. Rogers consulted with defendant, and she objected to making a sale over the heads of Thorpe Brothers, for the reason that they had an exclusive right to make a sale during the month of May; but the evidence tends to show that she was willing to accept the McMillan offer subject to their rights. Whereupon Rogers, in his own name, wired McMillan & Co. an acceptance of their offer, directing them to consult with John Crosby "before closing deal." McMillan & Co. thereafter, and on the twenty-eighth day of May, as the agents of defendant, entered into a written contract for the sale of the property to plaintiff. Defendant refused to recognize or perform the contract, and this action followed.

The authority of McMillan & Co., whatever it may have been, to enter into the contract, came through H. B. Rogers, representing defendant, and it appears that his authority was not in writing, as required by Revised Laws of 1905, sections 3487, 3488. The contract was therefore void and unenforceable: *Newlin v. Hoyt*, 91 Minn. 409, 98 N. W. 323; *Power v. Immigration Land Co.*, 93 Minn. 247, 101 N. W. 161.

But it is contended, first, that the telegram sent by H. B. Rogers was, under the circumstances disclosed by the evidence, the act of defendant herself, and therefore binding upon her; and, second, that defendant is estopped from setting up the absence of written authority in her agent. Neither contention can be sustained.

¹³⁴ 1. The first contention is founded upon the claim that defendant was advised personally by her son of the terms of plaintiff's offer, and that she then verbally authorized him to accept it, by sending the telegram to McMillan & Co. It is doubtful from the evidence whether defendant ever authorized her son to unconditionally accept the offer. She seems to have insisted that the rights of Thorpe Brothers in their exclusive agency should be protected, and that the question of the acceptance of plaintiff's offer should be deferred until after the first day of June, when their rights would expire by limitation. But conceding, for the purposes of the case, that she did orally authorize her son to accept the offer, the fact remains that the acceptance was in his name and was the act of an agent. The reasons for requiring the authority of the agent in real estate transfers to be in writing apply equally to the situation here presented, and the statute cannot be held inapplicable, or sufficiently complied with, without in effect repealing it. The immediate presence of defendant and consultation with her agent, unconnected with subsequent conduct amounting to an estoppel, does not change the situation from the viewpoint of the statute. If, under the circumstances here shown, an oral direction to the agent to accept an offer of purchase avoids the statute, then a like direction over the long-distance telephone would answer the same purpose. The statute was enacted for wise purposes, and the courts should not permit an avoidance of its commands in this indirect manner. The case of *Karns v. Olney*, 80 Cal. 90, 13 Am. St. Rep. 101, 22 Pac. 57, cited by plaintiff, is not in point. It was there held that written authority of the agent was not essential, where he makes the contract of sale in the presence of his principal, who accepts a payment on the purchase price and surrenders possession of the property to the purchaser, who subsequently makes valuable improvements thereon. That was a case of estoppel.

2. The second contention is that, inasmuch as Rogers was defendant's agent in fact, and for a long number of years exercised a general supervision of her affairs, of which plaintiff and McMillan & Co. were cognizant, and upon which they acted and relied in entering into this contract, defendant is estopped from repudiating the same on ¹³⁵ the sole ground that she had not clothed him with written authority to make this particular sale.

This contention is untenable. To sustain it would wholly defeat the statute. While it is true that defendant, on the facts stated, in holding her son out as her authorized agent, would be estopped to deny his authority, it is clear that it would not necessarily preclude her from insisting that a contract made by him was invalid as a matter of law. In respect to transactions within the general scope of his agency she would be bound, but not as to contracts made by him which were either expressly prohibited or not in conformity with the requirements of law: *Newlin v. Hoyt*, 91 Minn. 409, 98 N. W. 323. It is not a case of an excessive exercise of authority, which may be subsequently ratified by the principal, but whether an authority possessed and exercised was in writing as required by our statutes. The case presented is substantially as though the contract were oral, and therefore void and unenforceable. And though we have, in harmony with nearly all the courts, enforced such contracts where there has been a part performance, we have uniformly held that the part performance must be substantial, and of such a nature that injustice will result if performance is not decreed: *Place v. Johnson*, 20 Minn. 198 (219); *Williams v. Stewart*, 25 Minn. 516; *Slingerland v. Slingerland*, 39 Minn. 197, 39 N. W. 146; *Brown v. Hoag*, 35 Minn. 373, 29 N. W. 135; *Veum v. Sheeran*, 95 Minn. 315, 104 N. W. 135. The rule followed in this state is correctly stated in the last case cited, where the authorities are cited.

But the case at bar does not come within the rule. Here no part performance is shown, no part of the purchase price was paid to or received by defendant, nor was plaintiff given possession of the property, and his situation is precisely the same as before the contract was entered into, except that he deposited an amount of earnest money with *McMillan & Co.*, which he is entitled to have returned to him. Nor does it appear that in consequence of the contract he has altered or changed his position in reliance thereon, or that he will lose anything by a failure of performance save the benefit of his bargain. It is clear, therefore, that the case is not brought within the doctrine of part performance, and defendant is not estopped from pleading the ¹³⁶ statute: *Veazie v. Morse*, 67 Minn. 100, 69 N. W. 637; *Townsend v. Fenton*, 30 Minn. 528, 16 N. W. 421; *Richardson v. Crandall*, 48 N. Y. 348; 20 Cyc. 289 et seq.; 26 Am. & Eng. Ency. of Law, 2d ed., 50 et seq.

Order affirmed.

The Authority of an Agent to Sell Land must ordinarily be in writing, otherwise his agreement to sell will be unenforceable: *Thompson v. New South Coal Co.*, 135 Ala. 630, 93 Am. St. Rep. 49. See, however, *Antrim Iron Works v. Anderson*, 140 Mich. 702, 112 Am. St.

Rep. 434; *Henry v. Black*, 210 Pa. 245, 105 Am. St. Rep. 802. But where there is an oral contract for the sale of lands, and the purchaser pays a portion of the purchase price and is put in possession by the vendee's agent, it is not material that the agent's authority is not in writing: *Jones v. Gainer*, 157 Ala. 218, 131 Am. St. Rep. 52.

SAMMONS v. PIKE.

[108 Minn. 291, 120 N. W. 540, 122 N. W. 168.]

DIVORCE—Collateral Attack on Decree in Foreign Court.—

One Higbie, at all times involved a resident of Minnesota, initiated in 1886 a divorce proceeding in Dakota against his wife, who lived in New York. She answered. He dismissed the action. In 1887 he brought another suit in Nebraska. She answered, and set up a cross-bill for a divorce on her part. While this action was pending, and in 1888, he began a third divorce proceeding in Dakota. Fraud in service of summons was claimed and denied. The wife did not appear. Decree for absolute divorce was granted in 1889. Neither party remarried. The wife had actual knowledge of the existence of the decree for some seven years before her death. The husband died in 1905. The wife died in 1906. In an action of ejectment, brought later in 1906 by persons claiming under her to recover possession of the homestead and other property from persons claiming under him, it is held that a decree of divorce may be impeached collaterally in the courts of another state by proving that the court granting it had no jurisdiction because of the plaintiff's want of domicile, even where the record purports to show such jurisdiction. (pp. 427, 430.)

DIVORCE—Estoppel Against Victim of Fraud.—Where a decree of divorce by a court within the jurisdiction of which the person seeking a divorce was a resident at the time involved is voidable only because of fraud in connection with the service of the summons or in the conduct of the case, the victim of the fraud may by unexplained delay, lasting until after the death of the perpetrator of the fraud, or by other conduct operating by way of waiver or estoppel, be prevented from successfully asserting a right to a distributive share of the estate of the original wrongdoer. (pp. 427, 428.)

DIVORCE—Validation by Subsequent Conduct of Party.—Whether under any circumstances of aggravation a decree of divorce entered by a court of a state, of which neither plaintiff nor defendant were residents at any time, could be validated by any subsequent conduct—quaere. (p. 429.)

DIVORCE—Estoppel Against Victim of Fraud and Her Heirs. Where a resident of Minnesota brought an action for divorce in Dakota, which his wife, a resident of New York living apart from him for good cause, answered, whereupon he dismissed the action, and afterward he brought a second action for divorce in Nebraska, which she answered, and while the proceedings therein were pending he filed a third action for divorce in Dakota, and obtained a decree, committing fraud and perjury in the matter of jurisdiction and service of process, and thereafter both parties died without again marrying, the inaction of the wife, even after knowledge of the decree, does not estop her or those claiming through her from claiming a distributive share of his estate. (p. 430.)

DIVORCE—Estoppel Against Heirs of Wife.—The failure of the wife in this case to attack the invalid decree, and her other con-

duct complained of, did not operate to prevent persons claiming under her from securing her distributive share in his estate as the law determined it to be. (p. 430.)

(Syllabi by the court except when stated to be by the editor.)

L. W. Collins, W. A. Sperry and Wm. H. Hallam, for the appellants.

Leach & Reigard and J. A. and A. W. Sawyer, for the respondent.

293 JAGGARD, J. Plaintiff, claiming under Mrs. Higbie, deceased, brought ejectment in the latter part of 1906 to recover possession of a homestead and other lands in this state from defendant Pike, claiming under the will of Mr. Higbie, also deceased, and against other defendants in possession as her tenant. Mr. and Mrs. Higbie were married in New York in 1864, and shortly afterward removed to Owatonna, Minnesota. Mr. Higbie resided there until his death, January 5, 1905. Mrs. Higbie came to Minnesota with her husband, but lived apart from him between October, 1877, and April, 1880, when she returned and lived with him until November 3, 1883, when she finally left him and lived in New Jersey and New York, where she died in 1906. In 1886 Mr. Higbie initiated divorce proceedings in **294** Dakota against Mrs. Higbie on the ground of desertion. Mrs. Higbie answered. Mr. Higbie dismissed the action. In 1887 Mr. Higbie began another divorce suit in Nebraska on the ground of desertion. Mrs. Higbie answered, and set up a cross-bill for divorce on her part. Mr. Higbie sought to dismiss the case on the ground that he had become a resident of Minnesota. His motion the court denied. In 1888 Mr. Higbie's bill for divorce was dismissed, but the action was retained on the cross-bill. In September, 1890, it was stricken from the docket on motion of Mr. Higbie. In June, 1888, while the Nebraska action was still pending, and while he was still a resident of this state, he swore to a complaint for divorce from Mrs. Higbie on the ground of desertion, and in July filed it in Hand county, Dakota Territory, which is now in South Dakota. Later he made affidavit in which he stated he was a resident of Minnesota. Summons was served on Mrs. Higbie by publication. A copy was mailed to Mrs. Higbie by registered letter. Some one satisfied the postal authorities and received it. Plaintiff insists, and the trial court found, that the letter was sent to a place at which Mrs. Higbie did not reside, and that the service of summons was void for fraud. Defendant challenges the sufficiency of the evidence. The wife did not appear. The Dakota court entered a decree granting an absolute divorce in 1889. According to defendant upon the record it appears that Mrs. Higbie had no cause for desertion or divorce, that plaintiff had full knowledge of the decree of

divorce rendered in the Dakota court for seven years, and that she is barred by her "acquiescence . . . trickery, artifice, cunning, and bad faith." The trial court found that Mr. Higbie was, at the time of the Dakota divorce proceedings and at all times here involved, a resident of Minnesota. It granted plaintiff judgment. Some aspects of this case were before this court in *Sammons v. Higbie's Estate*, 103 Minn. 448, 115 N. W. 265. The present appeal involves two questions not there considered.

Of these the first is whether the decree of the Dakota court was subject to collateral attack under the circumstances of this case. The rule is settled beyond peradventure that "a decree of divorce may be impeached collaterally in the courts of another state by proof that the court granting it had no jurisdiction 'because of the plaintiff's ²⁹⁵ want of domicile,' even when the record purports to show such jurisdiction": *German S. & L. Soc. v. Dormitzer*, 192 U. S. 125, 24 Sup. Ct. Rep. 221, 48 L. ed. 373. How universally this view of the law has been accepted will appear in cases collected in *Succession of Benton (La.)*, 59 L. R. A. 135, 183. It is unquestionably the law in this state: *Thelen v. Thelen*, 75 Minn. 433, 78 N. W. 108. And see *Pollock v. Pollock*, 9 S. D. 48, 68 N. W. 176; *Smith v. Smith*, 7 N. D. 404, 75 N. W. 783. No well-considered decision, as distinguished from a dictum to the contrary, has been called to our attention.

The second question is whether the divorce decree should be given legal effect, because of Mrs. Higbie's conduct subsequent to it. That decree plaintiff insists was clearly void because, first, of fraud in the service of the summons; and, second, of the nonresidence in Dakota of both the plaintiff and defendant. In the view of the case we take, the second of these reasons only need be considered. It is decisive of the issues. Defendant places emphasis upon the fact that neither the cause of morality nor interest of the public is involved, since both parties are dead, and that this is a controversy about property interests only, to which principles peculiar to divorce proceedings should not be applied. They insist that the decree was voidable only, and that under the circumstances presented by this record it must stand.

None of the many authorities to which they have directed our attention justify this conclusion in letter or in spirit. In none of them were both the parties nonresidents of the state, the court of which granted the divorce. In all but one of them, after a summons had been duly served, and after proper proof had been adduced, and after all the required subsequent proceedings had been lawfully observed, a valid decree could have been entered. The proposition in which they fairly result is: Where a decree of divorce by a court within the jurisdiction of which the person seeking a divorce was a

resident at the times involved is voidable only because of fraud in connection with the service of the summons or the conduct of the case, the victim of the fraud by unexplained delay lasting until after the death of the perpetrator of the fraud, or by other conduct operating as a waiver or estoppel, may be prevented from ²⁹⁶ successfully asserting a right to a distributive share of the estate of the original wrongdoer.

Thus, in the leading case on the subject, *Zoellner v. Zoellner*, 46 Mich. 511, 9 N. W. 831, nine years' unexcused delay, during which the plaintiff in the divorce proceeding had died, was held sufficient to validate the divorce, although the publication of the summons was secured by fraud and constituted an imposition on the court. In that case, however, the defendant lived in Ohio; but no question was raised that plaintiff lived in Michigan. If the defendant had appeared in the proceeding, a valid decree might have been entered. Defendant might have waived an improper service of summons by appearance. It was consonant with equity that her conduct subsequent to the decree constituted a waiver.

In none of the cases to which defendant has referred us, and we have examined them all, did it appear that the plaintiff was not a resident of the state in which the court granted the divorce. Some of them were cases of fraud in connection with the service of summons: *Zoellner v. Zoellner*, 46 Mich. 511, 9 N. W. 831; *Earle v. Earle*, 91 Ind. 27; *Everett v. Everett*, 60 Wis. 200, 18 N. W. 637; *Prewett v. Dyer*, 107 Cal. 154, 40 Pac. 105; *Evans v. Woodsworth*, 213 Ill. 404, 72 N. E. 1082; *Marvin v. Foster*, 61 Minn. 154, 52 Am. St. Rep. 586, 63 N. W. 484. Indeed, in *Maher v. Title G. & T. Co.*, 95 Ill. App. 365, there was "colorable jurisdiction." At page 373, the court said: "The decree was not void for lack of jurisdiction of appellant's person, nor because of a want of power" on part of the court to entertain an application for divorce and to proceed to a decree. The proceedings of the court were at the most erroneous. In *Gilbert v. Reynolds*, 51 Ill. 513, no notice had been served and no appearance entered. In *Brigham, Petitioner*, 176 Mass. 223, 57 N. E. 328, the charge was that evidence in the divorce proceedings had been suppressed by fraud and collusion. "The jurisdiction was undoubted and complete." In *Nicholson v. Nicholson*, 113 Ind. 131, 15 N. E. 223, both parties were residents of the proper state. The fraud consisted of inducing the noninterposition of a defense. Promise to dismiss was broken. And see *Larimer v. Knoyle*, 43 Kan. 338, 23 Pac. 487; *Johnson v. Sharpe* (Tex. Civ. App.), 34 S. W. 1006 (where the answer was filed by an attorney without the authority of defendant, then a nonresident); *Arthur v. Israel*, ²⁹⁷ 15 Colo. 147, 22 Am. St. Rep. 381, 25 Pac. 81, 10 L. R. A. 693 (where the wife, after learning of the decree, married another man); *Mohler*

v. Shank's Estate, 93 Iowa, 273, 57 Am. St. Rep. 274, 61 N. W. 981, 34 L. R. A. 161 (where the same feature appeared); Hurley v. Hurley, 117 Iowa, 621, 91 N. W. 895; Sloan v. Sloan, 102 Ill. 581 (an unauthorized action). In Caswell v. Caswell, 120 Ill. 377, 11 N. E. 342, the husband resided in that state, and brought suit in the courts of that state, but not in the right county. This case is the only one cited by defendant which tends to support his contention.

Plaintiff insists that the divorce was an absolute "nullity, a mere brutum fulmen," of no force whatever, and incapable of having any legal effect given to it. Both principle and authority are strongly persuasive of the soundness of that proposition. But if a defendant in such irregular divorce had married, had had offspring, and had died after the death of the plaintiff, would a court bastardize the innocent children? Or if after the decree the defendant had attempted successfully or unsuccessfully to kill the plaintiff, and then died after his decease, would she transmit a right to his estate? The question whether, under any possible circumstances of extreme aggravation, the subsequent conduct of the defendant in the divorce proceedings could validate the improper decree, or operate as an estoppel against one claiming a distributive share of the estate of plaintiff therein, it is not necessary to here decide. For, assuming that there might be such circumstances, the record now before us certainly does not disclose them.

In this case Higbie himself was guilty of deliberate fraud upon his wife and upon the court. The trial court found, and was justified in finding, that neither husband nor wife had at any time been a resident of or domiciled in the territory of Dakota or in the state of South Dakota, and that Mr. Higbie never had any bona fide intention of removing thereto, but went there temporarily for the sole purpose of instituting the divorce action. This was not "a mere irregularity." A deliberate perjury as to a prerequisite to jurisdiction was involved. Mr. Higbie could not have come into equity with clean hands. Those claiming under him are in no better position.

²⁹⁸ Nor was the alleged misconduct of Mrs. Higbie by any justifiable reasoning sufficient to have confirmed the decree, or to have estopped her or persons through her from claiming a distributive share of the husband's estate. She had never married again. She had stopped the first divorce in Dakota. She had appeared in the second proceeding in Nebraska. Knowing that her husband lived and continued to live in Minnesota, she was not bound to follow him into any other jurisdiction, remote or near, in which he might attempt to perpetrate an outrage on the courts and fraud on her. Her mere inaction until the time of actual knowledge of the exist-

ence of the decree is immaterial and insignificant. What she did afterward did not validate the divorce. The unvarnished substance of her alleged misconduct is that she defaulted in the performance of her conjugal duties, that she contributed none of the aid of a wife to build up this estate, that she slept on her rights, and that according to the verbal testimony of a real estate agent, whose remembrance was indefinite, she once wrote a letter, which was not produced, wherein she claimed to have been divorced from her husband and to own certain property as a feme sole. Defendant's conclusion is that "the time-honored equitable trio, conscience, good faith and reasonable diligence," were wanting in her conduct. If there were no other considerations presented in this case, it is clear that the divorce was not validated by her conduct.

It appears, however, that Mr. Higbie's words and actions to his wife were brutal, and justified her in living apart from him, and that she notified persons engaged in buying land from Mr. Higbie that she was still his wife. She was not shown to have signed any deed as a single woman. The trial court, indeed, found that she never, at any time after such pretended divorce, acquiesced therein, or held herself out as a single woman, but until the death of her husband at all times claimed to be his wife. She always insisted that the Dakota divorce was a fraud. It necessarily follows that the judgment of the trial court must be and is hereby sustained.

In this view of the case it would be a work of supererogation to consider the merits of defendant's further contention that judgment previously rendered in the probate court operated as an estoppel.

Affirmed.

299 On July 2, 1909, the following opinion was filed:

JAGGARD, J. Defendants' motion for reargument proceeds on the express assumption that the original opinion herein was based on two points not presented nor argued. In point of fact, that decision rests on two simple and unmistakable propositions, elaborately argued orally and on briefs, on which the decision of the trial court rests, viz.: First, that the invalid Dakota divorce decree was subject to collateral attack; second, that the wife's conduct subsequent to the decree did not operate to validate it. The opinion did set forth that a group of authorities in defendants' brief sustained, not the proposition for which they were cited, but another which was there formulated, namely, that the conduct of a spouse, including laches, subsequent to the granting of a divorce decree invalidated by fraud in the service of summons or in the course of the trial, may estop representatives of such persons from claiming a distributive share in his estate. Defendants insist, however, that the cases to which reference will be im-

mediately made sustain the position that delay for a sufficient period to attack a decree of divorce void because neither of the parties were residents of the jurisdiction rendering the decree may by estoppel prevent any question as to its validity.

We did not refer in the original opinion to *In re Ellis' Estate*, 55 Minn. 401, 43 Am. St. Rep. 514, 56 N. W. 1056, 23 L. R. A. 287, because it does not purport at all to be of the class of cases to which the instant controversy belongs. There the divorce was obtained by collusion to confer jurisdiction. The divorced husband died. The parties to the controversy concerning his estate were his divorced wife, who alleged the invalidity of the decree, a woman whom he had married after the divorce, who asserted its validity, and a sister and a brother, claiming under the will. The trial court found for the second wife. This was affirmed. In the case at bar neither of the parties had married again. The intervening rights of third parties were not involved. Defendants themselves called our attention to the principle that the courts, in motions to vacate judgments, proceed with great caution and anxious care of the intervening rights of strangers: *Black on Judgments*, sec. 320. Moreover, at page 410 of 55 ³⁰⁰ Minn., page 1058 of 56 N. W. (43 Am. St. Rep. 514, 23 L. R. A. 287), Gilfillan, C. J., says:

"When, as between whom, and to what extent is such determination [of residence of the parties] binding in the state in which the parties are in fact residents? . . . First, in proceedings between the state of the parties' actual residence and one of the parties; second, in proceedings between the parties in the state of their actual residence, where the divorce in the other state was procured on the application of one of them, the other not appearing in the action to procure it; third, in proceedings between the parties when both voluntarily appeared in the action in which the divorce was granted, and consented to the jurisdiction, or that the court might determine the facts on which the jurisdiction depended. In the second class of cases it was settled that a judgment of another state can be assailed on the ground of want of jurisdiction in the court to render it; the decisions have been practically uniform that the party who did not submit to the jurisdiction is not bound by the judgment." The decision tends to sustain our original conclusion.

In *Hurley v. Hurley*, 117 Iowa, 621, 91 N. W. 895, it did not appear and was not found that the husband was a non-resident when he obtained a divorce. Moreover, the rights of third persons had intervened. In *McNeil v. McNeil* (C. C.), 78 Fed. 834, the opinion was oral and rested on the proposition that, "McNeil not having been a resident of the state for a year when he brought his suit for divorce, the court had no jurisdiction. This, however, is not apparent on the

record; and hence the judgment cannot be said to be void on its face, and therefore subject to attack at any time." This rule, as has appeared in the original opinion, is distinctly not the law, either in the federal courts or in this court.

For the first time our attention is now called to *Reed v. Reed*, 52 Mich. 117, 50 Am. Rep. 247, 17 N. W. 720. It fails, for a number of reasons, to support defendants' contention. It suffices for the present to point out that the law in Michigan accords with the opinion previously expressed in the original opinion. In *O'Dell v. Goff*, 153 Mich. 643, 117 N. W. 59, the testator had obtained a divorce in Indiana from contestant's mother. The undisputed evidence in the case proved that at this time the testator resided in Michigan. ³⁰¹ The judgment was held to be void ab initio, and that defendant in the proceedings to obtain it had a right to disregard proceedings therein of which she had notice. Carpenter, J., said: "The controversy was being tried by a court which possessed no jurisdiction, and she was pursuing a course which she had a lawful right to pursue by paying no attention to the steps that were therein taken."

Former opinion adhered to.

Justice Brown Dissented and delivered the following opinion in which Chief Justice Start concurred:

"A careful consideration of the merits of this case, after reargument, leads me to the conclusion that a reversal should be ordered. The opinion of the court states all the facts, and the reasons for my conclusions are, in brief, as follows: The judgment of divorce, though void in fact, was valid on its face, and a certified copy thereof was personally served on Mrs. Higbie many years before her death, yet she took no proceedings to have it set aside, and to this extent at least she acquiesced therein. If both parties had voluntarily appeared before the Dakota court in which the action for divorce was brought and submitted to its jurisdiction, they would have been bound by the judgment, although the court, by reason of the fact that both were nonresidents, had no jurisdiction of the subject matter of the action, the marital relations between them: *In re Ellis' Estate*, 55 Minn. 401, 43 Am. St. Rep. 514, 56 N. W. 1056, 23 L. R. A. 287. If in such a case the parties conclude themselves by their personal appearance, it is a little difficult to see why a long-continued acquiescence by one of them, with full knowledge of a judgment obtained by a court of a state having no jurisdiction of the subject matter, but valid on its face, would not be equally effective against him: *Reed v. Reed*, 52 Mich. 117, 50 Am. Rep. 247, 17 N. W. 720; *McNeil v. McNeil* (C. C.), 78 Fed. 834; *Earle v. Earle*, 91 Ind. 27.

"In this particular case the parties had resided apart for a long number of years, Higbie in Minnesota, and Mrs. Higbie in New Jersey. The divorce judgment was entered by the Dakota court in 1889, and the wife, though immediately served with notice thereof, permitted it to remain unchallenged, and never in any proceeding did she question its validity before her death in 1906, a period of sixteen years. Higbie died in 1905. Under such circumstances it would seem at least equitable and just that the rights of the heirs,

the only persons now before the court, should be tested in the light of and guided by the status of the relations of the Higbys as fixed and settled by the judgment for divorce, valid on its face, which they voluntarily chose to abide by and acquiesce in for sixteen years prior and up to the time of their death, namely, not husband and wife. And this the Ellis case sustains."

**WHEN ESTOPPEL EXISTS AGAINST URGING INVALIDITY OF
A VOID OR VOIDABLE DIVORCE.***

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I. Basis of the Rule of Estoppel in Cases of This Character.

It is not claimed in any of the cases involving this subject that courts ever acquire jurisdiction by the acts constituting an estoppel

***REFERENCES TO MONOGRAPHIC NOTES.**

- Extraterritorial effect of decrees of divorce: 83 Am. St. Rep. 616.
Proceedings to vacate and annul divorces and effect on parties and on marriages which they have contracted: 61 Am. Dec. 465.
When and to what extent can a decree of divorce be attacked after the death of one of the parties: 125 Am. St. Rep. 239.
Divorces in another state: 7 Am. Dec. 206; 21 Am. Dec. 747.
Jurisdiction over absent citizens: 53 Am. St. Rep. 179.
Foreign judgments: 94 Am. St. Rep. 532.
Judgments of other states: 103 Am. St. Rep. 304.
Compelling the division of property accumulated during a void marriage: 68 Am. St. Rep. 375.
Exceptions to rule that domicile of a husband is the domicile of his wife: 84 Am. St. Rep. 27.
Effects of marriage during continuance of prior valid marriage: 46 Am. Dec. 130.
Estoppel by silence or failure to assert one's rights: 10 Am. St. Rep. 22.
Am. St. Rep., Vol. 133—28

where they had no jurisdiction prior to the happening of such acts. The rule allowing an estoppel against urging the invalidity of void or voidable decrees of divorce under certain circumstances is not intended as a mode of circumvention by which to give validity to something which otherwise would have no validity. Its object is merely to apply the ordinary rules of estoppel to cases involving the subject of divorce decrees. There is no necessity to apply them to valid decrees; hence they are applied to that class of decrees which stand in need of the application of the equitable principles constituting the law of estoppel, namely, void and voidable decrees. It will be found in every case where the rule of estoppel has been correctly applied in cases of this character that the facts of the case are such that the person urging the invalidity of the divorce decree has been guilty of some acts in connection with the rendition of the decree, or in the allowing of it to remain of record, which make it inequitable, under the general principles of equity, to allow him or her to have it set aside. It is quite true that the effect of the application of the rule of estoppel in such cases often is the same as if validity had been imparted to the void or voidable decree itself, but that circumstance is merely incidental to the granting of the equitable relief under the rule of estoppel and not the purpose of the rule.

II. Rule as to Party Who Procured Rendition of Void or Voidable Decree.

The rule is well settled that a plaintiff who procures the rendition of a decree of divorce in his or her favor is thereafter precluded from attacking such decree on the ground that the court had no jurisdiction to render the same: *Elliott v. Wohlfrom*, 55 Cal. 384; *Ellis v. White*, 61 Iowa, 644, 17 N. W. 28; *In re Ellis' Estate*, 55 Minn. 401, 43 Am. St. Rep. 514, 56 N. W. 1056, 23 L. R. A. 287; *Ferry v. Ferry*, 9 Wash. 239, 37 Pac. 431. And where the husband commences a divorce suit in another state to which he has resorted solely for that purpose, and the wife appears in the action and sets up a cross-petition asking for a divorce, alimony and the custody of their child, all of which were adjudged to her, she is thereafter precluded from attacking the decree for want of jurisdiction: *Bledsoe v. Seaman*, 77 Kan. 679, 95 Pac. 576. And where the wife who procured the decree of divorce and allowance of alimony was a minor at the time, acquiesces in it after coming of age by availing herself of the property awarded to her and contracting subsequent matrimonial alliances, she is precluded from asserting dower rights in property conveyed by her former husband: *Bourne v. Simpson*, 9 B. Mon. 454. And where a husband leaves his wife and goes into another state and there obtains a divorce, after which he marries another woman, he cannot, in a proceeding in the state he originally left to declare him a disorderly person for a failure to support his second wife, claim that the divorce decree is void because of the court not having obtained jurisdiction: *People v. Shrady*, 47 Misc. Rep. 333, 95 N. Y. Supp. 991.

But it has been suggested by the New York courts that the rule denying the divorce plaintiff the right to impeach the jurisdiction of the court rendering the decision, though analogous to estoppel, is not strictly based on that principle. Thus in *Lacey v. Lacey*, 33

Misc. Rep. 196, 77 N. Y. Supp. 235, the court said: "In addition to the views already expressed there are two further grounds, either of which, I think, compels a denial of any relief to the plaintiff. In the first place, she invoked the jurisdiction of the Washington court, and in all equity and good conscience she should not be permitted to attack the authority of the decree which her own acts induced the court to grant her: In *re Morrison*, 52 Hun, 102, 5 N. Y. Supp. 90, affirmed without opinion in *Re Morrison*, 117 N. Y. 638, 22 N. E. 1130; *Hewitt v. Northrup*, 75 N. Y. 506; In *re Swales' Estate*, 60 App. Div. 599, 70 N. Y. Supp. 220. In *Re Morrison*, supra, affirmed in the court of appeals, Van Brunt, P. J., says: 'There is another suggestion, and that is that Henry Feyh, having invoked the jurisdiction of the court of Ohio, and submitted himself thereto, cannot now be heard to question such jurisdiction. . . . This position does not rest upon the doctrine of estoppel, as such term is ordinarily used, but upon a principle which has been repeatedly recognized by the courts—that where a party has gone into a court and invoked its jurisdiction, he cannot subsequently attack the decree of the court, obtained at his instance, because of the want of jurisdiction of somebody else. In the case of *Hewitt v. Northrup*, 75 N. Y. 506, this principle is clearly recognized. In the case at bar, therefore, Henry Feyh cannot be heard to claim the nullity of this decree, he having invoked the jurisdiction of the court, and asked its rendition'; Page 108, 52 Hun, and page 93, 5 N. Y. Supp.

'In *Re Swales' Estate*, 60 App. Div. 599, 70 N. Y. Supp. 220 [affirmed without opinion in 172 N. Y. 651, 65 N. E. 1122], the appellate division for the fourth department said: 'It is made to appear beyond all controversy that the respondent did invoke the jurisdiction of the court of a sister state to free himself from all marital relations with the decedent. . . . Now, while it probably would not be technically correct to assert that any or all of the respondent's acts constituted an estoppel within the ordinary acceptance of that term, for the reason that they were not designed to and did not influence the decedent to do anything which he would not otherwise have done, . . . yet we think the case justifies the application of a somewhat similar principle, which is that where a party has invoked the jurisdiction of any court, and submitted himself thereto, he cannot thereafter be heard to question such jurisdiction.'"

And in a later case the court of appeals applied the above rule against a divorcee who, after obtaining a divorce in Massachusetts, sought to recover dower in the real estate of which her former husband died seised. The court in that case (*Starbuck v. Starbuck*, 173 N. Y. 508, 93 Am. St. Rep. 631, 66 N. E. 193) saying: "We think the case under consideration cannot be distinguished from that of *Swales* (60 App. Div. 599, 70 N. Y. Supp. 220, 172 N. Y. 651, 65 N. E. 1122) or *Morrison* (52 Hun, 102, 5 N. Y. Supp. 90, 117 N. Y. 638, 22 N. E. 1130). It is true that in the *Swales* case the petitioner was seeking administration instead of dower, but if she was the widow of decedent she had a statutory right to administer the estate, and the plaintiff in her action for dower has no greater right. In the *Swales* case the petitioner, after procuring her decree of divorce, had remarried. In this case the plaintiff procured her divorce, but did not remarry; but it does not appear to us that this distinction affects the legal proposition involved.

"It is said in the Swales case that the action of the plaintiff in procuring the decree of divorce in Illinois does not constitute an estoppel within the ordinary acceptation of that term; for the reason that it did not influence the decedent to do anything which he could not otherwise have done. That may be true in that case; and yet in other cases the decree may influence parties to do that which they otherwise would not have done. The statute of the state of Massachusetts, upon certain conditions, permits both parties to marry again. If Starbuck had gone to that other state and had contracted a marriage with a woman there, who acted upon the faith of the decree that the plaintiff had obtained, it may be that a question of estoppel would have been presented: *Moore v. Hegeman*, 92 N. Y. 521, 44 Am. Rep. 408. But we do not deem it necessary to determine that question at this time. We prefer to rest our decision upon the principle that the plaintiff, having invoked the jurisdiction of the Massachusetts court and submitted herself thereto, cannot now be heard to question the validity of its decree."

The case of *McCreery v. Davis*, 44 S. C. 195, 51 Am. St. Rep. 794, 22 S. E. 178, 28 L. R. A. 655, would appear to be against the rule above set forth. In that case it was held where a wife procured in another state a divorce, which was regarded as void by the courts of South Carolina, that the husband was incompetent to give a perfect title to real estate unless the divorced wife released her dower in the property. The suit was one for specific performance of a contract to convey land free from encumbrances and the wife was not a party thereto. The subject of the wife's estoppel to claim such a dower right was not, however, discussed by the court.

In several cases decrees of divorce have been set aside at the instance of the plaintiff in the divorce suit upon the ground that jurisdiction was fraudulently given to the court, but the fraud in those cases was not that of the plaintiff but of the defendant or others who commenced the suit without the knowledge or authority of the nominal plaintiff: *Brown v. Grove*, 116 Ind. 84, 9 Am. St. Rep. 823, 18 N. E. 387; *Olmstead v. Olmstead*, 41 Minn. 297, 43 N. W. 67. In another case relief under a similar claim was denied solely upon the ground that the proof of the alleged fraud was not sufficiently clear: *Sloan v. Sloan*, 102 Ill. 581.

III. Where the Decree is Result of Collusion.

Where the parties to a divorce suit through fraud and collusion prevail upon the court to take jurisdiction of the suit and render a decree of divorce therein, they are thereafter precluded from having it set aside because of such acts since they cannot take advantage of their own wrongful acts: *Greene v. Greene*, 2 Gray, 361, 61 Am. Dec. 454; *Simons v. Simons*, 47 Mich. 253, 645, 10 N. W. 360; *In re Ellis' Estate*, 55 Minn. 401, 43 Am. St. Rep. 514, 56 N. W. 1056, 23 L. R. A. 287; *Nichols v. Nichols*, 25 N. J. Eq. 60; *Kinnier v. Kinnier*, 45 N. Y. 535, 6 Am. Rep. 132; *Miltmore v. Miltmore*, 40 Pa. 151. Thus in *Karren v. Karren*, 25 Utah, 87, 95 Am. St. Rep. 815, 69 Pac. 465, 60 L. R. A. 294, the court, in a case of this character, said: "The plaintiff, when she gave her consent, must have known that the contemplated divorce could only be procured by a suppression of the facts and false testimony. It does not appear that she made any objections to the proceedings until after the

defendant, more than a year after the divorce, had remarried. This suit was instituted thirteen months after the divorce. While a decree of divorce obtained by collusion of the parties, or by the suppression of the facts, or false testimony, is a fraud upon the court, and against public policy, it would be more against public policy to disturb the decree at the instance of either of the parties who are in *pari delicto*, when, after the divorce, as in this case, one of the parties has remarried."

The case of *Hubbard v. Hubbard*, 19 Colo. 13, 34 Pac. 170, contains perhaps the kind of circumstances which are the most apt to prompt one of the parties to such a collusive divorce into attempting to have it set aside. In that case the wife, who was defendant in the divorce suit, after service of its summons, was induced to abstain from interposing any defense upon the agreement of the plaintiff to pay her three thousand dollars as soon as the decree of divorce was signed, and promised also to have certain property conveyed to her. After obtaining the decree he failed to perform his part of the agreement. The court in refusing to set the decree aside said: "After the entry of the decree thus obtained, she remained silent for more than one year, and only upon failure to realize the consideration promised for her shameless bargain did she apply for relief. She not only permitted the term at which the decree was rendered to pass, but also the six months additional allowed by statute for relief in certain instances, without advising the court of the fraud practiced upon it and the law. To entitle her to relief, had her petition been filed in apt time, it should have been made to appear affirmatively that she was then acting from good motives, and not from any expected personal advantage. It is apparent, however, from her petition, that she entertains no feelings of remorse for her base conduct, but is, on the contrary, actuated solely by a desire to obtain a money consideration for the fraud to which she was a party. Plaintiff, under these circumstances, is not in a position to demand favorable action from the court.

"It is urged that the divorce should be set aside on the ground of public morals. The manner in which the public morals would be subserved by such action is not apparent. With the marriage contract reinstated, plaintiff in error would occupy a more advantageous position from which to renew her demand for money, and perhaps, profiting by her experience, negotiate for another collusive divorce upon a cash in hand basis, but we must be permitted to question the benefit that would result to the public morals by opening anew such an avenue of speculation at the instance of a party to the fraud. Undoubtedly, courts should exercise care in dissolving the marriage relation, and decline to grant relief where collusion appears; but after a decree has been rendered, and acquiesced in for a long period of time, reasons which would in the first instance have caused it to be withheld may not be sufficient to warrant setting it aside."

In *New York* the court also refused to set aside a decree obtained under similar circumstances because the applicant was a party to the fraud in the court and the purpose of applying for relief was purely mercenary: *Whittley v. Whittley*, 60 Misc. Rep. 201, 111 N. Y. Supp. 1078. And where the collusion consisted in the husband employing attorneys to institute a divorce suit in the name of the wife against himself in a state wherein neither were residents, he is precluded

from assailing the decree for want of jurisdiction in a suit to partition community property: *Moor v. Moor* (Tex. Civ. App.), 63 S. W. 347. In the case last cited the court very pertinently observed: "Collusion of the parties in going to another state to procure a divorce will prevent either of the parties from showing in a subsequent proceeding that the decree was void for lack of jurisdiction. Neither of the parties can complain of mutual fraud upon the court. The party who invoked the aid of the court cannot be heard to question its jurisdiction: 2 *Nelson on Divorce and Separation*, sec. 1055; *Turpin v. Turpin* (Tenn. Ch.), 58 S. W. 763. By entering into a collusion with the appellee, and employing counsel to institute suit, and obtain a decree of divorce, though entered into and done by him for the purpose of effecting a settlement with his wife of their community effects, he is as much estopped from questioning the validity of the decree as he would have been had he appeared and answered in the case. That his wife may have overreached him, and intended not to abide by the settlement after the decree was obtained does not relieve the appellant from the effect of the alleged fraud and collusion on his part, nor place him in any better light than he would appear in had his wife's intentions concurred only with his own, and not reached beyond his in fraud."

In another Texas case the court refused to reopen a divorce decree in a case wherein the defendant wife had agreed not to contest the case if the plaintiff would withdraw a charge of adultery made in the complaint and make a certain property settlement. In the petition to set the decree aside, which was made in the same court which rendered it, it was alleged that the husband in the divorce suit produced false testimony as to the property involved being his separate property, and thereby obtained an improper disposition of said property. The husband had remarried. The petition was refused on the ground that the wife had failed to show proper diligence in discovering the property disposition made by the decree before the end of the term, and did not show the evidence by which she would show the falsity of the showing made by the husband: *Sperry v. Sperry* (Tex. Civ. App.), 103 S. W. 419. Likewise where a wife agreed with her husband that he might institute a divorce proceeding against her in a state wherein neither had a domicile, and she filed an answer in the suit admitting the allegations in the complaint, the answer being prepared by an attorney retained by the husband for that purpose, she will not be heard to complain of the divorce decree in the courts of a state where neither reside and have their domicile, and where neither resided at the time the decree complained of was rendered: *Turpin v. Turpin* (Tenn. Ch.), 58 S. W. 763. In Massachusetts the court refused to hold the wife estopped from attempting to set aside a decree of divorce rendered in a state wherein the parties were not domiciled merely because she withdrew her active opposition to the divorce, in consideration of a payment of money, and thereafter remained silent: *Andrews v. Andrews*, 176 Mass. 92, 57 N. E. 333. But in another case in that state the court declared that where the parties were guilty of collusion in suppressing evidence in the divorce suit, the wife could not set the decree aside on that ground unless the fact that her husband improperly created some or all of her motives for colluding with him made a difference, but refused

to pass on the latter question: *Brigham, Petitioner*, 176 Mass. 223, 57 N. E. 328.

Where, however, the party petitioning to set the decree aside was an unwilling party to the collusion and joined therein through weakness or force of circumstances, no estoppel is said to arise: *Olmstead v. Olmstead*, 41 Minn. 297, 43 N. W. 67. Thus where it was agreed between the parties that a divorce could be obtained by the husband on the ground of desertion and the husband fraudulently obtained one on the ground of adultery, it was held that the wife was not estopped from having the decree set aside. The agreement in that case, however, was obtained by the paid agents of the husband, who was wealthy, in consideration of a sum of money needed for the wife's temporary support while she was financially distressed and greatly enfeebled by disease and her mind largely impaired. Under the circumstances it was said that the parties were not in *pari delicto*: *Daniels v. Benedict*, 50 Fed. 347. Likewise where an agreement was entered into between the plaintiff husband and the attorney for the wife, the wife not consenting or knowing of the agreement, that a certain sum of money, deposited with a bank as a special deposit, should be paid to the wife "whenever she or her attorney produces a certified copy of a decree of divorce" from the said wife, it was held that the wife could have the decree set aside as having been rendered under a collusive agreement that no defense should be interposed against the rendition of a decree. The agreement did not state that the money named was in part or in full of alimony: *Danforth v. Danforth*, 105 Ill. 603. In *Singer v. Singer*, 41 Barb. 139, the wife sought to have a decree of divorce set aside on the ground of collusion, but the court refused to do so because she had acquiesced in the decree for three years and the plaintiff had remarried, but the court intimated that such a decree would be set aside on the ground of public policy if the motion were made in due season.

IV. Where Record Shows an Appearance of the Defeated Party.

Where both of the parties to an action for divorce are residents of a state other than that of the forum, the fact that the defeated party voluntarily appeared in the action will preclude such party from attacking the decree of divorce for want of jurisdiction: In *re Ellis' Estate*, 55 Minn. 401, 43 Am. St. Rep. 514, 56 N. W. 1056, 23 L. R. A. 287; *Kirrigan v. Kirrigan*, 15 N. J. Eq. 146; *Moor v. Moor* (Tex. Civ. App.), 63 S. W. 347. And where the record shows the filing of an answer by the defendant, the latter is precluded from attacking the validity of the decree on the ground that he was not served with process and did not authorize any attorney to file an answer for him, where he had actual knowledge of the rendition of the decree several months after its rendition and waited for five years before making any effort to set it aside: *Johnston v. Sharpe* (Tex. Civ. App.), 34 S. W. 1006.

And where after the entry of a divorce decree the defendant appears in the action and consents that the decree may stand if she is given a share of the community property, she is estopped from assailing it for want of jurisdiction: *De Hereu v. Hereu*, 6 Ariz. 270, 56 Pac. 871. But the defendant is not precluded from setting aside a divorce decree on the ground that the order for the publication of process was obtained by fraud by the fact that she appeared generally by

calling the attention of the court to the fact that the plaintiff had remarried in violation of the decree: *Metzler v. Metzler*, 132 Wis. 601, 113 N. W. 49.

V. Where Attacking Party has Availed Himself of the Decree or Affirmatively Recognized Its Validity.

a. General Rule.—A husband or wife who accepts the benefits and privileges of a void decree of divorce cannot afterward repudiate his or her action and urge its invalidity. Such action by the parties does not correct the defect which makes the decree void or voidable nor impart validity to it as a decree, but merely operates as an estoppel against such parties in accordance with well-settled principles of equity: *De Hereu v. Hereu*, 6 Ariz. 270, 56 Pac. 871; *Arthur v. Israel*, 15 Colo. 147, 22 Am. St. Rep. 381, 25 Pac. 81, 10 L. R. A. 693; *Ellis v. White*, 61 Iowa, 644, 17 N. W. 28; *Bourne v. Simpson*, 9 B. Mon. 454; *Loud v. Loud*, 129 Mass. 14; *Marvin v. Foster*, 61 Minn. 154, 52 Am. St. Rep. 586, 63 N. W. 484; *Richeson v. Simmons*, 47 Mo. 20; *Richardson's Estate*, 132 Pa. 292, 19 Atl. 82. In *Mohler v. Shank's Estate*, 93 Iowa, 273, 57 Am. St. Rep. 274, 61 N. W. 981, 34 L. R. A. 161, the court, in discussing this general rule, said: "We have found that the decree was void. It has often been said that a void judgment is no judgment; that it may be attacked directly or collaterally. Freeman, in his work on Judgments, uses this language: 'A void judgment is, in legal effect, no judgment. By it no rights are divested. From it no rights can be obtained. Being worthless in itself, all proceedings formed upon it are equally worthless. It neither binds nor bars anyone. All acts performed under it, and all claims flowing out of it, are void.' This is true, in a general sense; yet, notwithstanding, a party to such a judgment may voluntarily perform it, by paying the amount adjudged against him, and, when paid, no inquiry will be made as to the validity of the judgment; or he may perform the acts required by a void decree, or accept its benefits, and thereby estop himself from questioning the decree. In other words, a party to a void judgment or decree may be estopped from attacking it either directly or indirectly. Suppose a judgment is for a money demand, justly due, and the record shows that it was rendered without having jurisdiction of the person of the defendant by the service of process upon him, and he voluntarily satisfies the judgment. That is the end to the controversy. . . . This exception to the doctrine that a judgment or decree entered without jurisdiction is absolutely void is founded upon the plainest principles of justice. As applied to the case at bar, it is but the enforcement of the legal maxim that the law will not permit a person to take advantage of his own wrong."

b. Acceptance of Alimony or Other Benefits Under the Decree.—The fact that the party attacking the validity of the divorce decree has accepted alimony or a division of property made by such decree or the disposition of the children made by the decree operates as an estoppel against the party. As a general rule, however, that fact is but one among others showing the acquiescence of the party in the decree, although it is always regarded as one of the strongest circumstances going to make up the estoppel: *De Hereu v. Hereu*, 6 Ariz. 270, 56 Pac. 871; *Maher v. Title G. & Trust Co.*, 95 Ill. App. 365; *Mohler v. Shank's Estate*, 93 Iowa, 273, 57 Am. St. Rep. 274, 61 N.

W. 981, 34 L. R. A. 161; *Bourne v. Simpson*, 9 B. Mon. 454; *Bidwell v. Bidwell*, 139 N. C. 402, 111 Am. St. Rep. 797, 52 S. E. 55, 2 L. R. A., N. S., 324; *Kirrigan v. Kirrigan*, 15 N. J. Eq. 146. Thus in *Sedlack v. Sedlack*, 14 Or. 540, 13 Pac. 452, the court, in applying the rule of estoppel in such cases, said: "This is a suit to impeach a decree for fraud. The final decree was entered nearly thirty years ago, granting to the plaintiff a divorce and the custody of her children, and an interest in the defendant's estate. The benefits of that decree she has accepted, taking the divorce, receiving the children, and the money awarded her under it. As such party to the record, after receiving all the advantages of the decree, and acquiescing in it for so many years, can she be now heard to impeach it on the ground that the decree was entered without notice, or her knowledge or consent? During all this period it is not disputed but that the decree has been spread upon the proper record for the information of all concerned. And now, after the former husband has married, raised other children, and recently died, and by his will (so it was said at the argument) providing for the children of both marriages, ought this not, under the circumstances, to be entertained? Is not the claim made against his estate, and sought to be enforced, such as is denominated 'stale,' and regarded with disfavor in equity? The general rule, without doubt, is that no lapse of time or delay in bringing the suit will be a bar to the remedy in equity, provided the injured party during the interval was ignorant of the fraud. But the ignorance of such party must not have been negligent; for if by reasonable diligence the fraud could have been discovered, or ought to have been well known, he will be deemed guilty of laches, or of acquiescence, and equity will refuse to interfere."

c. **Remarriage.**—In applications to set aside void or voidable divorce decrees, it is frequently urged by the party in whose favor the decree was rendered that relief should be denied because of the fact that such prevailing party has remarried subsequently to the rendition of the decree, but such arguments are invariably rejected as being no obstacles to setting such a decree aside, although the courts frequently declared that the fact of such a remarriage having taken place will make the court cautious and reluctant to setting the decree aside if the moving party is otherwise guilty of laches or acquiescence: *Caswell v. Caswell*, 120 Ill. 377, 11 N. E. 342; *Maher v. Title G. & Trust Co.*, 95 Ill. App. 365; *Field v. Field*, 215 Ill. 496, 74 N. E. 443; *Earle v. Earle*, 91 Ind. 27; *Day v. Nottingham*, 160 Ind. 408, 66 N. E. 998; *Webster v. Webster*, 54 Iowa, 153, 6 N. W. 170; *Hurley v. Hurley*, 117 Iowa, 621, 91 N. W. 895; *Comstock v. Adams*, 23 Kan. 513, 33 Am. Rep. 191; *Holmes v. Holmes*, 63 Me. 420; *Colby v. Colby*, 64 Minn. 549, 67 N. W. 663; *Buffington v. Carty*, 195 Mo. 490, 93 S. W. 779; *Simpkins v. Simpkins*, 14 Mont. 386, 43 Am. St. Rep. 641, 36 Pac. 759; *Wisdom v. Wisdom*, 24 Neb. 551, 8 Am. St. Rep. 215, 39 N. W. 594; *Whittley v. Whittley*, 60 Misc. Rep. 201, 111 N. Y. Supp. 1078; *Allen v. Maclellan*, 12 Pa. 328, 51 Am. Dec. 608; *Winstone v. Winstone*, 40 Wash. 272, 82 Pac. 268; *Everett v. Everett*, 60 Wis. 200, 18 N. W. 637.

But where the party against whom a void or voidable divorce decree has been rendered avails himself or herself of such decree by remarriage, such party is generally estopped from urging the invalidity of the decree: *Arthur v. Israel*, 15 Colo. 147, 22 Am. St. Rep. 351, 25

Pac. 81, 10 L. R. A. 693; *Webster v. Webster*, 54 Iowa, 153, 6 N. W. 170; *Mohler v. Shank*, 93 Iowa, 273, 57 Am. St. Rep. 274, 61 N. W. 981, 34 L. R. A. 161; *Ashbury v. Powers*, 23 Ky. Law Rep. 1622, 65 S. W. 605; *Marvin v. Foster*, 61 Minn. 154, 52 Am. St. Rep. 586, 63 N. W. 484; *Richardson's Estate*, 132 Pa. 292, 19 Atl. 82.

In *Arthur v. Israel*, 15 Colo. 147, 22 Am. St. Rep. 381, 25 Pac. 81, 10 L. R. A. 693, a well-considered case on this subject, the court in stating the reasons for this salutary rule observed: "If the divorce decrees receive the same treatment as judgments or decrees in ordinary controversies relating to damages or property, petitioner's action must fail; for one who accepts and retains the fruits of a void judgment cannot afterward repudiate his action, and take advantage of its invalidity: *Denver etc. Water Co. v. Middaugh*, 12 Colo. 434, 13 Am. St. Rep. 234, 21 Pac. 565, and cases cited; *Duff v. Wynkoop*, 74 Pa. 300. . . .

"We are not unmindful of the fact that the analogy between accepting the fruits of void judgments at law and accepting the pecuniary benefits, if any there be, together with the privileges of void divorce decrees, is not perfect in all respects. But the importance and justice of recognizing an estoppel in the latter case may be far more weighty than in the former. The immediate parties are not alone concerned. The public is always, and other individuals are usually, profoundly interested. Public policy, as well as private interest, requires that, so far as may be consistent with fundamental principles of law, one who has attempted to profit by a supposed divorce, and has exercised the resulting privilege of remarriage, shall not, for the mere purpose of obtaining property, be permitted to repudiate his election, and thus demonstrate the invalidity of his second marriage, together with the unconscious adultery of his second wife, and the illegitimacy of her children, if any she have by him."

And in *Marvin v. Foster*, 61 Minn. 154, 52 Am. St. Rep. 586, 63 N. W. 484, a leading case on this subject, the court, in holding a husband who had remarried after the rendition of a void divorce decree to be estopped from claiming a share in his former wife's estate, characterized the attempt to claim such a share in the following language: "Living with a second wife for fourteen years and raising a child by her, during a period of time when he says that in law he was still the husband of the former wife, is too much of a mockery of law, a travesty upon justice, and an insult to the morality and decency of a civilized government, to be tolerated; and, if there were no legal precedents against such a claim, we should not hesitate to establish one."

And where the party who obtained a voidable divorce decree remarries, she is precluded from claiming a dower interest in her former husband's estate: *Bourne v. Simpson*, 9 B. Mon. 454. And where after a void legislative divorce, each of the parties live apart and remarry, each one is estopped from interfering with the affairs of the other. Consequently, where the wife contracts to convey lands, her conveyance without her former husband joining therein is a sufficient compliance with her contract: *Richeson v. Simmons*, 47 Mo. 20. But the marriage of the husband who was the nominal defendant in a divorce suit within a week after a decree in favor of the wife will not operate as an estoppel against the wife showing that she was coerced by the husband into obtaining the divorce and that she was

an unwilling actor in the proceedings and that he in fact furnished the evidence produced by her: *Lake v. Lake*, 124 App. Div. 89, 108 N. Y. Supp. 964.

A woman who, mistakenly believing a Mormon church divorce to be valid, contracts a second marriage is not thereby estopped, on learning that the divorce is invalid, from asserting the first marriage and claiming her rights as the widow of the first husband: *Hilton v. Roylance*, 25 Utah, 129, 95 Am. St. Rep. 821, 69 Pac. 660, 58 L. R. A. 723. And where both parties to a divorce suit remarry under the supposition that they are divorced, whereas as a matter of fact no formal decree had been signed, although findings allowing a decree had been made, the subsequent entry of a decree *nunc pro tunc* cannot be attacked by one of the parties as being without jurisdiction for want of service of process in the divorce suit: *Scase v. Johnson*, 130 Ill. App. 35. But the remarriage of a defendant husband after the rendition of a divorce in favor of the wife in another jurisdiction and without personal service of process upon him will not estop him from denying the jurisdiction of the court to reopen the decree after his remarriage, and without notice to him award alimony in favor of the wife: *Hekking v. Pfaff*, 33 C. C. A. 328, 91 Fed. 60, 43 L. R. A. 618.

d. Recognition of Decree in Subsequent Judicial Proceedings.—The fact that after the rendition of a divorce decree the wife brought a replevin suit against her former husband in her own name and recovered a judgment as a feme sole estops her from asserting the invalidity of the divorce decree: *Baily v. Baily*, 44 Pa. 274, 84 Am. Dec. 439. Likewise, where a divorce decree has been acquiesced in for more than thirty years and recognized and invoked by both parties in a judicial proceeding, it will not be treated as a nullity: *Succession of Weigel*, 18 La. Ann. 49. But in New York it was held where a party had offered the divorce decree obtained by his wife in another state in evidence in a partition suit in order to show that she had no dower interest in certain lands and upon the faith of such decree she was held to have no interest in the property, he is not thereafter estopped from questioning the divorce decree, since "the principle of equitable estoppel cannot be invoked to confer jurisdiction on a foreign tribunal in a divorce suit": *Percival v. Percival*, 106 App. Div. 111, 94 N. Y. Supp. 909, affirmed in 186 N. Y. 587, 79 N. E. 1114. And where the validity of the divorce decree, which is attacked as a nullity, has been established by the courts of another state, such adjudication will operate against asserting its invalidity in a third state: *Bidwell v. Bidwell*, 139 N. C. 402, 111 Am. St. Rep. 797, 52 S. E. 55, 2 L. R. A., N. S., 324.

e. Recognition of Decree in Subsequent Contractual Relations Between the Parties.—Where a wife not only appeared in a divorce suit brought by the husband in another state, but afterward executed a release which recited the rendition of the decree and for a pecuniary consideration discharged all her claims upon him or his estate, she is precluded from thereafter, after his remarriage, attacking the decree, "not upon the ground of a strict estoppel, but because her own conduct amounts to a connivance at, or acquiescence in, his subsequent marriage": *Loud v. Loud*, 129 Mass. 14.

VI. Where Party Against Whom Divorce was Granted has Subsequently Lived in Adultery.

Where a wife, without cause, deserts her husband and home, lives for years in adultery, and afterward learning that a divorce has been procured by her deserted husband, causes a marriage ceremony to be performed with her paramour, and continuously lives and cohabits with him as his wife until the death of her abandoned husband, she cannot take advantage of the fact that the divorce decree is void, and successfully assert against the heirs her rights under the statute to the estate of the deceased husband as his widow: *Arthur v. Israel*, 15 Colo. 147, 22 Am. St. Rep. 381, 25 Pac. 81, 10 L. R. A. 693. But in a Pennsylvania case a wife under somewhat similar circumstances was held not precluded from asserting dower in lands conveyed by the husband. In that case the husband deserted the wife and obtained a void decree of divorce in another state. Thereafter the wife lived in adultery with another man and had a child by him. The husband remarried and conveyed the land in controversy by a deed in which the second wife joined. The purchaser was a bona fide purchaser. The court said: "Now, there was not only no evidence that the plaintiff had willingly left her husband, but the proof was direct, positive, and uncontradicted that he had deserted her. He did not request her to go with him, nor even inform her of his intention. He left her clandestinely, on the false pretense that he was going a-gunning, and was absent for several years. His own crime of unfaithfulness to his marriage vows exposed her to seduction, and that she fell was as much his fault as hers. The industry and zeal of the plaintiff's counsel has found a case in point, decided in the common pleas of Upper Canada (*Graham v. Law*, 6 Jones, 310); but it required no authority to sustain so plain a position. This view renders it unnecessary to consider the effect of the evidence of final reconciliation between John Elder and the plaintiff, as it only could become important if the dower had been barred by force of the statute. At the time, then, of the execution of the deed to the defendant for the land, the plaintiff was the lawful wife of John Elder, and had done nothing to bar her action of dower. Was there evidence of anything which ought to work as an equitable estoppel to prevent her maintaining her claim against the defendant? The principle of equitable estoppel is well stated by Lord Chief Justice Denman, in *Pickard v. Sears*, 6 Ad. & E. 469, that: 'When one by his words or conduct willfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time': *Commonwealth v. Moltz*, 10 Pa. 527, 51 Am. Dec. 499. 'Estoppels,' says Woodward, J., 'operate only between parties and privies; and the party who pleads an estoppel must be one who was adversely affected by the act which constitutes the estoppel': *Cuttle v. Brockway*, 32 Pa. 49; *Eldred v. Haslett's Admr.*, 33 Pa. 307. . . . That the defendant was a bona fide purchaser without notice sufficiently appears; and it is most probable that he was deceived into the belief that the woman with whom John Elder was then living, and who joined in the deed, was his lawful wife; but we see no evidence in the cause that any act or declaration of the

plaintiff contributed to produce that deception": *Reel v. Elder*, 62 Pa. 308, 1 Am. Rep. 414.

VII. Where Motive of Moving Party is Solely Mercenary or to Harass Other Party.

Where the party seeking to set aside a void or voidable divorce decree is not actuated by good motives, but solely by the desire to obtain the right to participate in the property owned by the other spouse, the court will be very reluctant to set the decree aside: *Hubbard v. Hubbard*, 19 Colo. 13, 34 Pac. 170; *Nicholson v. Nicholson*, 113 Ind. 131, 15 N. E. 223; *Day v. Nottingham*, 160 Ind. 408, 66 N. E. 998; *Zoellner v. Zoellner*, 46 Mich. 511, 9 N. W. 831; *Nichols v. Nichols*, 25 N. J. Eq. 60; *Whitley v. Whitley*, 60 Misc. Rep. 201, 111 N. Y. Supp. 1078. In *Singer v. Singer*, 41 Barb. 139, the court said: "Independent of any other considerations, if the motion was properly made, and in due season, the court would order any judgment of divorce obtained by collusion or fraud to be set aside, not from any regard to the parties concerned, but from motives of public policy. In such a case, however, it should be made apparent that the party so moving was acting from good motives, and not from any expected personal advantage. But where the judgment of divorce has been acquiesced in for the period of several years, and the plaintiff has again been married, some better reason than the mere gratification of personal feeling, or the desire to obtain a further sum of money from the plaintiff, should be made clearly to appear, before the court would be warranted in granting such an application."

Where the applicant knew of the decree within six months after its entry and took no steps to set it aside until about a year after the remarriage of the divorced party and nearly three years after the entry of the decree, he does not present himself in an attitude which will strongly commend him to the court. The court, in refusing the application in a case under these circumstances, observed: "He declares that he has no wish to take the complainant back, or to live with her again as his wife, and has no expectation of doing so, but that he desired to be divorced from her. His professed object in seeking to have the decree vacated is for the purpose of obtaining the custody of his infant son. But, as the custody of the child is always within the discretion of the court, and may be disposed of in such a way as to subserve the best interests of the child, the decree need not be vacated for that purpose. There is much foundation in the evidence for the conclusion that his only purpose in seeking to have the decree vacated is to annoy and harass the complainant, and to place her in the embarrassing and unfortunate position which, in view of her second marriage, would result from an annulment of the decree. A court of equity should not aid him in the accomplishment of such purpose, unless imperative rules of law necessitate that result": *Whittaker v. Whittaker*, 151 Ill. 266, 37 N. E. 1017.

VIII. Where Parties Acquiesce in or Allow Considerable Time to Elapse Before Attacking Validity of Decree.

a. In General.—The court in *De Hereu v. Hereu*, 6 Ariz. 270, 56 Pac. 871, in discussing the effect of delay in cases of this character, said: "Delay in pursuing a remedy is not acquiescence, although it often is strong evidence of acquiescence; yet mere delay—a suf-

fering of time to elapse—may of itself be a reason for courts of equity to refuse to act, and they generally do refuse where other parties have contracted new engagements as the result of delay. Acquiescence is mere silence—a refusal to speak when one ought to speak for the protection of others, or to act in time to prevent others from doing acts of which the dilatory one afterward complains.”

b. Delay Until After the Death of Other Party to the Divorce.—

A delay until after the death of the party obtaining a void or voidable divorce decree before attempting to set it aside is always a fact which will be considered in connection with other acts evidencing acquiescence in the decree and will be given important consideration as a reason for holding that the applicant is estopped from urging the invalidity of the decree as will be seen by the cases in which this fact was one of the circumstances: *Brown v. Grove*, 116 Ind. 84, 18 N. E. 387, 9 Am. St. Rep. 823; *Ashbury v. Powers*, 23 Ky. Law Rep. 1622, 65 S. W. 605; *Gilbert v. Reynolds*, 51 Ill. 513; *Maher v. Title G. & Trust Co.*, 95 Ill. App. 365; *Evans v. Woodworth*, 213 Ill. 404, 72 N. E. 1082; *Zoellner v. Zoellner*, 46 Mich. 511, 9 N. W. 831; *Marvin v. Foster*, 61 Minn. 154, 52 Am. St. Rep. 586, 63 N. W. 484; *Sammons v. Pike*, 108 Minn. 291, ante, p. 425, 120 N. W. 540, 122 N. W. 168, 23 L. R. A., N. S., 1254; *Starbuck v. Starbuck*, 173 N. Y. 503, 93 Am. St. Rep. 631, 66 N. E. 193; *Sedlak v. Sedlak*, 14 Or. 540, 13 Pac. 452; *Richardson's Estate*, 132 Pa. 292, 19 Atl. 82. In *Brigham, Petitioner*, 176 Mass. 223, 57 N. E. 328, the wife sought to set aside a divorce decree obtained by the husband, after his death, on the ground of its having been procured through the fraud of the husband. The proceeding was not brought until several years after the entry of the divorce decree. The court, in refusing to set it aside, said: “We repeat that if in any case such a proceeding as the present is possible, the utmost diligence and good faith are the conditions without which it cannot be entertained. If there were degrees in the requirements, it would be peculiarly exigent in a case presenting so many suspicious elements as this. But the petitioner, relying on getting the advantages of a widow without any of the troubles which she found incident to being a wife, and thinking that she could be better able to prove her case if the opposition of her husband was removed, waited until his death before she took a step. Whether it be called laches or be given a harsher name, such a course put an end to any claim she ever may have had to be heard.”

c. What Length of Time is Sufficient to Constitute an Estoppel.—

In the principal case (*Sammons v. Pike*, 108 Minn. 291, ante, p. 425, 120 N. W. 520, 122 N. W. 168, 23 L. R. A., N. S., 1254) the court, speaking through Mr. Justice Jaggard, raises a distinction as to the rule which should obtain where the divorce decree is void and where it is only voidable. The court is in doubt as to whether under any circumstances a void decree may be validated by the subsequent conduct of the parties, but it does admit that a voidable decree may become operative by way of estoppel by reason of unexplained delay on the part of the victim of the fraud in seeking to set the decree aside or otherwise question its validity in a legal proceeding. This is the only case in which we have observed this distinction raised in respect to divorce decrees. We have not found any case in which the void character of the decree has been apparent upon the face of the record. As will be most naturally expected where jurisdiction

is fraudulently imposed upon a court, the fraudulent acts or facts by which the jurisdiction of the court is acquired are not apparent upon the face of the record and are unknown to the court taking jurisdiction of the cause. But cases may, however, be found which militate very strongly against the distinction raised in the principal case. Thus in *Turpin v. Turpin* (Tenn. Ch.), 58 S. W. 763, neither the husband nor wife were residents of the state of Washington wherein the husband commenced a divorce suit. The complaint, however, alleged that plaintiff was a resident of the state. The defendant appeared through an attorney, who appears to have been retained by the husband, and admitted the allegations of the complaint. A decree of divorce was awarded to the husband. In a suit brought by the wife in Tennessee to set aside the decree on the ground of a fraudulent imposition of jurisdiction, the court held that she was precluded from attacking the validity of the decree. And in *Webster v. Webster*, 54 Iowa, 153, 6 N. W. 170, the decree was assailed on the ground of fraud in imposing upon the jurisdiction of the court and false grounds of divorce. Both of the parties were residents of New York, but plaintiff removed to Iowa and commenced her action, although it was claimed she was not a bona fide resident of that state. The court said: "The defendant, after having had notice of the decree at the suit of the plaintiff for nearly a year, and after the plaintiff has remarried, and after he has himself procured a decree of divorce from the plaintiff, seeks to set aside and annul the decree pronounced by plaintiffs, because of fraud in imposing upon the jurisdiction of the court, and because the grounds upon which the decree was obtained were false. We think he is not in a position to attack the decree. He has no interest in the subject matter of the litigation. After he procured his decree of divorce in New York he had no further claims upon the plaintiff. It is said that the decree should be set aside to enable him to vindicate his character against the aspersion of having been guilty of conduct entitling his wife to a divorce. We do not think this is of sufficient consequence to justify the interference of the courts, especially in view of the fact that defendant had knowledge of the decree for nearly a year, and took no steps to vindicate his character until after the plaintiff's marriage."

In another case both husband and wife lived in Chicago. The husband went to Nebraska, after an unsuccessful attempt to obtain a divorce in Illinois, and there obtained a divorce upon the same grounds. He fraudulently claimed not to know of the whereabouts of the wife. The divorce was obtained in 1879, but the wife did not know of its existence until after his death in 1894, although she knew that he lived at the home of his second wife's mother and with the second wife several years prior to his death. She was held not estopped from participating in his estate: *Field v. Field*, 215 Ill. 496, 74 N. E. 443. And in another case where an order for publication of process was obtained by false affidavits with a view to preventing notice reaching the wife, the decree was set aside for the fraud even though she had not, because of poverty, commenced proceedings for eighteen months after knowledge of the decree and the plaintiff had remarried: *Everett v. Everett*, 60 Wis. 200, 18 N. W. 637. But in another case where both parties were nonresidents but procured the divorce through collusion, both were precluded from attack-

ing the decree as void for want of jurisdiction: *Moor v. Moor* (Tex. Civ. App.), 63 S. W. 347. In the Michigan case, cited in the principal case, that of *Reed v. Reed*, 52 Mich. 117, 50 Am. Rep. 247, 17 N. W. 720, the opinion was rendered by Mr. Justice Cooley. Both parties were residents of Michigan, but the husband sojourned in Indiana the required time to obtain a divorce. His stay there was for that purpose. The void character of the decree obtained by the husband appears to have been conceded, but the court held the wife estopped to claim support from the husband because of her unexplained delay and apparent acquiescence in the fraudulent proceedings for thirteen years.

Of course, what circumstances will amount to an estoppel to urge the invalidity of a void or voidable decree is a matter for the court to determine upon the facts of each case. The principal case does not pretend to say what the Minnesota court would do "under any possible circumstances of extreme aggravation." It is true there were not in that case any affirmative acts on the part of the wife which often occur in other cases where an estoppel is held to have arisen. Nor were the rights of bona fide purchasers from the divorced husband in issue.

Where the husband sends his wife to another state, and while she is absent, by a false affidavit stating she was not a resident of Illinois, imposes jurisdiction upon the court which grants him a divorce, she is not estopped from seeking to set it aside on the ground of laches, even though fourteen years have elapsed since the rendition of the decree, where he concealed the existence of the divorce for several years from her, and when, having remarried, he falsely informed her that the decree was obtained in Indiana, and kept his whereabouts unknown from her, though she had constantly searched for the court wherein the decree was granted and his residence: *Caswell v. Caswell*, 120 Ill. 377, 11 N. E. 342. But in another case where defendant had actual knowledge of the divorce suit a month before the decree was entered, her motion to vacate it made eight months thereafter was denied even though plaintiff had fraudulently given a wrong address of defendant in obtaining substituted service of process: *McDonald v. McDonald*, 34 Wash. 293, 75 Pac. 865. So, also, where the defendant was coerced into appearing and signing an authority to enter a default, a delay of ten months and until after the plaintiff had remarried was held to preclude a vacation of the decree even though the plaintiff had lulled her into the belief that the proceedings were void and that he would remarry her in case it was necessary to do so: *Maher v. Title G. & Trust Co.*, 95 Ill. App. 365. But in another case a divorce decree was set aside after the death of the plaintiff and thirteen years after its rendition where the husband had given the wife an impression that the proceedings had been abandoned and had frequently after its rendition visited her as her husband: *Fidelity Ins. Co.'s Appeal*, 93 Pa. 242. An estoppel was declared where the husband knew of the divorce within six months after its rendition and took no steps for relief for more than a year after he knew that the wife had remarried: *Whittaker v. Whittaker*, 151 Ill. 266, 37 N. E. 1017. And where the decree of divorce was twenty months old when defendant heard of it, and she allowed eighteen months more to elapse before filing her bill to set it aside, she was held precluded by her laches, the court placing con-

siderable importance on the statutory provisions limiting the period for relief against a judgment obtained through mistake, inadvertence or excusable neglect. The application in this case was based on the ground that the plaintiff had not been a resident of the state for the required period to give the court jurisdiction, although record did not show the defect: *McNeil v. McNeil*, 78 Fed. 834. But in another case a delay of nineteen months after the suit had commenced and after the remarriage of the plaintiff was held excusable because of the wife being in a foreign country at the time and in great poverty: *Colby v. Colby*, 64 Minn. 549, 67 N. W. 663. And where a suit had been commenced in the name of the wife, but by the husband in fact without her knowledge and authority, the decree may be set aside, notwithstanding that the husband remarried within ten days after the rendition of the decree and the motion to vacate for fraud was not made until about a year thereafter: *Olmstead v. Olmstead*, 41 Minn. 297, 43 N. W. 67. Where a husband, who attacks a divorce decree on the ground of having been procured through the fraud of the wife, knew of the institution of the suit, and later on of the rendition of the decree itself two and a half years before his attack, and the rights of third parties who take under the will of the wife had intervened prior to his suit, he will be barred by his laches: *Evans v. Woodworth*, 213 Ill. 404, 72 N. E. 1082. A divorce decree will not be disturbed for the purpose of awarding alimony where both parties have acquiesced in it for four years and the plaintiff had remarried: *Nichols v. Nichols*, 25 N. J. Eq. 60. And where the victim of a fraudulent decree knew of its rendition several days thereafter, but was deterred from taking immediate steps to set it aside through statements of the husband that she was without a remedy but that he would make ample provisions for her, the fact that she made several abortive attempts to obtain relief which were decided against her for want of jurisdiction is no excuse for allowing a lapse of four years before commencing a proper proceeding for that purpose: *Nicholson v. Nicholson*, 113 Ind. 131, 15 N. E. 223. And in another case a failure of the wife for five years, without adequate excuse for the delay, to bring suit to set aside a collusive decree was regarded as such laches as would preclude relief: *Whittley v. Whittley*, 60 Misc. Rep. 201, 111 N. Y. Supp. 1078. And where a wife knew during a period of six years of a fraudulent divorce which her husband had procured in another state and knew of his remarriage, she was held estopped from attacking its validity: *Yorston v. Yorston*, 32 N. J. Eq. 495. Allowing seven years to elapse after learning of the existence of the decree estops the defendant from having it set aside where the plaintiff had remarried: *Hurley v. Hurley*, 117 Iowa, 621, 91 N. W. 895. In another case relief against a decree awarded upon the suit of the wife seven years previous was denied because the proof was not clear that she had not authorized it nor had any knowledge of the decree until about one month before bringing her suit, which was one in the nature of a bill of review: *Sloan v. Sloan*, 102 Ill. 581. An unexcused delay of nine years and until after the death of the other party is fatal to the maintenance of a suit to set aside a divorce decree obtained by the deceased husband, where the only purpose of the proceeding is "to get through a kind of post-mortem adjudication a share of the property he left": *Zoellner v. Zoellner*, 46 Mich. 511, 9 N. W. 831. And

where the wife six years after her husband obtained a divorce by substituted service returns to the city where the decree was rendered and where the husband was still living, and the facts of its rendition were well known to her friends and relatives, she will be precluded from attacking the decree four years after such return upon the ground that it had been obtained by fraud and that she had just learned of the existence of the decree: *Prewett v. Dyer*, 107 Cal. 154, 40 Pac. 105. Nor will a decree of divorce be vacated after a lapse of twelve years upon the ground that plaintiff had suborned witnesses and induced the petitioner's witnesses to absent themselves where no new evidence is offered except that of petitioner who was an incompetent witness at the time of trial: *Holbrook v. Holbrook*, 114 Mass. 568. So, also, where the wife against whom a divorce was obtained knew the facts constituting the fraud alleged as the basis for setting the decree aside thirteen years before commencing proceedings, her application is too late: *Peyton v. Peyton*, 28 Wash. 278, 68 Pac. 757.

Where a wife was aware of the fact that her husband was living with another woman as his wife, and knew that he had obtained a divorce from herself fifteen years prior to her suit claiming a dower interest in land conveyed by the husband and his second wife to a bona fide purchaser, she will be estopped from attacking the decree since "her silence and inaction during all this time amounts to a fraud and should be so regarded": *Gilbert v. Reynolds*, 51 Ill. 513. And where the record shows a decree of divorce regular in form, a delay of fifteen years in commencing a proceeding to set it aside for fraud will bar the suit where she knew the facts during almost the entire time and her only excuse for the delay was financial distress: *Earle v. Earle*, 91 Ind. 27. A delay of seventeen years, during which time the divorced wife had remarried and conveyed property held by her as her separate estate at the time of the decree, will bar an attack on the validity of the decree where the attacking party had been personally served with process and knew of the divorce: *Buffington v. Carty*, 195 Mo. 490, 93 S. W. 779. And where the parties to an invalid legislative divorce have recognized it as valid for twenty years and both have remarried, they are both estopped from asserting its invalidity: *Richeson v. Simmons*, 47 Mo. 20. And where a wife commenced a suit for divorce from bed and board, but later on filed an amended petition seeking an absolute divorce, which was granted, she is estopped after a lapse of twenty-five years and the remarriage and death of her former husband from attacking the decree on the ground that neither she nor her husband were residents of the county in which the action was brought, and that the amended petition was filed without her authority: *Ashbury v. Powers*, 23 Ky. Law Rep. 1622, 65 S. W. 605. And where the wife who was awarded a divorce, custody of her children and an interest in her husband's estate has accepted the benefits of the decree for thirty years, she will be precluded from attacking its validity after the remarriage and death of her former husband: *Sedlack v. Sedlack*, 14 Or. 540, 13 Pac. 452.

d. Poverty as an Excuse for Laches.—The poverty of the party seeking relief from a void or voidable divorce decree is not alone regarded as a sufficient excuse for laches but it is a fact which will be considered in connection with other facts: *Caswell v. Caswell*, 120

Ill. 377, 11 N. E. 342; *Field v. Field*, 215 Ill. 496, 74 N. E. 443; *Brown v. Grove*, 116 Ind. 84, 9 Am. St. Rep. 823; *Colby v. Colby*, 64 Minn. 549, 67 N. W. 663; *Whittley v. Whittley*, 60 Misc. Rep. 201, 111 N. Y. Supp. 1078; *Everett v. Everett*, 60 Wis. 200, 18 N. W. 637.

IX. Who may Avail Themselves of the Rule of Estoppel in Cases of This Character.

What will bind the original parties to the divorce decree will also bind those who claim through them or either of them: *In re Ellis' Estate*, 55 Minn. 401, 43 Am. St. Rep. 514, 56 N. W. 1056, 23 L. R. A. 287; *Sammons v. Pike*, 108 Minn. 291, ante, p. 425, 120 N. W. 540, 122 N. W. 168, 23 L. R. A., N. S., 1254; *Matter of Morrison*, 52 Hun, 102, 5 N. Y. Supp. 90, affirmed in 117 N. Y. 638, 22 N. E. 1130. The grantees of the respective parties in a case of this character are in the same position as their grantors in respect to the right to attack the decree: *Elliott v. Wohlfrom*, 55 Cal. 384.

A third person who marries one of the parties relying on a divorce decree which was obtained by fraud and collusion is precluded from having it set aside on those grounds in order to invalidate his own marriage: *Kinnier v. Kinnier*, 45 N. Y. 535, 6 Am. Rep. 132; *Ruger v. Heckel*, 85 N. Y. 483.

Where a husband leaves his wife and goes to another state where he obtains a divorce and thereafter remarries, he cannot, in an action against him by the state to adjudge him a disorderly person for failing to support his wife, impeach the validity of the jurisdiction of the court which granted him the divorce in order to escape his responsibility under his second marriage: *People v. Shrady*, 47 Misc. Rep. 333, 95 N. Y. Supp. 991.

PLEINS v. WACHENHEIMER.

[108 Minn. 342, 122 N. W. 166.]

ACTIONS—Joinder of Causes.—Several Causes of Action, Legal or Equitable, arising out of the same contract or transaction, and not inconsistent, may, under section 4154, Revised Laws of 1905, be united in the same complaint, where they affect all the parties to the action, though all be not affected alike. (p. 453.)

CONTRACT in Name of Agent—Parol to Identify Real Party. A person who enters into a contract with another and causes it to be reduced to writing in the name of his agent may be identified by parol evidence as the real party in interest and thus subjected to liability thereon. (p. 454.)

(Syllabi by the court.)

Thos. J. McDermott and G. S. Ives, for the appellant.

Ambrose Tighe, for the respondents.

342 BROWN, J. Defendant Locke interposed a demurrer to plaintiff's amended complaint, specifying as grounds thereof (1) that several causes of action were improperly united.

and (2) that the facts therein stated do not constitute a cause of action; and plaintiff appealed from an order sustaining the same.

³⁴³ The action is to recover damages for the breach of a contract alleged to have been entered into between plaintiff and defendant Locke, which for the convenience and at the instance of Locke was made in the name of defendant Wachenheimer, who the complaint alleges was the agent of Locke. The complaint alleges: "That on the sixteenth day of October, A. D. 1906, a contract in writing was executed by this plaintiff and the defendant Wachenheimer, a copy of which is hereto annexed, marked Exhibit 'A,' and made a part of this complaint. That all the negotiations for said contract were made between this plaintiff and the defendant Locke, acting in his own behalf, and that all the matters stated in said contract were agreed upon between this plaintiff and said Locke, acting in his own behalf as aforesaid, prior to the execution of said contract. That thereupon the said Locke caused said contract to be prepared in accordance with the terms of such agreement, with the exception that he caused the name of said defendant Wachenheimer to be inserted in the same instead of his own. That said Locke represented to this plaintiff that he was the president of the Security Trust Company. That said company was largely and actively engaged in business in St. Paul, Minnesota, including the administration of estates of decedents and other fiduciary matters, and for such reason he did not think it proper for him as president of such company to publicly be known as connected with or engaged in exploiting an invention or patent right. That he would faithfully carry out and perform all the terms of said agreement, but desired and requested this plaintiff for the reasons aforesaid to allow said contract to be executed nominally in the name of said Wachenheimer, who was at such time associated with said Locke in matters of this character. That in accordance with such request, and relying upon such statements and promises on the part of said defendant Locke, this plaintiff executed the said contract as aforesaid. Plaintiff further alleges that in the making of such contract, and in all subsequent proceedings thereunder, the said Wachenheimer acted and continued to act as the agent of said defendant Locke, and that during all said time the said Locke was and still is the real party in interest therein, and that said contract was so made and said business transacted in the ³⁴⁴ name of said Wachenheimer as a matter of convenience for said Locke, for his accommodation and to avoid publicity as aforesaid."

The contract is attached to and made a part of the pleading, and the extract above set out is followed by appropriate allegations of a breach of its provisions. The prayer for relief is that plaintiff have and recover five thousand dollars

damages for failure of defendants to carry out the terms of the contract, and that the contract be rescinded and delivered up for cancellation.

1. If it be conceded that the complaint states two causes of action, one for damages and one for the cancellation of the contract, still it is not demurrable; for section 4154, Revised Laws of 1905, expressly permits a joinder of causes of action, legal or equitable, where they arise out of the same transaction, are not inconsistent, and affect all the parties to the action. Both causes of action presented by this complaint arise out of the same contract or transaction, are not inconsistent, and affect all the parties of the action. The contract, though made with Locke, was in the name of Wachenheimer, and to effect a cancellation thereof both are necessary parties. Respecting the damages, perhaps, Wachenheimer is not a necessary party; but from that fact a misjoinder of the causes of action does not follow. It is not necessary that the several causes of action authorized to be joined under the statute referred to affect all the parties alike: *Mayberry v. Northern Pac. Ry. Co.*, 100 Minn. 79, 110 N. W. 356, 12 L. R. A., N. S., 675, 10 Ann. Cas. 754. The relief awarded in such cases may affect them differently but, when all are concerned in some material part of the subject matter in litigation, they may be joined. In the case at bar the contract may be canceled as to both defendants, but a recovery of damages would in all probability be limited to Locke.

2. The argument in support of the second ground of demurrer, namely, that the complaint does not state facts sufficient to constitute a cause of action, is that, since the contract is in writing and upon its face an agreement between plaintiff and Wachenheimer, to permit evidence to connect Locke with it as a party in interest would violate the elementary rule that an unambiguous written contract cannot be varied or changed by parol. The question was presented on the oral argument mainly on the theory of the general principle ³⁴⁵ that an undisclosed principal may, by parol proof, be subjected to liability on contracts made in his behalf by his agent; but that rule, except by analogy, has no special application to the facts here presented. Its particular application is to cases where an agent enters into a contract on behalf of his principal, without disclosing to the person with whom he is dealing that he is acting as an agent.

In the case at bar the complaint alleges that the contract in question was in fact made and entered into between plaintiff and Locke, that it was put in Wachenheimer's name at Locke's request, and that Wachenheimer thereafter in all matters pertaining to the agreement acted as Locke's agent. Under such circumstances it cannot well be said that Locke was an unknown principal within the rule stated. He was known,

and personally made the contract in his own behalf. But on the same principle, which is supported by all modern authority (18 Yale L. J. 443), Locke may be identified by parol as the real party in interest (Wm. Lindeke Land Co. v. Levy, 76 Minn. 364, 79 N. W. 314; overruling Rowell v. Oleson, 32 Minn. 288, 20 N. W. 227). We need not stop to consider the extent to which the Oleson case was overruled, nor whether, where an agent enters into a written contract on behalf of his principal, but in his own name and after expressly disclosing to the other contracting party the name of his principal, the latter may be subjected to liability thereunder. Such is not this case.

Here, as already stated, the principal made the contract and caused it to be placed in his agent's name for reasons of his own. He had the right to do business in his own or in the name of his agent, as he thought proper and advisable, and parol evidence identifying him as the real party in interest violates to no greater extent the rule against varying written contracts by extrinsic evidence than by subjecting to liability an unknown and unnamed principal by similar means. Had Locke assumed, in making the contract, an artificial or fictitious name, it is clear that he could have been identified as the real party. The situation is in no essential way changed by the fact that he made use of the name of another known person: Pease v. Pease, 35 Conn. 131, 95 Am. Dec. 225.

While plaintiff, in his amended complaint, apparently shifted his position as to the facts, as pointed out by respondent, the amended ³⁴⁶ pleading is the only one before us, and its sufficiency must be determined in the light of the facts therein set forth, without reference to the allegations of the original complaint: Hanscom v. Herrick, 21 Minn. 9.

Order reversed.

A Person may Enter into a Contract Under Any Name he may choose to assume; all that the law looks to is the identity of the individual, and when that is established the act will be binding upon him and upon others: Scanlan v. Grimmer, 71 Minn. 351, 70 Am. St. Rep. 326; Hartman v. Thompson, 104 Md. 389, 118 Am. St. Rep. 422. That evidence aliunde the instrument is admissible to identify him, see Wakefield v. Brown, 38 Minn. 361, 8 Am. St. Rep. 671.

VILLAGE OF EXCELSIOR v. MINNEAPOLIS AND ST. PAUL SUBURBAN RAILWAY COMPANY.

[108 Minn. 407, 120 N. W. 526, 122 N. W. 486.]

APPEAL—Notice of Argument—Computation of Time.—Held, following *Coe v. Caledonia & Mississippi Ry. Co.*, 27 Minn. 197, and *State v. Weld*, 39 Minn. 426, and overruling *Greve v. St. Paul, Stillwater & Taylor's Falls R. Co.*, 25 Minn. 327, that, in the computation of the ten days' notice of argument required by rule 8 of the supreme court, the day of service should be excluded, and the first day of the term included. (p. 456.)

RAILWAYS—Ordinance Requiring Cars to Stop at Crossing.—A writ of mandamus was issued to defendant suburban railroad company to compel it to stop its cars at a point in the plaintiff village. Defendant was authorized to operate its lines within the limits of the village under an ordinance provision that it should carry passengers within the village limits on the payment of the specified fare. The village subsequently passed an ordinance requiring railroad and street cars, which occupied public streets for the purpose of operating upon and along the same, to stop such cars at grade crossings of streets when any persons required to enter or alight from such cars. It is held that mandamus did not lie to compel defendant to stop at the designated place because:

1. The ordinance was not a legitimate exercise of the police power.
2. Defendant's lines did not in fact occupy a street, and were not located upon and along a street, but were constructed upon its own right of way.

3. The ordinance was opposed to public policy; under the general law, defendant was not a mere street railway company, but had the legal status of a suburban railway with the power to condemn lands (*Minneapolis & St. P. S. Ry. Co. v. Manitou Forest Syndicate*, 101 Minn. 132, followed); the requirement that a suburban railroad should stop at every street intersection to take on and discharge passengers tended to destroy its usefulness as a carrier of passengers and to destroy competition with steam railways; and the observance of the ordinance did not subserve public convenience. (pp. 457, 459.)

(Syllabi by the court.)

Petition by Village of Excelsior for an alternative writ of mandamus to compel the defendant railway company to stop its cars at the intersection of its roadbed in George street in the village when passengers desire to board or leave the cars. From an order sustaining the demurrer of petitioner to the answer and return, the railway company appealed. A motion to continue the case, on the ground that the notice of the argument was not served in time, was denied. On April 8, 1909, the following opinion was filed.

N. M. Thygeson, John F. Dahl and D. R. Frost, for the appellant.

Julius E. Miner, for the respondent.

408 PER CURIAM. Motion to continue the case for the reason that the notice of argument was not served in time.

Rule 8 provides that "cases shall be noticed for argument at least ten days before the first day of the term." If this rule be construed so as to exclude the day of service and include the first day of the term in the computation of the ten days, the notice in this case was duly served; otherwise, not.

In the case of *Greve v. St. Paul etc. R. Co.*, 25 Minn. 327, it was held that the rule excluded from the computation both the day of service and the first day of the term. No reason for the decision was given. Some two years later practically the same question was before the court in the case of *Coe v. Caledonia etc. Ry. Co.*, 27 Minn. 197, 6 N. W. 621, and the court construed a statute which provided that a notice of election should be posted "at least ten days prior" thereto. The notice in the case cited was posted on May 13th, and the election was held on the 23d of the same month. The court held that the notice was posted in time for the reasons following: "The general rule is that where notice is required to be posted or published a specified number of days before an event of which notice is to be given, the required number of days is computed by excluding the day of first posting or publishing, and including the day on which the event is to occur: *Worley v. Naylor*, 6 Minn. 123 (192); *Arnold v. Nye*, 23 Mich. 286. This is in accordance, also, with the rule prescribed by our statute with reference to the computation of time in civil actions: 409 Gen. Stats. 1878, c. 66, sec. 82; Rev. Laws 1905, sec. 5514, subd. 21. No reason can be given why a different rule should obtain in cases arising otherwise than in civil actions, nor why the law should not be consistent in following the statutory rule in all instances to which it is logically applicable by analogy." This indirectly overrules the *Greve* case (25 Minn. 327). Again in *State v. Weld*, 39 Minn. 426, 40 N. W. 561, the court construed the statute as to the serving notice of trial in the district court, which required the notice to be served "at least eight days before the term," and held that in the computation of the eight days the day of service should be excluded and the first day of the term included.

The result of the decisions referred to is that the proper construction of rule 8 is left uncertain, and the *Greve* case has become a stumbling-block. There is no reason why the rule should not be construed in harmony with the rule of the statute, but every reason why it should be. We therefore hold, following *Coe v. Caledonia etc. Ry. Co.*, 27 Minn. 197, 6 N. W. 621, and *State v. Weld*, 39 Minn. 426, 40 N. W. 561, and expressly overruling *Greve v. St. Paul etc. R. Co.*, 25 Minn. 327, that in the computation of the ten days' notice of argument required by rule 8 of the supreme court, the day of service should be excluded and the first day of the term included.

Motion denied.

On July 16, 1909, the following opinion was filed:

JAGGARD, J. On the petition of the village of Excelsior, the district court issued a writ of mandamus to the defendant and appellant suburban railway company. To an answer and return of the defendant the plaintiff village demurred on the ground that it did not state facts sufficient to constitute a defense. The demurrer was sustained, with leave to defendant to amend. This appeal was taken from the order to that effect.

It appeared that defendant was authorized by ordinance to operate its lines within the limits of the village under provisions which included the following:

"Sec. 8. Said Minneapolis and St. Paul Suburban Railway Company, its successors and assigns, shall have the right to charge and ⁴¹⁰ collect five cents, and no more, for each passenger traveling on any of said lines of street railway or parts thereof, within the village limits of the village of Excelsior; provided, however, that the payment of said five cents shall entitle the passenger so paying the same to one continuous ride from any point in the village limits in the village of Excelsior located along any of said lines to any other point within the village limits of the village of Excelsior, located along any of said lines; provided, however, that no fare shall be required for children under six years of age when traveling with or attended by an adult having paid one full fare."

Subsequent to the construction of defendant's lines, the village passed an ordinance which is as follows:

"Any person, company, or corporation driving or propelling, or requiring to be driven or propelled, any railroad car or street-car which occupies the public streets, avenues or alleys of the village of Excelsior for the purpose of operating upon and along same, shall stop such cars at any and all of the intersections or crossings of streets when any person or persons require to enter or alight from such cars, provided such crossings are grade crossings."

It was sought under this ordinance to compel defendant to stop its car at a place where its line in plaintiff village was intersected by George street. In point of fact defendant was willing to establish a stopping place three-fourths of a mile distant, where its lines divided, and one line passed up Water street. Within the village limits west of this stopping place six village streets intersected defendant's tracks.

The plaintiff contends that the ordinance requiring defendant to stop at George street was a legitimate exercise of police power. For present purposes it may be conceded that the village council had the authority to pass a proper ordinance in the exercise of such power. Such an ordinance must have reference, however, to public peace and safety and the good order of persons or agencies upon the streets. Upon the as-

sumption that such power existed, the village had the right to pass reasonable ordinances regulating, *inter alia*, the speed of traffic and the stoppage of cars. Incidentally, such ordinances would conduce to the convenience and comfort of the community. It by no means follows, however, that an ordinance designed entirely ⁴¹¹ for the comfort and convenience of the inhabitants is a valid exercise of the police power. The ordinance in question cannot by any reasonable construction be regarded as the result of the exercise of the police power. Under its terms cars are allowed to operate without restriction, except "when any person or persons require to enter or alight from such cars." The element of danger to users of the highway is effectually ignored. The right to *mandamus* based upon the police power must therefore be eliminated.

The question then arises whether the terms of the ordinance applied to the facts in this particular case. The defendant urges that their fair construction compels the conclusion that they do not apply. They refer expressly to lines of the defendant which occupy and which are located upon any public street. At the place in question defendant did not occupy a street—had not constructed its lines along the street, but on its own right of way. On Water street it had constructed its lines along the street. The *mandamus*, however, did not purport to affect Water street. It is true that defendant's lines crossed streets and alleys; but that fact did not bring defendant within the provisions of the ordinance, for it was held in *Minneapolis & St. P. S. Ry. Co. v. Manitou Forest Syndicate*, 101 Minn. 132, 112 N. W. 13, that "the crossing of streets and alleys, incidental to constructing a railroad from place to place, does not constitute the occupancy of such streets or alleys for the purpose of operating a railway thereon, within the provisions of section 2841 of the Revised Laws of 1905, and a railroad company has the right to acquire by condemnation, under section 2916 of the Revised Laws of 1905, a right of way over the streets and alleys of cities and villages and over private property within such limits, without securing a franchise from the municipal authorities." There is obvious cogency in this argument; but in view of the great importance of the public question involved we feel unwilling to rest the decision on this ground alone, or to abstain from the determination of the larger questions involved.

We are of opinion that the contract with the village under which defendant operated its lines did not authorize the ordinance. It is obvious that section 8 must be reasonably construed. It is clear that the provisions, literally construed, would be void. An ordinance may require under given conditions that a street-car must ⁴¹² stop at the end of any block, or at the middle of long blocks, or at railroad crossings, or at places where fire engines may suddenly emerge. But a re-

quirement that a car must stop at every point at which a passenger may wish to enter or alight would be destructive, not only of the purposes for which the corporation was authorized to transact business, but would also completely demoralize traffic, and would be, the authorities generally agree, without legal force. It is equally clear that a proper construction of the charter provisions must have reference to the situation as a whole, and be determined with due regard to all relevant circumstances. The subject is not to be regarded from a narrow or local point of view. The reasonableness of an ordinance, it is elementary, is a question of public policy. Public policy necessarily involves a consideration of a number of important facts appearing on this record.

One of these considerations is that the respondent company has a somewhat anomalous legal status. Under the charter provisions which have been herein quoted, it would appear to be a street railroad. In *Minneapolis & St. P. S. Ry. Co. v. Manitou Forest Syndicate*, 101 Minn. 132, 112 N. W. 13, however, it was held that defendant was not a mere street railroad company, but was organized to construct and operate interurban railroads from place to place, and as such had the right to exercise the power of eminent domain. A construction which would give to special legislation by a village or city an effect which would render nugatory rights exercisable under general laws would be subject to obvious and substantial objections.

Another consideration is that the principal business of the respondent is to furnish rapid transportation of passengers between various points around Lake Minnetonka and the people of cities to the east and of the surrounding district to the west. In this business respondent had the competition of two steam railroads. If the principle for which the village contends would be adopted, respondents might be compelled to stop at so many street crossings as to seriously hamper, and possibly to destroy, its competitive power. It is clearly opposed to public policy to secure to steam railroads monopoly of local passenger traffic. As *Summers, J.*, said in *Townsend v. City of Circleville*, 78 Ohio, 122, 84 N. E. 792, 16 L. R. A., N. S., 914: "If every city and village through which such a railway [as the one at bar] ⁴¹³ passes may require its cars to be stopped at every street intersection to take on or to discharge passengers, and to serve the purposes of a street railway, then its usefulness as a means of interurban transportation may be very much limited, because so much time will be consumed in passing through cities and villages that it will no longer be practicable for many to travel in that way."

A final consideration is that the ordinance does subserve the public convenience in the village. The distance between the place at which the cars are sought to be stopped, George

street, and the place at which defendant offers to stop the cars, at Water street, is inconsiderable. The population between the two points is sparse. How many people would use a stopping point is conjectural; but it is plain that the number would be very small. The inconvenience resulting to the altogether larger number of persons carried to more distant points would inevitably tend to decrease the extent of train service. The eventual diminution in the number and speed of cars, especially if the principle invoked was applied to a great extent, would appear to more than equal any possible advantage. The weight to be given to this custom is undoubtedly diminished by the fact that this matter rests largely in the discretion of the village council.

After examination of the question as a whole, we have concluded that the proper course is to reverse the decision of the trial court.

Reversed.

The Power of Municipal Corporations to Enforce Regulations respecting the operation of street railways for the protection of the public, is the subject of a note to *People v. Detroit United Ry.*, 104 Am. St. Rep. 636. According to *Townsend v. Circleville*, 78 Ohio St. 122, 81 N. E. 792, 16 L. R. A., N. S., 914, municipal corporations of Ohio have only such police power as is expressly granted or clearly implied; and the legislature has not granted to them power to require, by a penal ordinance, the stopping of interurban cars to take on and to discharge passengers, but only to regulate the speed of such cars within the corporation.

MAR v. SHEW FAN QUI.

[108 Minn. 441, 122 N. W. 321.]

JURY—Coercion of Verdict by Undue Means.—Though the trial court in its discretion may urge upon a disagreeing jury a further consideration of the case, in the hope that an agreement may be reached, it exceeds proper limits when it attempts to coerce a verdict by undue means. (p. 462.)

JURY—Improper Coercion by Court.—The jury reported their inability to agree, whereupon the court said to them, among other things: "The facts are plain. There is no law in this case . . . and I do not feel that I can let you go until you return a verdict." Held, an improper coercion of the jury. (pp. 461, 462.)

(Syllabi by the court.)

Hall & Kolliner, for the appellants.

Bardwell & Levy, for the respondent.

441 BROWN, J. Action to recover money alleged to have been lost by plaintiff at gambling rooms operated by defendants in the city of Minneapolis. Plaintiff had a ver-

dict, and defendants appealed from an order denying a new trial.

A large number of errors are assigned and discussed in the briefs. One in particular, charging irregularities in the proceedings below, received the greatest attention on the argument and in the briefs. This related to efforts on the part of the court and counsel, acting under section 4664 of the Revised Laws of 1905, and occupying nearly two days, to ⁴⁴² discover the form of oath administered under the laws of China, on the theory that it was more binding on the conscience of Chinamen than our own. Many of the assignments present unimportant matters and will receive no separate consideration. The error presently to be mentioned reverses the case, so we deem it unnecessary to determine whether the proceedings relative to a Chinese oath constituted such irregularity as to justify a new trial. We may say in passing, however, that if the method of administering the oath to witnesses in some foreign country cannot be ascertained in less than two days' effort, the court would be fully justified in declining to make it, in admonishing the witnesses in an emphatic way of the consequences of perjury under the laws of this state, and proceeding with the trial according to our own forms of procedure.

The principal issue in the case, namely, whether plaintiff had lost money at the defendant's gaming table, was closely contested on the trial, and the evidence was sharply conflicting. The case was given to the jury under proper instructions, and they retired for deliberation. After being out some time, the record does not say how long, the jury reported to the court that they were unable to agree upon a verdict, whereupon the court gave them the following instructions:

"Gentlemen, I don't know any more about how you stand in this matter than some foreigner in a foreign land; but I wish to say this: It is your duty to act honestly and conscientiously in your deliberations. No one or two men have a right to get off in a corner and deliberately refuse to discuss and argue the testimony presented to you. One or two jurors are not justified in holding out and blocking a jury, unless they feel morally certain that they are right. You are sent there to deliberate, and to discuss and argue with each other, and try conscientiously to come to a conclusion. This is not a case where you should not come to a verdict. The facts are plain. There is no law in this case. It is a plain, simple question of fact, and you are just as able to decide that question as any twelve men we can get; and I do not feel that I can let you go until you return a verdict."

The jury again retired, and soon thereafter brought in a verdict for plaintiff, assessing his damages at two hundred and fifty dollars. Plaintiff brought his action to recover five

hundred dollars, and testified that he lost that amount at defendants' ⁴⁴³ place of business. So that the verdict was evidently a compromise, and the result of the court's statement that he would not discharge the jury until they agreed upon a verdict.

This action and instruction of the court is assigned as error. We are clear that it is fatal to the verdict. This was strictly a jury case, depending upon conflicting evidence, and in view of the record before us it is not at all surprising that the jury could not agree. Both parties had the right to a conscientious verdict from the jury, free from undue influence or coercion by the court; and though it is a thoroughly settled practice that the court may, in the exercise of its discretion, where jurors report their inability to agree, urge upon them a further consideration of the case in the hope that an agreement may be reached (*Watson v. Minneapolis St. Ry. Co.*, 53 Minn. 551, 55 N. W. 742; *Gibson v. Minneapolis St. P. & S. S. M. Ry. Co.*, 55 Minn. 177, 43 Am. St. Rep. 482, 56 N. W. 686), it exceeds proper limits in bringing about an agreement by threats of long-continued confinement in the jury-room, or other undue or coercive methods. That the jury felt constrained to report a verdict of some kind in this case is quite clear, and that it was produced by the remark of the court that the case was a simple one, and that the jury would not be discharged until they had returned a verdict, is equally clear: *Green v. Telfair*, 11 How. Pr. 260; *Slater v. Mead*, 53 How. Pr. 57; *Brooks v. Barth*, 98 Mo. App. 89, 71 S. W. 1098; *Twiss v. Lehigh Val. R.*, 61 App. Div. 286, 70 N. Y. Supp. 241; *Hagen v. New York Cent. etc. R. Co.*, 79 App. Div. 519, 80 N. Y. Supp. 580; *Phoenix Ins. Co. v. Moog*, 81 Ala. 335, 1 South. 108; *Hancock v. Elam*, 3 Baxt. (Tenn.) 33. For this error a new trial is granted.

Order reversed.

Urging or Coercing a Verdict is the subject of a note to *State v. Eatherly*, 105 Am. St. Rep. 569.

KOREIS v. MINNEAPOLIS AND ST. LOUIS RAILROAD COMPANY.

[108 Minn. 449, 122 N. W. 668.]

RAILROADS—Engineer Operating Defective Locomotive—Assumption of Risk and Contributory Negligence.—Plaintiff, defendant's engineer, when half way between two stopping places, found that fastenings of the eccentric straps on the engine were defective and the two halves of those straps partially pulled apart. Having made imperfect repairs, he proceeded to the next station for which he had orders, a distance of nineteen miles. When the engine was within about half a mile of that station, the left eccentric strap broke, threw back the lever, and broke his arm. It is held:

1. The complaint was valid as against objections made after the case had been called for trial and plaintiff had introduced some evidence. (p. 463.)

2. A railroad engineer owes a duty to the public, as well as to his employers, and is justified in taking much greater risks than employes in other occupations, without necessarily forfeiting the right of action for injuries resulting from his master's negligence of which he has knowledge. While the emergency of railroad traffic will not excuse the servant for running the risk of almost certain injury, it is only in extreme cases that he will not be warranted in operating a temporarily repaired engine until he reaches the next station. In view of the circumstances of this case in general, and of the particular fact that the engine in this case ran eighteen and one-half out of a possible nineteen miles with entire safety, it was a question of fact for the jury whether plaintiff assumed the risk. (p. 465.)

3. Plaintiff was not guilty of contributory negligence as a matter of law. (p. 466.)

4. Defendant's negligence was a question of fact for the jury, because of testimony that the defective condition of the eccentric strap was previously reported to defendant, and that the bolts by which the eccentric straps were attached were old and thread-worn, and because of the occurrence of the accident within a short distance of the place of inspection. *Sheedy v. Chicago, M. & St. P. Ry. Co.*, 55 Minn. 357, followed and applied. (p. 466.)

5. It was for the jury to determine whether or not defendant's negligence was the proximate cause of the injury. (p. 467.)

6. That the court charged defendant's duty to have been to furnish plaintiff instrumentalities safe for use is held not to have been reversible error, because the court's attention had not been called to the inaccuracy in language before the jury retired. *Waligora v. St. Paul Foundry Co.*, 107 Minn. 554, followed and applied. (p. 467.)

(Syllabus by the court.)

John I. Dille, Peter McGovern, W. H. Bremmer and George W. Seevers, for the appellant.

Albert E. Clarke and D. F. Carmichiel, for the respondent.

450 JAGGARD, J. Plaintiff and respondent, an engineer in the employ of defendant and appellant railroad company, when half way between two stopping points found that the keys and nuts for the bolts which fastened the left eccentric strap to the eccentric were gone and that the two ⁴⁵¹ halves of those straps had pulled partially apart. He repaired the engine by restoring the left eccentric strap to its proper position, putting a nut on the top of the bolt and a wire in the hole made for key to keep the nut in place. He then proceeded to the station for which he had orders, a distance of nineteen miles. When within about half a mile of that station, the left eccentric strap broke, threw back the lever, and broke respondent's arm. The jury returned a verdict for three thousand dollars for plaintiff. This appeal was taken from an order overruling appellant's motion in the alternative.

1. Defendant's first point is that the complaint does not state a cause of action. The question before us is not whether that complaint is technically perfect, but whether it is valid

as against objections made after the case had been called for trial and plaintiff had introduced some evidence. The pleading charged defendant with negligence, and advised that the accident was due to an imperfection in "the left go-ahead eccentric" and other parts connected therewith. That defendant was in any wise prejudiced by any inartistic imperfection is not suggested. The assignment of error is without merit.

2. The second point argued by defendant is that "plaintiff acted for the defendant in deciding to repair the engine, made the repairs, and voluntarily used the engine after it had been repaired and assumed the risk." Defendant's rules, of which plaintiff had full knowledge, required the plaintiff to take every precaution for his safety, to resolve all doubts in favor of the safe course, and never to take an unusual risk. Plaintiff was familiar with the relation of the eccentric straps to the lever that caused the injury and the probable consequences of a break in an eccentric strap, the effect of the loosening of the strap upon the eccentric, and the danger of the parts coming off. Plaintiff undertook to repair, and to proceed with the engine as repaired, as part of his employment. He was at perfect liberty to proceed no farther when he discovered the break, and to report the accident to the master mechanic, and to await his orders. He had the same freedom in deciding whether he could himself make the repairs and proceed in safety. He was in full possession of all the facts and in absolute authority. The failure to make the engine safe was his failure. Having made the repairs, and having proceeded to use the engine with full knowledge of all facts, and necessarily appreciating ⁴⁵² all the danger himself, he must be held to have assumed the risk in so doing.

This argument by defendant the learned trial judge recognized as the only serious question in the case. In his memorandum he said: "Whether or not an engineer under such circumstances should abandon his journey and report the condition of matters to headquarters for instructions, or should make such temporary repairs as were possible and proceed for the short remainder of his run, was for the engineer, in the exercise of his best judgment, to determine; and that he does not necessarily assume the risks of the journey because he erred in judgment. It is not every defect in his engine discovered by the engineer that would justify him in stalling his train and waiting for repairs from distant headquarters, and whether any particular case required such action must necessarily be left to the good judgment of the engineer, both on general principles governing the duty of an employé to his master and the special rule of the defendant company given in evidence at the trial. Whether the engineer in this case

was required to do one thing or the other was, I think, for the jury to say."

His conclusion was, we are satisfied, correct. Mr. Labatt has thus summarized the authorities: "The case of a railway servant stands upon a special footing, as he is deemed to owe a duty to the public as well as to his employers, and the effect of the decision, as a whole, is that he is justified in taking much greater risks than employes in other occupations, without necessarily forfeiting his right of action. Under ordinary circumstances, such a servant seems to be, at all events, entitled to remain at work until he obtains an opportunity of notifying the proper agent of the master as to the existence of danger. It is only in very extreme circumstances that he will not be warranted in remaining on a train until it reaches the next station. But the exigencies of railway traffic will not excuse the servant for running the risk of almost certain injury": Labatt on Master and Servant, sec. 302a, p. 740.

It would merely encumber the reports to here discuss or to amplify the authorities there cited. That in the case at bar the engineer's course was a reasonably prudent one the jury might have concluded from many facts generally, and from the particular fact that the engine ⁴⁵³ ran eighteen and one-half miles out of a possible nineteen with entire safety.

The authorities to which defendant calls our attention in this case do not at all control. It is to be borne in mind that at this point defendant is arguing and we are deciding the question of assumption of risk, and not the question of defendant's negligence.

In *Scott v. Eastern Ry. Co. of Minn.*, 90 Minn. 135, 95 N. W. 892, a freight conductor was held guilty of contributory negligence in using a step on a car, which step was in bad order. The defect existed when plaintiff was directed to take the car out. That case is as foreign to the immediate issue as is *Nordquist v. Great Northern Ry. Co.*, 89 Minn. 485, 95 N. W. 322, in which a conductor of a freight train was held guilty of contributory negligence as a matter of law in not complying with the special rule as to conduct of conductors at a mountain tunnel, requiring them to inform the engineers how many cars of air were working. Plaintiff had no personal knowledge that the air was working on fifteen cars back of the engine. "Plaintiff did not inform the engineer how many cars the air was working on," as the rule imperatively required, "for he had not informed himself in the premises." The train proceeded, became unmanageable, ran at a dangerous rate of speed through the tunnel to a point below where it left the rails at a curve, was thrown down the mountain side, and plaintiff injured. The other decisions to which we are specially referred in this connection set forth admitted, familiar, but irrelevant, principles.

Nor is the case controlled by defendant's authority to the effect that a servant who is employed to repair machinery, who as a part of his duty handles defective machinery, assumes all risks arising from such defects. That in *Kelley v. Chicago, St. P. M. & O. Ry. Co.*, 35 Minn. 490, 29 N. W. 173, a yard brakeman engaged in handling disabled cars assumed the risk of handling such cars is in no wise inconsistent with the conclusion here reached. Nor does defendant strengthen its position in this case by citing *Broderick v. St. Paul City Ry. Co.*, 74 Minn. 163, 77 N. W. 28, in which a servant, employed to replace rotten wooden poles with iron poles, placed a ladder against a wooden pole and was injured by jumping off when the pole broke at the ground, or *Saxton v. Northwestern Tel. Exch. Co.*, 81 Minn. 314, ⁴⁵⁴ 84 N. W. 109, in which a servant was injured by a fall from a pole which he had climbed for the purpose of detaching and removing a wire preparatory to taking the pole down.

3. Defendant's third point is that plaintiff was guilty of contributory negligence. We are at a loss to see how possible failure on plaintiff's part to originally inspect the engine has any direct connection as the proximate cause of plaintiff's injury: See *Le Due v. Northern Pac. Ry. Co.*, 92 Minn. 287, 100 N. W. 108. If plaintiff was guilty of contributory negligence at all, it was when he started the engine in motion after he himself had made repairs and necessarily knew the defective condition of the eccentric. The view previously expressed as to his conduct controls, and justified the trial court in trying the question as one of fact.

4. Defendant further insists that the verdict was not justified by the evidence. Here defendant urges that it was not shown to have been negligent. On defendant's statement of facts it would be a serious question whether its conclusion did not follow. The record contains enough to fully justify the trial court in submitting the question to the jury and in sustaining its verdict for the plaintiff. Defendant's own roundhouse foreman testified that the defective condition of the eccentric of the engine in question had been reported by the engineer who had previously brought it in, that entries in the road book had been made with respect thereto, and that certain repairs were thereupon made. Plaintiff discovered that the bolts by which the attachment was made were old and their threads worn. Moreover, the occurrence of the accident within a short distance from the place of inspection was evidence of negligence: *Sheedy v. Chicago, M. & St. P. Ry. Co.*, 55 Minn. 357, 57 N. W. 60. And see *Cederberg v. Minneapolis, St. P. & S. S. M. Ry. Co.*, 101 Minn. 100, 111 N. W. 953. It is so plain that the jury might have properly found the negligence of the defendant to have been the proximate cause of the injury that it would justify no elaboration here.

5. Finally, defendant urges that it was error for the court to have instructed the jury, as it did, that it was defendant's duty to furnish plaintiff instrumentalities that were safe for use. The attention of the court was not called to this matter before the jury retired: Steinbauer ⁴⁵⁵ v. Stone, 85 Minn. 274, 88 N. W. 754. Within the familiar rule on the subject, this did not constitute reversible error: Waligora v. St. Paul Foundry Co., 107 Minn. 554, 119 N. W. 395. It is to be noted that in Kreigh v. Westinghouse, Church, Kerr & Co., 214 U. S. 249, 29 Sup. Ct. Rep. 619, 53 L. ed. 984, Mr. Justice Day uses both formulas. No prejudice appears.

Affirmed.

The Doctrine of Assumption of Risks and Contributory Negligence in the law of master and servant is discussed in the notes to Houston etc. Ry. Co. v. De Walt, 97 Am. St. Rep. 884; Brazil Block Coal Co. v. Gibson, 98 Am. St. Rep. 289. According to Marshall v. St. Louis etc. Ry. Co., 78 Ark. 213, 115 Am. St. Rep. 27, a railroad brakeman engaged in coupling a disabled car to be taken to a repair shop, with notice of its condition, assumes the risk of handling it.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

ROURKE v. HOLMES STREET RAILWAY COMPANY.

[221 Mo. 46, 119 S. W. 1094.]

EASEMENT OF LIGHT, Air and Access in Public Street.—The owner of real property abutting upon a public street has an easement therein of light, air and access to and from his property by means of the street; and that easement is property of which he cannot be deprived without just compensation. (p. 473.)

ELEVATED RAILWAY—Liability for Obstructing Light, Air and Access.—When an elevated street railway, constructed and operated by permission of a town or city, interferes with and deprives the owner of property abutting on the street of his easement of light, air, and access to and from his lot and buildings, he is entitled to recover all damages resulting therefrom. (p. 473.)

INSTRUCTIONS — Error Invited by Appellants. — Appellants cannot complain of error in instructions which they have invited. (p. 475.)

ELEVATED RAILWAY—Evidence of Damages to Adjacent Property.—In an action by a property owner for damages from the construction and operation of an elevated railway in the street in front of his premises, the testimony of another property owner of increase in the rentals of his properties in the same block after the construction of the road is inadmissible; and the right to object to such testimony is not waived by the fact that previously, after the defendant on cross-examination of a witness brought out that character of evidence, the plaintiff briefly questioned the witness in regard to such matters on redirect examination. (p. 476.)

ELEVATED RAILWAY—Evidence of Damages to Adjacent Property.—In an action by a property owner for damages from the construction and operation of an elevated railway in the street in front of his premises, evidence is not admissible which shows that the railway enhances the value of properties abutting upon another street of the city; the inquiry should be limited to the specific damages and benefits which result to this property, and the joint benefits received in common with other property in the vicinity should not be gone into. (p. 476.)

ELEVATED RAILWAY—Opinion That Property was Damaged.—An Expert upon values of real estate may give his opinion, in an action by a property owner for damages from the construction of an elevated railway in the street in front of his premises, that the property was damaged from fifteen to twenty thousand dollars. (p. 477.)

Reed, Yates, Mastin & Harvey and Perry S. Rader, for the appellants.

John H. Lucas and Ben T. Hardin, for the respondents.

54 WOODSON, J. The plaintiffs instituted this suit in the circuit court of Jackson county to recover damages, alleged to have been done to their property, located in Kansas City, caused by the construction and operation of an elevated street railway in front thereof by defendants, and thereby obstructing the light and air, and the ingress and egress to and from said property. The amount of damages claimed was thirty-five thousand dollars. The answers were general denials.

A trial was had before the court and a jury, which resulted in a verdict and judgment for defendants; and in due time and in proper manner plaintiffs appealed the case to this court.

As the sufficiency of the pleadings are not challenged, it will be useless to encumber this statement by giving them space herein.

The facts of the case are practically undisputed, except as regards the question of damages, and they are stated substantially, in brief of counsel for appellant, as follows:

Plaintiffs were husband and wife, and she is the owner of lot 40 in Ross and Searritt's Addition to Kansas City, Missouri, which is situated at the northeast corner of Main and East Eighth streets. The lot is known by its street number as No. 727 Main street, and fronts twenty-four feet on that street, and runs back on East Eighth to the alley between Main and Walnut streets. On the west end of the lot is a substantial three-story and basement brick building which runs back east on Eighth street seventy-two and one-half feet. East of this building is a two-story brick building fronting on Eighth street, forty-two feet wide and twenty-four ⁵⁵ feet deep, and east of that a one-story brick building also fronting on Eighth street. Running along south of all these buildings, on the north side of Eighth street, there was a sidewalk ten and one-half feet wide prior to the construction of the viaduct or elevated railway in 1899. The first floor of the three-story brick building in front is on a level with Main street, and on the south are three windows to give light to the first-floor room, and six windows to give light to the second-floor room. There is a door or entrance way just at the corner of Main and Eighth, and there is also a door farther east on Eighth street to the first-floor room.

Eighth street is sixty feet wide from building line to building line. By an ordinance approved March 4, 1899, and accepted March 8, 1899, Kansas City authorized the Holmes Street Railway Company, its successors and assigns, to con-

struct, maintain and operate, for a period of twenty-five years, in said Eighth street, a double-track elevated railway, whose motive power was to be "an endless cable or electricity or either of said motive powers." By section 13 the railway in the vicinity of plaintiff's property was to be "constructed upon a substantial and safe steel viaduct," elevated above the surface of the street, and was not to "exceed a width of eighteen feet in extreme dimensions, except where stairways and stations are maintained. One stairway at each of the four corners shall be erected and maintained at Eighth and Main streets so as to afford at said place convenient passage between the cars used on said viaduct and the streets below." The stock of the Holmes Street Railway Company was owned by the Metropolitan Street Railway Company, and the latter company operated the railway.

In this Eighth street the defendants, between March 8, 1899, and July, 1900, constructed an elevated railroad. There is a steep up-grade between Walnut street and Main street, Walnut being the next parallel ⁵⁶ street east of Main. The viaduct begins at the surface on the west line of Walnut street, and its elevation increases as it approaches plaintiff's property. Opposite plaintiffs' property, at the alley, the under side of the structure is six and one-half feet above the surface of Eighth street. Opposite the northeast corner of Main and Eighth streets, the under side of the structure is thirteen and three-tenths feet above the level of Eighth street. From the under side or bottom of the structure to "the landing" or level above, is four feet, so that "the landing" opposite the northeast corner is seventeen and three-tenths feet above the level of the street. Above the landing there is a steel guard and "a shelter" with a cover over its top, "a shelter on the station."

The viaduct is eighteen feet wide in its usual construction. On its north side opposite plaintiffs' property there is a stairway, which extends out north, that widens the whole structure for a length of twenty-nine and two-tenths feet east from Main street. This stairway takes up five and one-half feet of the sidewalk, so that it comes up within five feet of the building, leaving a passageway only five feet wide from the southwest corner of the building along Eighth street for a distance of twenty-nine and two-tenths feet. This stairway is the same width above and below, so that its landing above comes within five feet of the building. The viaduct covers the first-story windows, or is higher than they are, and the top or shelter of the stairway extends as high up as the windows of the third story. The stairway takes up half the sidewalk between the building and the curb. The viaduct shuts off the view of the building from the south, so that when approached from the south it can scarcely be seen, and

that fact renders it unfit for display or advertising of any kind.

On this elevated structure defendants run seventy-one cars per hour during the daytime, and average fifty-three per hour for the whole twenty-four hours, and sometimes there are even more than seventy-one ⁵⁷ per hour. The cars come within twelve feet of the building. The windows of the second story are on a level with persons in the cars, and the blinds or shades of those windows must be kept constantly drawn to prevent passengers on the cars and on the stairway from looking into the rooms, which are living-rooms.

Prior to the construction of the elevated railway, it was not necessary to use artificial light to give sufficient light to the room on the first floor of the building that comes up to Main street. It was then "a very bright room." Since then it has been necessary to keep an arc electric light going in the room day and night at all seasons of the year. The passing of the cars blinds those within the room; when a car passes, "it gets dark for a second, and when it passes and the sunshine comes out again it is like coming from the dark into the light."

The viaduct where it crosses Main street has plates of steel or sheet iron on the under side, which makes it a kind of sounding board as cars pass. All the witnesses testified that the cars make a great and unusual noise—far more than ordinary surface cars.

"It is one continual rumble—that is all there is to it—you can hardly understand each other sometimes." "Standing in the lobby of the restaurant or saloon you can hardly hear a person talk." The ground floor of the building at the corner of Main and Eighth streets is used for a saloon, and connected with it in the building immediately north is a restaurant.

Prior to the construction of the viaduct there was and is now a single-track surface railway in Main street, and more lines pass over that line than did formerly. Since the elevated railway was constructed there has been a settling in the west building. The walk from the curb to the building has settled down at least an inch, and the doors are settling down at the bottom and have to be trimmed off at the bottom ⁵⁸ about once a year. The movement of the cars can be felt in any part of the building. Whether one is in the basement or on the first floor he "can feel the car going by without taking into consideration hearing them."

Plaintiffs' evidence tended to prove that the special and peculiar damages done and would be done to this property by the erection, maintenance and operation of this elevated road from the time it was constructed, less whatever peculiar benefits it had received in consequence thereof, was from

fifteen thousand dollars to twenty thousand dollars, while that of defendants tended to show said property was not only damaged but that it was in fact benefited from ten thousand dollars to twenty thousand dollars thereby.

Plaintiffs objected to the rulings of the court regarding the admission and striking out of certain testimony, which will receive special attention in the course of the opinion.

At the request of plaintiffs the court gave the following instructions:

"1. The court instructs the jury that the plaintiffs as the owners of lot forty (40) in Ross and Searritt's Addition to Kansas City, Missouri, known as No. 727 Main street, and Nos. 6, 8, 10, 12 and 12 1-2 East Eighth street in said city, were at the time of the construction of the viaduct in question along Eighth street and across Main street adjoining the said property, seised of an easement in such streets of air, light and access to and from said property by said streets, and were entitled to have the use of the same free from unusual noise, and that the plaintiffs cannot be deprived of such rights without just compensation.

"That the construction and maintenance on such streets of an elevated structure or viaduct and the use of the same for street railway purposes constitute a new and additional servitude on the land upon which the street is constructed, and that the city of Kansas ⁵⁹ City, Missouri, had no authority in law to grant the power to the defendants to so use said streets as to destroy or unreasonably interfere with the right of the plaintiffs to access to or egress from their said property, or to so deprive them of such easement of light and air from the said streets.

"If, therefore, the jury find and believe from the evidence that the construction, operation and maintenance of the said viaduct or elevated superstructure for street railway purposes by the defendants along and adjacent to the plaintiffs' said property has impaired the use of said streets for the ordinary purposes of a public street or highway, and that unusual obstructions of light, air, access to and egress from the said premises of the plaintiffs and unusual noises from the operation of said street railway company have resulted therefrom, then the finding and verdict in this case must be for the plaintiffs.

"2. The court instructs the jury that if they find for the plaintiffs under the other instructions in this case, then the measure of plaintiffs' damages will be the difference between the market value of the plaintiffs' property, known as No. 727 Market street, and Nos. 6, 8, 10, 12 and 12 1-2 East Eighth street, immediately before the construction, maintenance and operation of the viaduct in question and immediately after the same was constructed and used for street

railway purposes, and in such event the jury should return a verdict in favor of plaintiffs for such sum as they may find and believe from all the evidence in the case will reasonably compensate the plaintiffs for such injury or injuries, if any, to the said property of the plaintiffs referred to in the other instruction in the case."

The defendants asked and the court, over the objections of plaintiffs, gave to the jury the following instructions, to wit:

⁶⁰ "1. If you believe and find from the evidence in this case that the market value of the property in controversy immediately after the building and operation of the street railway and viaduct in Eighth street, was equal to or greater than it was immediately before said railway and viaduct was built, then the plaintiffs cannot recover in this suit, and your verdict must be for the defendants.

"2. The court instructs the jury that in this case the burden of proof rests upon the plaintiffs to prove to the satisfaction of the jury by a preponderance of the evidence in the case that they have been damaged by reason of the construction of the railway and viaduct in Eighth street, as claimed by them and alleged in their petition. And by 'a preponderance of the evidence' is meant the greater weight of all credible evidence in the case; if plaintiffs have not greater weight of the credible evidence with them or if the evidence is evenly balanced as to the weight, then in neither of such events can plaintiffs recover in this case, and your verdict must be for defendants."

1. It is no longer an open question in this state that the owner of real property abutting upon a public street in a town or city has an easement therein of light, air, and access to and from his property by means of said street; and that easement is property of which he cannot be deprived without just compensation.

And when an elevated street railway, constructed and operated by permission of such town or city on permanent structures along such public street, interferes with and deprives such owner of his easement of light, air and access to and from his lot and buildings, he is entitled to recover all damages done thereto in consequence of said construction and operation: *De Geofroy v. Merchants' B. T. R. R. Co.*, 179 Mo. 698, 101 Am. St. Rep. 524, 79 S. W. 386, 64 L. R. A. 959; *Gaus & Sons Mfg. Co. v. St. Louis etc. R. R. Co.*, 113 Mo. 308, 35 Am. St. Rep. 706, 20 S. W. 658, 18 L. R. A. 339, and cases cited; ⁶¹ *Story v. New York El. R. R. Co.*, 90 N. Y. 122, 43 Am. Rep. 146; *Doane v. Lake St. R. R. Co.*, 165 Ill. 510, 56 Am. St. Rep. 265, 46 N. E. 520, 36 L. R. A. 97; *Bohm v. Metropolitan El. R. R. Co.*, 129 N. Y. 576, 29 N. E. 802, 14 L. R. A. 344.

The evidence showed plaintiffs were the owners of the property described in the petition; that it abutted on Eighth street, in Kansas City; that the defendants constructed and operated an elevated street railroad along said Eighth street in front of their property, which materially deprived them of light, air and access to and from their said property, to their great damage. That evidence made a clear case for plaintiffs, and the court very properly submitted it to the jury.

2. Counsel for appellant complain of instructions numbered 1 and 2 given by the court for respondents, for the reason assigned—that they are inconsistent with and contradictory to plaintiffs' instructions numbered 1 and 2, also given by the court.

The particular difference between them, as pointed out, regards the elements of damages stated in each.

Appellants' instructions in substance told the jury that the measure of their damages was the difference between the market value of the property immediately before the construction, maintenance and operation of the road and immediately after the same was constructed and used for the purposes mentioned. While respondents' instruction, numbered 1, substantially told the jury that if the market value of the property immediately after the building and operation of the road was equal to or greater than it was immediately before it was built, they could not recover; and instruction numbered 2 given for respondents told the jury that the burden rested upon the appellants to prove they had been damaged by reason of the construction of the railroad, before they were entitled to a recovery.

⁶² The verbiage of the instructions given for appellants differs from that employed in those given for respondents, but the meanings are substantially the same. In our opinion those given for appellants, as well as those given for respondents, fixed the measure of damages at the difference, if any, between the market value of the property immediately before and immediately after the construction and operation of the road. While respondents' instructions do not use the word "maintenance" as appellants' do, yet that omission did not give them a different meaning from that expressed in appellants'; nor could the jury have been misled by that omission, as we must presume they were men of common sense and would know and understand such a road could not be constructed and operated without it was maintained.

We, therefore, hold that there was no conflict or inconsistency between the instructions given for appellants and those given for respondents. If the former properly declares the law, then the latter does also; but if the latter does not correctly state the law as applied to this case, then neither

does the former. But whether respondents' instructions are correct or incorrect, appellants are in no position to complain, because their instructions fixed the same measure of damages as that fixed by the respondents'. They having invited the error, if error it be, then they cannot complain: *Smart v. Kansas City*, 208 Mo. 162, 123 Am. St. Rep. 415, 105 S. W. 709, 14 L. R. A., N. S., 565, 13 Ann. Cas. 932; *Christian v. Connecticut M. L. Ins. Co.*, 143 Mo. 460, 45 S. W. 268.

3. Counsel for appellants next complain of the action of the trial court in permitting Mr. W. C. Searritt to testify over their objection as to the increase of rentals of his properties, situate on Main street, in the same block as that of appellants, after the construction and operation of the road, for the purpose of tending to show the property in question ⁶³ has not been damaged by the construction and operation of the road.

The precise question came before the New York court of appeals in the case of *Jamieson v. Kings County El. R. R. Co.*, 147 N. Y. 322, 41 N. E. 693, and Judge Finch, in speaking for the unanimous court, used this language: "But I think, also, that there was error in the admission of evidence which we cannot disregard. The plaintiff sought to prove the evil effect of the road in diminishing values by the process of calling the owners of property in the vicinity and proving, in each case, what the particular premises owned by the witnesses rented for before the road was built and what thereafter. There were objections and exceptions. Such a process is not permissible. Each piece of evidence raised a collateral issue (*Gouge v. Roberts*, 53 N. Y. 619), and left the court to try a dozen issues over as many separate parcels of property. We have held such a mode of proof to be inadmissible: *Huntington v. Attrill*, 118 N. Y. 365, 23 N. E. 544; *In re Thompson*, 127 N. Y. 463, 28 N. E. 389, 14 L. R. A. 52. The elevated railroad cases in this court, to which the plaintiff refers us, give no warrant for such a mode of proof, but indicate that the general course and current of values must be shown by persons competent to speak, leaving to a cross-examination any inquiry into specific instance if such be deemed essential. Almost all the evidence of depreciation was of the erroneous character, and we cannot say that it may not have worked harm to the defendant." The same conclusions were reached in the case of *Douglas v. New York El. R. R. Co.*, 43 N. Y. Supp. 847.

And in the case of *Robinson v. New York El. R. R. Co.*, 175 N. Y. 219, 67 N. E. 431, the same question was again presented to the New York court of appeals, and, after quoting with approval the language heretofore mentioned in the case of *Jamieson v. Kings County El. R. R. Co.*, 147 N. Y.

322, 41 N. E. 693, it adhered to that ruling. The same principle was announced by the supreme court of Illinois in the case of Metropolitan etc. R. R. Co. ⁶⁴ v. White, 166 Ill. 375, 46 N. E. 978; St. Louis, K. etc. R. R. Co. v. Union Stock Yards, 120 Mo. 541, 25 S. W. 399.

In our opinion, the conclusions reached by those courts in those cases are correct upon both principle and authority; and this testimony should have been excluded, because it injected into the case collateral and immaterial issues which could throw no light whatever upon the question of appellants' damages, and was calculated to confuse and mislead the minds of the jury.

Counsel for respondents undertook to justify the court's action in admitting that evidence by showing that appellants first introduced the same character of testimony in proving their case, and for that reason they should not now be heard to complain. After an inspection of the record, we are of the opinion that counsel for the respondents are in error regarding that matter, for the record discloses that they, and not counsel for appellants, first brought out that character of evidence by cross-examination of plaintiffs' witnesses. While it is true counsel for appellants on redirect examination briefly questioned the same witness, Miller, regarding the matters testified to by him on cross-examination, yet that brief examination, in our judgment, should not have barred his right to object to the further introduction of that class of testimony, for the reason respondents' case was not changed or injured in any manner whatever thereby: Douglas v. New York El. R. R. Co., 43 N. Y. Supp. 847; Metropolitan St. R. R. Co. v. Walsh, 197 Mo. 392, 94 S. W. 860.

This question was presented in the case last cited, and the ruling therein was adverse to the contention of respondents.

We, therefore, hold that the court erred in the admission of that testimony.

4. We are also of the opinion that the court committed reversible error in the admission of testimony ⁶⁵ showing that the construction and operation of the road enhanced the values of properties abutting upon other streets of the city. The inquiry should have been limited to the specific damages and benefits which resulted to this property in consequence of the construction and operation of this road; and the general benefits it received in common with other property in the vicinity should not have been gone into. It was misleading and confusing to the jury, who presumably took it into consideration in estimating the questions of damages and benefits, as submitted to them by the instructions.

5. The witness, Guignon, an expert upon values of real estate in Kansas City, was asked by counsel for appellants the following question, among others, "In your judgment, did

the viaduct benefit or damage that property?" In answer thereto he stated that in his judgment it damaged the property from fifteen thousand dollars to twenty thousand dollars. At the request of counsel for respondents the court struck out that and similar answers, to which appellants excepted, and assign that action of the court as error. Clearly, that testimony was competent, material and relevant to the issues on trial, and it should not have been stricken out. That character of testimony has been held admissible so often by this court that it would be a supererogation of labor to cite authorities in support thereof.

For errors before suggested, the judgment is reversed and the cause remanded for a new trial.

All concur, except Vallian, J., absent.

An Abutting Owner on a Public Street has an Easement Therein of Light, air and access to and from his property by means of such street, of which he cannot be deprived without compensation: De Geofroy v. Merchants' Bridge Terminal Ry. Co., 179 Mo. 698, 101 Am. St. Rep. 524; notes to Powers v. Heffernan, 122 Am. St. Rep. 220; Field v. Barling, 41 Am. St. Rep. 323.

Elevated Railways as Imposing an Additional Servitude on the Street for which abutting owners are entitled to compensation are discussed in the note to Mordhurst v. Ft. Wayne etc. Co., 106 Am. St. Rep. 246. For leading cases on this question, see Field v. Barling, 149 Ill. 556, 41 Am. St. Rep. 325; De Geofroy v. Merchants' Bridge Terminal Ry. Co., 179 Mo. 698, 101 Am. St. Rep. 524.

STATE v. JACKSON.

[221 Mo. 478, 120 S. W. 66.]

CRIMINAL LAW—Imposing Sentence While Motion for New Trial is Pending.—Rendering judgment and pronouncing sentence upon the defendant while his motion for a new trial, which was filed in season, is pending, is in effect a denial of the motion; it is not his duty, when asked if he has any cause to show why judgment should not be pronounced, to call the court's attention to the fact that the motion is pending, and by failing to do so he does not waive the benefits of the same, but is entitled to a full hearing upon the errors assigned in the motion. (pp. 481, 482.)

CRIMINAL LAW—Motion to Discharge Accused, Preservation for Appeal.—The record proper on appeal should show the filing of a motion for the discharge of the defendant for want of jurisdiction, to warrant a review of the matter on appeal; it is not enough that the bill of exceptions preserves the motion, and recites the action of the court upon it and the exceptions of the defendant thereto. (p. 482.)

INDICTMENT—Filing and Indorsement.—The Failure of the Clerk to indorse on an indictment for forgery the filing and the date of the return of the indictment into court does not authorize the discharge of the accused. (pp. 483, 484.)

INDICTMENT.—An Indictment for Forgery is Filed in Contemplation of law when it is returned into open court, presented to the court, and deposited with the clerk. (p. 484.)

FORGERY.—A Deposit Slip or Ticket, Such as is Commonly Used in Banking, is an evidence of debt and a subject of forgery. (pp. 485, 492.)

BANKING.—A Deposit Slip or Ticket is an Evidence of Debt; an acknowledgment of so much money deposited with the bank. (pp. 486, 489.)

FORGERY—Deposit Slip—Sufficiency of Indictment.—Where a deposit slip is embraced in the indictment for forgery, and upon its face shows its legal efficacy, there is no necessity for an allegation of any extrinsic matter to give the instrument alleged to have been forged any force and effect beyond what appears on its face. (p. 490.)

FORGERY—Name of Instrument in Indictment.—Courts are not disposed to “quibble” about the name of the instrument charged to have been forged. (p. 491.)

FORGERY—Name of Instrument in Indictment.—If the Instrument as set out in an indictment for forgery is an evidence of debt, it is a matter of little concern as to what the instrument is called. (p. 492.)

FORGERY—Variance Between Indictment and Proof.—A Variance between the deposit slip alleged in an indictment for forgery and the evidence offered by the prosecution is not fatal if not material to the merits of the case nor prejudicial to the offense of the accused. (p. 493.)

FORGERY.—The Giving of an Instruction in a Prosecution for Forgery “that it is not necessary to prove that defendant is guilty by the testimony of witnesses who may have seen the offense committed; his guilt may be shown by proof of facts and circumstances from which it may be reasonably and satisfactorily inferred”—is not reversible error, although it may have been more appropriate to follow the approved precedents. (p. 495.)

John A. Cross, J. M. Sandusky, R. H. Musser, Pross T. Cross and William Henry, for the appellant.

Elliott W. Major, attorney general, and Chas. G. Revelle, assistant attorney general, for the state.

485 **FOX, J.** This cause is now pending before this court upon appeal on the part of Noah Jackson, the defendant, from a judgment of the Clay circuit court convicting him of forgery in the second degree.

On September 18, 1907, the grand jury of Clinton county returned in open court an indictment charging defendant with forgery in the second degree, it being alleged that on May 1, 1907, he forged, counterfeited and falsely made a certain evidence of debt, commonly known as a deposit slip or ticket, on the Farmers' Bank of Cameron, purporting to have been made and issued by said bank for the sum of \$19,000. There were two counts in the indictment, both being identical, except as to the tenor of the forged instrument, one charging that the evidence of debt purported to

be signed "C. E. Packard, Cashier, DeHart," the other purporting to be signed "C. E. Packard, Cashier, D."

On the second day of October, 1907, defendant filed an application for change of venue from Clinton county, charging bias and prejudice on the part of the inhabitants of that and all other counties in the fifth judicial district. Thereafter, said application and petition were considered and the change awarded to Clay county, and the cause ordered transferred and the transcript of all proceedings certified, which was accordingly ⁴⁸⁶ done. Thereafter, to wit, February 25, 1908, defendant was duly arraigned and entered a plea of not guilty. June 8, 1908, defendant moved for his discharge, alleging that neither the original indictment nor the transcript disclosed the indorsement of the clerk thereon, showing the filing of the indictment or the date of the filing. This motion was overruled, and defendant thereupon demurred to the indictment, and after the same was determined adversely to him the trial proceeded in due form.

Upon the trial of this cause the evidence developed upon the part of the state tended to prove that at all the times mentioned in the evidence, the Farmers' Bank of Cameron was a banking institution, duly organized and incorporated, and doing business as such under and by virtue of the laws of this state. C. I. Ford was president; N. S. Goodrich, vice-president; C. E. Packard, cashier; H. B. Cooper, assistant cashier; T. W. Parton, chief bookkeeper, and Louis DeHart, assistant bookkeeper. For several years defendant had been doing business with this institution, at times depositing money therein and at other times borrowing therefrom, he being, at the date of the commission of his offense, indebted thereto in the sum of about \$16,000.

On the eighth day of March, 1907, defendant went to the bank about the noon hour, and at that time Louis DeHart and Mr. Ford were present. Said DeHart was at that time acting as receiving teller, and was not acquainted with defendant. When defendant arrived at the bank he told DeHart that he wanted to deposit \$100. DeHart asked him to whose credit the deposit should be placed, to which defendant replied, "Noah Jackson." DeHart thereupon inquired if he was Noah Jackson, to which defendant answered in the affirmative, whereupon he produced \$100 in currency, and after the same had been counted and received by DeHart, he asked him for his pass or deposit book, and ⁴⁸⁷ defendant said that he did not have the same with him. DeHart thereupon made out a deposit ticket, together with a duplicate thereof, and after signing said duplicate in the name of the cashier, he stamped under the name of Mr. Packard, "Cashier," and to indicate who received the deposit attached either the letter "D" or name "DeHart," and delivered same to

defendant. The deposit ticket so delivered to defendant was of the character commonly used by banking institutions for that purpose, and stated in substance that defendant had deposited in the Farmers' Bank of Cameron for his account, \$100 in currency. Immediately following this defendant went to a trust company in Cameron and withdrew therefrom the sum of \$5,000, which he had theretofore deposited, and in company with another party went to Kansas, where he deposited this money in a bank. About May 1st, defendant returned to Cameron, and a part of his indebtedness being then due, he was notified to make payment. He accordingly went to the bank and gave his note in settlement of that portion of his indebtedness then due. In a few days thereafter, to wit. about May 1st, defendant again went to the bank and asked where all his money had gone, saying that on the 8th of March he had deposited \$19,000, which was more than enough to discharge in full his indebtedness to that institution. On being informed that he had made deposit of no such sum, but to the contrary had deposited but \$100, he contended that he had deposited \$19,000, and had the bank's deposit slip or receipt disclosing that condition. He steadfastly contended that this amount was due him, and that DeHart had received \$19,000 on March 8th, and had issued the deposit slip which he then and there presented. This ticket disclosed upon its face a deposit of \$11,000 in currency and \$8,000 in gold. Defendant, upon being asked where he had gotten this money, said that \$5,000 of the amount had been received by him from the trust company. Upon ⁴⁸⁸ being asked from what source he had received the rest he said: "I will show it at the right time; you would not believe me if I would tell you." He again accused said DeHart of receiving the \$19,000 and issuing the ticket in the form and for the amount disclosed by the ticket. Defendant passed the ticket around among various parties to convince them that this amount had been deposited by him. The ticket had been altered by prefixing a one and adding a cipher to the \$100 in currency, making same read \$11,000 instead of \$100. The item of \$8,000 in gold had been inserted immediately below the entry of \$11,000. The evidence disclosed that these alterations were made after the delivery to defendant of the deposit ticket, and that the figures thereto added were not figures made by DeHart or other officers of the bank.

At the close of the evidence the defendant requested that the court give an instruction to the jury in the nature of a demurrer to the evidence, directing them that under the law and the evidence they would find the defendant not guilty. This instruction was by the court refused, to which action and ruling of the court the defendant then and there at the

time excepted. The court then gave instructions to the jury fully covering every phase of this case to which the testimony was applicable. It is unnecessary to here reproduce the instructions given and those refused. We will give them such attention as may be required during the course of the opinion. The cause being submitted to the jury they returned a verdict finding the defendant guilty as charged in the second count of the indictment and assessed his punishment at a term of five years in the penitentiary. Timely motions for new trial and in arrest of judgment were filed by the defendant and by the court taken up and overruled. Sentence and judgment followed in accordance with the verdict. From this judgment the defendant prosecuted ⁴⁸⁹ his appeal to this court and the record is now before us for consideration.

The record in this cause presents numerous assignments of error as a basis for the reversal of this judgment. We will give the complaints made by the appellant, during the course of the opinion, such attention as their importance requires and merits.

Preliminary to the treatment of the assignments of error on the part of the appellant it is well that the suggestion of the learned attorney general, that nothing but the record proper can be considered, first be disposed of. The insistence upon this proposition is that the defendant was duly sentenced and judgment pronounced before his motion for a new trial was passed upon, and upon this state of the record it is insisted that when the defendant was asked, in the presence of his counsel, if he had any legal cause to show why judgment should not be pronounced, it was his duty to call the court's attention to the fact that his motion for new trial was pending, and failing in this he must be held to have waived the same. The record in this cause discloses that after the return of the verdict finding the defendant guilty and before sentence and judgment was rendered, the defendant, within the time prescribed by statute, filed his motion for new trial. Subsequent to the filing of the motion for new trial and while it was pending, the court sentenced and entered judgment against the defendant, and afterward formally overruled the motion for a new trial.

We have reached the conclusion that the insistence of the attorney general, under the provisions of the statute, cannot be maintained. The defendant filed his motion within the statutory period after the return ⁴⁹⁰ of the verdict, and before the rendition of judgment; hence it follows, notwithstanding the court did not before sentence and judgment overrule the motion for new trial, yet the court must be presumed to have full knowledge of its records and to know that the motion for new trial had been filed and was then pending. The only logical conclusion that can be reached is that the

sentence and judgment rendered against the defendant during the pendency of the motion for new trial was in effect an overruling of such motion. This being the effect of the sentence and judgment pending the motion for new trial, and then subsequently formally overruling such motion, we are of the opinion that the defendant has a right to a full hearing upon the errors assigned in his motion for new trial. Manifestly there was no necessity for the defendant, when the court propounded the question to him as to whether he had anything to say why he should not be sentenced, to state that his motion for new trial alleged the grounds and reasons why he should not be sentenced, for presumptively the court must be held to have had knowledge of the fact that the motion for new trial had been filed and was pending, as well as the grounds alleged in it. We repeat, that the rendering of the judgment against the defendant while the motion for new trial was pending was in effect a denial of such motion.

The disclosures of the record in this cause are unlike those presented in the cases of *State v. Pritchett*, 219 Mo. 696, 119 S. W. 386, and *State v. Fraser*, 220 Mo. 34, 119 S. W. 389. In those cases the records disclosed that after the return of the verdicts judgments were entered upon such verdicts, and subsequent to sentence and judgment defendants filed their motions for new trial. In other words motions for new trial were not filed until sentence and judgment had been entered against the defendants. Therefore it follows that those cases were controlled by the provisions of section 2689, Revised ⁴⁹¹ Statutes of 1899, which expressly provides that the motion for new trial shall be filed before judgment is rendered in the cause, and this provision of the statute was held, in the cases to which we have made reference, to be mandatory.

Directing our attention to the complaints of the appellant:

1. It is insisted by learned counsel for appellant that the court committed error in overruling the motion for discharge of the defendant, on the ground that the court was without jurisdiction to try him on the indictment before the court. This motion, which it is insisted should have been sustained, was predicated upon the ground that the clerk had failed to indorse on the indictment the filing and the date thereof.

At the very threshold of the consideration of this motion we find that the record proper fails to disclose the filing of any such motion or any ruling of the court thereon. If the rules applicable to motions for new trial and in arrest of judgment are applicable to motions of this character, as announced in *Stark v. Zehnder*, 204 Mo. 442, 102 S. W. 992, *Pennowfsky v. Coerver*, 205 Mo. 135, 103 S. W. 542, and cases therein cited, then it would logically follow that this motion is not before us for review. While it is true the bill of ex-

ceptions preserves this motion and recites the action of the court upon it, and the exceptions of the defendant to such action, yet, as has repeatedly been held by this court, this is insufficient to show that in fact the motion was filed. When we come to look to the filing of a motion which this court is called upon to review, we seek the record proper, and there ascertain if the motion was in fact filed, and as to whether or not the court took any action upon such motion. We have carefully ⁴⁹² analyzed this record, and unless we have overlooked some of the recitations in the record proper it absolutely fails to disclose that a motion of this character was filed, or that the court ever acted upon it.

But aside from all this, there is no merit in this motion. The record in this cause discloses that on the thirteenth day of September, 1907, the sheriff of Clinton county, Missouri, returned into open court the writ commanding him to summon a grand jury, duly executed. Some of those served were excused and others summoned in their stead. The record discloses that the grand jurors summoned as heretofore stated appeared at the time and place as ordered by the court, and were duly impaneled, sworn and charged and instructed as the law requires. The court appointed W. A. White as foreman of said body, and they were then ordered by the court to retire to their room to consider of their presentments and indictments. The record further discloses that on the eighteenth day of September, 1907, the same being the ninth day of the regular term of said court, the grand jurors appeared in open court, and by their foreman in the presence of his fellows, presented and made return of the indictment of the state of Missouri v. Noah Jackson, forgery, which said indictment, the record discloses, was by the court examined and found indorsed a true bill by the foreman and signed by the prosecuting attorney, which said indictment was ordered filed by the court. Then follows in the record a copy of the indictment as returned by the grand jury into court, and is the indictment as is shown by the record in this cause upon which the defendant was tried and convicted.

In *State v. Grate*, 68 Mo. 22, this court, speaking through Judge Sherwood, first refers to the statute that indictments found and presentments made by grand juries shall be presented by their foreman, in their presence, to the court, and shall be filed and ⁴⁹³ remain as records of such court. Discussing this statute it was said in that case that "it is out of the power of the clerk, by his remissness, to balk the action of the grand jury. The indictment became a record of the court when returned by the grand jury in accordance with the statutory provision above noted." A similar rule was announced in *State v. Clark*, 18 Mo. 432. In the case last cited it was said that there was no necessity for spreading

the indictment in full upon the records of the court at any time, and while it is said in that case that it was the duty of the court to have ordered the clerk to indorse the time of the filing of the indictment in court and this would have placed the whole matter right, yet it was expressly ruled that there was no ground for sustaining the defendant's motion to dismiss the cause. The failure of the clerk to indorse on the indictment the filing and the date of the return of such indictment into court could not authorize the court to discharge the defendant. In *Baker v. Henry*, 63 Mo. 517, it was expressly ruled that in contemplation of law the presentation and delivery of the paper to the court or officer is the filing which dates from its receipt by the clerk and lodgment in his office.

When this indictment was returned into open court, presented to the court and deposited with the clerk, it was, in contemplation of law, filed. The indorsement by the clerk simply furnishes evidence of the filing. The entire record in this cause discloses that the indictment upon which the defendant was tried was the one returned into open court by the grand jury and presented to the court and deposited with the clerk by the foreman of the grand jury. This was fully recognized by the defendant himself. He executed a bond to answer the indictment returned into open court; he entered his plea of not guilty to this indictment; made application for a change of venue, and the transcript of the proceedings from the ⁴⁹⁴ circuit court of Clinton county to that of Clay county shows clearly that it was the indictment as returned into open court by the grand jury of Clinton county. While as heretofore indicated, the record presented in this cause is insufficient to authorize a review of the action of the court upon such motion, however, we are of the opinion that the motion as preserved in the bill of exceptions is without merit.

2. This brings us to the consideration of the contention upon which counsel for appellant seem to chiefly rely for a reversal of this judgment, that is, that the deposit slip or deposit ticket issued by the Farmers' Bank of Cameron, Missouri, designated in the indictment, is not the subject of forgery. To fully appreciate this proposition it is perhaps well to reproduce the challenge to the sufficiency of this indictment as contained in the brief of learned counsel for appellant. Counsel make the inquiry: "Is the indictment good in this case?" Then assert, "It charges the defendant with having forged a certain evidence of debt, commonly known as a deposit slip . . . or deposit ticket, on the Farmers' Bank of Cameron, Missouri, and undertakes to set out in the indictment the alleged forged instrument in *hæc verba*, without a single averment of any extrinsic matter, which could give the instrument alleged to have been forged any force or

effect beyond what appears on its face. The deposit slip has no legal validity and affects no legal rights so as to injure another, which should appear from the indictment charging the offense, that such was its legal character, either by the instrument itself or by matter aliunde which will show it to be of that character. The indictment fails to comply with this rule." It is further insisted upon this proposition that a deposit slip or deposit ticket as alleged in the indictment is not such an evidence of debt as comes within ⁴⁹⁵ the term "or other evidence of debt" as used in the statute defining this offense. This indictment is predicated upon the provisions of section 2001, which provides: "Every person who shall forge or counterfeit, or falsely make or alter, or cause to procure to be forged, counterfeited or falsely made or altered: First, any promissory note, bill of exchange, draft, check, certificate of deposit or other evidence of debt, being or purporting to be made or issued by any bank incorporated under the laws of this state or of any other state, territory, government or country; or, second, any order or check being or purporting to be drawn on any such incorporated bank or any cashier thereof, by any other person, company or corporation, shall, upon conviction, be adjudged guilty of forgery in the second degree."

It will be observed that this section of the statute specifically designates certain instruments which are the subject of forgery, that is to say, promissory notes, bills of exchange, drafts, checks, certificates of deposit; then concludes, "or other evidence of debt being or purporting to be made or issued by any bank incorporated under the laws of this state, or of any other state," etc.

The contention of learned counsel for appellant is that the deposit slip or deposit ticket as alleged in the indictment is not such an evidence of debt as is contemplated by the provisions of the section of the statute indicated, which would subject the persons forging, altering or counterfeiting such slips or tickets to the charge of forgery under the provisions of that section.

After a most careful consideration of all the authorities applicable to this proposition we are unable to give our assent to this insistence. Our attention upon this proposition is directed by counsel for appellant to the cases of *State v. Schuchmann*, 133 Mo. 111, 33 S. W. 35, 34 S. W. 842, and *State v. Krueger*, 134 Mo. 262, 35 S. W. 604. In the ⁴⁹⁶ *Schuchmann* case (133 Mo. 111, 33 S. W. 35, 34 S. W. 842) it was held that the term "other buildings" as used in the Revised Statutes of 1889, section 3526, making it burglary for any person to break and enter any shop, store, booth, tent, warehouse or other building, etc., means a building of like kind to those enumerated, and does not there-

fore embrace a chicken-house building. The same principle was announced in the Krueger case (134 Mo. 262, 35 S. W. 604).

The deposit slip or ticket as alleged in the indictment is substantially an acknowledgment that so much money was deposited by the defendant to his credit in the Farmers' Bank of Cameron. In the indictment it is charged that the Farmers' Bank of Cameron issued this deposit slip or ticket and that it was an evidence of debt, and in our opinion it does not infringe upon the rule as announced in the cases to which our attention has been called. It may be that a chicken-house building is not of like kind to a shop, store, booth, tent or warehouse, but the statute now under discussion enumerates promissory notes, bills of exchange, checks, drafts and certificates of deposit, and in our opinion the deposit slip or ticket alleged in the indictment in this case is at least a like kind to a certificate of deposit designated in the statute. It will certainly not be contended that it must be identical with the kinds of evidences of debt as enumerated, for the Schuchmann case only requires that it shall be of like kind. A certificate of deposit and the deposit slip or ticket as alleged in the indictment are used for the same purpose—of indicating to the depositor to whom the slip is delivered that so much money is deposited in the bank that issues the paper. The certificate of deposit, it is true, is more formal, yet so far as indicating that the money of the depositor has been placed in the bank, it does not do it more effectively than the deposit slip alleged in the indictment, which is daily used by hundreds and thousands of banks in this country in the transaction of ⁴⁹⁷ their business. That the deposit slip as alleged in the indictment, which in substance simply states that the defendant deposited so much money in the bank, is an evidence of debt, we think is too plain for discussion.

It certainly will not be seriously contended that in a dispute between the bank and a depositor as to the amount of a deposit, this deposit slip or ticket would not be of the most highly important evidence in settling a controversy between the depositor and the bank as to the amount of money deposited. The very purpose of the issuance by the bank of a deposit slip and its delivery to the depositor is to furnish evidence to him that he has deposited in the bank the amount of money designated in such deposit slip. While it may be true that this deposit slip is not a negotiable instrument, yet its non-negotiability falls far short of in any way destroying or affecting the element of evidence of debt manifested upon the face of such deposit slip.

In the civil case of First Nat. Bank v. Clark, 134 N. Y. 368, 32 N. E. 38, 17 L. R. A. 580, a case cited by appellant,

Judge Parker fully recognized that a deposit slip is an evidence of debt. He says: "The use of a deposit slip is well understood. It constitutes an acknowledgment that the amount of money named therein has been received." It is true that in the usual and ordinary course of banking these deposit slips are not used with the view of paying money upon the presentation of the slip to the bank, for it may be, as is said by Judge Parker in the case last cited, that all or nearly all of the money may be checked out at the moment of making the deposit slip; but it is, as is held in that case, an evidence of debt; in other words, an acknowledgment that the amount of money named therein has been received. It may be conceded that a deposit slip ⁴⁹⁸ would not furnish the basis of a cause of action similar to a promissory note, yet that fact would in no way affect the question as to whether or not it was an evidence of debt. But, as Judge Parker says, in a dispute between the bank and depositor as to the amount of deposit, it would become important as evidence. Take the facts as applicable to this proposition in the case at bar. If this defendant had instituted suit against the Farmers' Bank of Cameron to recover \$19,000 for money had and received which appeared upon the face of this slip, is there any doubt but what upon the trial of that case, when the plaintiff offered in evidence this deposit slip, the signature of the cashier being acknowledged as genuine, that would not make out a prima facie case of indebtedness on the part of the bank to the plaintiff? There can be none. The deposit slip would clearly be admissible in evidence, and in fact in the absence of any showing to the contrary that the money was had and received or had not been drawn out on checks or otherwise, it would authorize a recovery for the \$19,000; hence, it logically follows that it is an evidence of debt. If it was not and was a mere worthless piece of paper it would be inadmissible in evidence.

In *Hotchkiss v. Mosher*, 48 N. Y. 478, it was held that the certificate was an acknowledgment of so much money deposited with the bank. "It was of the same force and effect as a receipt for money," and it was said in that case that "a simple certificate like the one in question is not the basis of an action like a promise in writing, but would be evidence, like a receipt to raise an implied promise to pay in an action for money had and received." Manifestly that case treated the certificate as an evidence of debt, otherwise it would not have been admissible in evidence.

Our attention is also directed by counsel for appellant to the case of *First Nat. Bank v. Bank of Kansas City*, 102 Mo. App. 357, 76 S. W. 489. Manifestly that case furnishes ⁴⁹⁹ no support to the contention that a deposit slip does not constitute any evidence of debt. On the contrary, when

the case is fully read, it indicates very clearly that the court construes a duplicate deposit slip which is always handed to the depositor, as an evidence of the transaction. In other words, as evidence of the amount of money deposited in the bank. In discussing that case Judge Ellison said: "The 'deposit slip' made out at the time by the cashier in Shinn's presence said nothing of the deposit being for any purpose. Such slip or ticket is said to be 'a note to help the memory': Morse on Banking, sec. 290. The cashier stated that he gave Shinn a duplicate. Shinn does not deny this. It must in reason be true, for the deposit was not put on a passbook, and it seems out of accord with business principles that Shinn would have left the bank without taking with him any evidence of the transaction." Clearly that court fully recognized the usual methods in transacting business with banks, as well as the force and effect of a duplicate slip which is given to the depositor; and the court, upon the facts developed at the trial, reached the conclusion that the bank must have given Shinn a duplicate deposit slip, for it was said that this deposit was not put on a passbook, and it would be out of accord with business principles for Shinn to have left the bank without taking with him any evidence of the transaction. This case, as well as numerous other cases, clearly indicates that when it is said that a deposit slip or deposit ticket is said to be a note to help the memory, reference is made to the deposit slip or ticket retained by the bank; but the duplicate deposit slip which is handed to the depositor is issued to him as an evidence of the amount of his deposit; and while it is true that in a contest between the depositor and the bank for money had and received this slip would not be conclusive evidence of the liability of the bank and would be susceptible of explanation ⁵⁰⁰ that the amount of the deposit as evidenced by such deposit slip had been drawn out of the bank by check or otherwise, but this by no means changes the nature and character of such duplicate deposit slip or lessens its force and effect as an acknowledgment that so much money has been deposited in the bank by the depositor.

Our attention is also directed to the case of Weisinger v. Bank of Gallatin, 10 Lea (Tenn.), 330. An examination of that case demonstrates very clearly that it has no application to the facts in the case at bar. There the son of the party making the deposit signed a deposit slip to be deposited with the bank. The bank did not undertake to issue any certificate or duplicate deposit slip to the depositor; hence, it was ruled in that case that the deposit slip as signed by the young man making the deposit for his father was merely a memorandum to guide the bank in making the entries in the book. In other words, a note to help the memory. The facts

in that case are widely different from the case at bar, where the bank issued a duplicate deposit slip, not for the purpose of helping the memory of the cashier of the bank in making entries, for this duplicate deposit slip passes out of the hands of the bank and is issued to the depositor, and is issued but for one purpose, that is, to furnish to the depositor evidence of the amount of money he has deposited with the bank, and unless such money deposited is drawn out by the depositor by check or otherwise, the depositor is entitled to recover such money in an action for money had and received, upon the introduction of his deposit slip, which *prima facie* shows that he has that amount of money deposited in said bank.

In *Long v. Straus*, 107 Ind. 94, 57 Am. Rep. 87, 7 N. E. 763, it was expressly ruled that an action might be maintained upon a receipt in this form: "Received of Joseph S. Long sixteen hundred dollars, on deposit, in National ⁵⁰¹ currency," signed, "Straus Bros." In the discussion of the propositions involved in that case the court very clearly said that "the deposit of money is a transaction well known to the law, and it is one out of which well-defined legal rights emerge; chief among these rights is that of the depositor to receive his own again, and a correlative of this right is the implied promise of the person who receives money on deposit to return it to the depositor. . . . It would shock everyone's sense of justice to affirm that a depositor could not get back his money unless there is an express promise to return it to him, but this cannot be affirmed without doing violence to the settled principles of jurisprudence." Again, it is said by the court of appeals of New York, that "money on deposit means, *ex vi termini*, money placed where the owner can command it at any time": *Curtis v. Leavitt*, 15 N. Y. 9.

We stop here to inquire, if the deposit slip or ticket as alleged in the indictment was not issued and delivered to the defendant for the purpose of furnishing him evidence as to how much money the bank owed him by reason of such deposit, then what was the necessity of issuing it at all? Unless these deposit slips, which are in such common use by all the banks over the country, are issued for the purpose of furnishing evidence of the indebtedness of the bank by reason of such deposit slips, then clearly they should be treated as mere worthless paper. If the deposit slip or ticket as alleged in the indictment is not to be construed as an evidence of debt, and it is to be held that depositors indiscriminately may make a deposit of \$50 in a bank, add a cipher to it and make it \$500, or make a deposit of \$500, add a cipher and make it \$5,000, with the privilege of entering the courts of the country contesting for the recovery of the amount in the altered instrument with the bank for money had and received, without subjecting themselves to ⁵⁰² a criminal prosecution, then

we confess that the banks doing business in this state would have very little or no protection against the perpetration of such frauds, and would be compelled to cease the long-established method of doing business by the issuance of deposit slips to depositors. To so hold would be but an invitation to the criminal classes of our population to unjustly seek the money and property of the business institutions of the country, as well as a humiliation to the law-making power of this great commonwealth in failing to provide the administering of proper punishment for the perpetration of frauds of this character.

Giving attention to the other complaint challenging the validity of the indictment in this cause, that is, that "the deposit slip has no legal validity and affects no legal rights so as to injure another," what was said in *State v. Sharpless*, 212 Mo. 176, 111 S. W. 69, is applicable to this subject, namely: "It is fundamental that one of the essential elements of this crime is the intent to defraud, and it is only essential that the instrument, to be the subject of forgery, should be of some apparent legal efficacy for injury to another. On the other hand, instruments which upon their face are utterly valueless and have no binding force or effect for any purpose of harm, liability to injury to anyone, cannot be the subject of forgery. This rule is fully recognized both at common law and in the highest courts of the several states of the Union: *State v. Cordray*, 200 Mo. 29, 98 S. W. 1, 9 Ann. Cas. 1110; *Colson v. Commonwealth*, 110 Ky. 233, 61 S. W. 46; *King v. State*, 43 Fla. 211, 31 South. 254; 19 Cyc. Law and Proc. 1370, and cases cited in note 94."

In *People v. Tomlinson*, 35 Cal. 503, the object and purposes of the statute against forgeries were very clearly and tersely stated. It was said: "The purpose of the statute against forgeries is to protect society against fabrication, falsification, and the uttering, ⁵⁰³ publishing, and passing of forged instruments, which, if genuine, would establish or defeat some claim, impose some duty, or create some liability, or work some prejudice in law to another in his rights of person or property. Hence, without much conflict, if any, it has been held from the outset that the indictment must show that the instrument in question can be made available in law to work the intended fraud or injury."

Applying the rules of law as indicated in the cases last cited, we are of the opinion that the charge in the indictment in the case at bar fully meets all the requirements of the rules announced in those cases. We have heretofore fully discussed the nature and character of the deposit slip as well as its force and effect. The indictment charges that this deposit slip was an evidence of debt, and the deposit slip was embraced in the indictment and shows upon its face its

legal efficacy, and clearly furnishes evidence of the rights and claims of the depositor to whom such duplicate slip was issued. This deposit slip manifestly purports upon its face to be good and valid for the purposes for which it was intended and which might operate to the prejudice of the rights of another; hence, there was no necessity for any allegation in the indictment of any extrinsic matter to give the instrument alleged to have been forged any force and effect beyond what appears on its face. The instrument speaks for itself, and clearly shows that it is such an instrument as is susceptible of affecting legal rights so as to injure another; hence, it follows that upon this complaint the ruling must be adverse to the appellant.

It is not out of place to direct attention to some of the cases in this state as indicative of the views of this court upon the subject of the offense of forgery. While in the case of *State v. Gullette*, 121 Mo. 447, 26 S. W. 354, the offense of forgery charged was under a different ⁵⁰⁴ provision of the statute, yet the views of the court as expressed in that case indicate very clearly that this court is not disposed to "quibble" about the name of the instrument charged to have been forged. It was there said: "It was unnecessary that the order in question, if genuine, should have been addressed to any person by name. This ruling has passed into precedent: *People v. Krummer*, 4 Park. Cr. 217. Nor was it necessary that the instrument employed with intent to defraud should be entitled in strictness to bear the title or appellation of a bill of exchange or of a promissory note. There need be no formality about it, nor need it be designated by any certain name. Any instrument or writing being, or purporting to be, the act of another by which any pecuniary demand or obligation shall be, or purport to be, transferred, created, increased, discharged or diminished, or by which any rights or property whatsoever shall be, or purport to be, transferred, etc., if made with intent to defraud, is amply sufficient to come within the penal prohibitions of the statute. 'The question is whether, upon its face, it [the writing] will have the effect to defraud those who may act upon it as genuine, or the person in whose name it is forged.' . . . And it does not lie in the mouth of the forger to claim immunity for his crime because, if the man he imposed upon had been vigilant, he would not have been deceived."

In the case of *State v. Eades*, 68 Mo. 150, 30 Am. Rep. 780, the forgery charged was that defendant forged a certificate of indebtedness of the city of Kansas. It was insisted in that case as in the case at bar that the instrument set out in the indictment was not such as can be the subject of forgery, because the charter of the city of Kansas does not confer on the mayor and common council the power to issue

the same. In treating of that proposition this court, speaking through Judge Norton, said: "Upon a statute of ⁵⁰⁵ New York, similar to our own, which came before the court for construction in the case of *People v. Krummer*, 4 Park. Cr. 217, it was held that 'we are never called upon to determine whether in legal construction the false instrument or writing is an instrument of a particular name or character. It is a matter of perfect indifference whether it possesses or not the legal requisites of a bill of exchange, or an order for the payment of money or the delivery of property. The question is whether, on its face, it will have the effect to defraud those who may act on it as genuine, or the person whose name is forged. It is not essential that the person, in whose name it purports to be made, should have the legal capacity to make it, nor that the person to whom it is directed be bound to act upon it, as genuine, or have a remedy over. Though all the parties to a bill of exchange are purely fictitious, if it be passed as genuine, it is regarded by the law as forgery. The law looks only to the falsity of the instrument and the fraudulent use of it as genuine.'"

Also in the case of *State v. Kattlemann*, 35 Mo. 105, it was expressly ruled by this court that "altering the date of a receipt from the 11th of April to the 1st of April, if done fraudulently, that is, if done to prejudice the rights of another, and the more easily or successfully to enable the party altering it to obtain a double credit for money paid, is a material alteration, and sufficient to constitute the offense of forgery."

Now, we repeat, that while the cases last cited were predicated upon provisions of the statute unlike the one in the case at bar, yet applying the reasoning in those cases to the character of the instrument in the case now before us, it may well be said that if the instrument as set out in the indictment is an evidence of debt, it is a matter of little concern as to what you call that instrument—whether a certificate ⁵⁰⁶ of deposit, a deposit slip or a deposit ticket; the question is as to whether or not such instrument purports on its face to be good and valid for the purposes for which it was intended and which may operate to the prejudice of the rights of another.

That the deposit slip or ticket as alleged in the indictment is an evidence of debt as contemplated by the provisions of the statute upon which this indictment is predicated, and is the subject of forgery, we have no doubt. In our opinion the provisions of this statute are broad enough to embrace every character of paper issued by the banks designated in the statute which furnish evidence to those persons dealing with the banks of the amount of any indebtedness due them. We are unwilling to say that the deposit slip or ticket alleged

in the indictment, the issuance of which by the bank was but following one of the most common and usual methods of transacting business by the bank with depositors, is not, in contemplation of that statute, evidence of debt. The ruling upon this proposition must be adverse to the contention of the learned counsel for appellant.

3. It is next insisted that there is a fatal variance between the deposit slip or deposit ticket alleged in the indictment and the evidence offered in proof thereof by the state. It is sufficient to say that the law applicable to this proposition is well settled. Section 2534, Revised Statutes 1899, provides that "whenever . . . there shall appear to be any variance between the statement in the indictment or information and the evidence offered in proof thereof . . . in the name or description of any matter or thing whatsoever therein named or described, . . . such variance shall not be deemed grounds for an acquittal of the defendant, unless the court before which the trial ⁵⁰⁷ shall be had shall find that such variance is material to the merits of the case and prejudicial to the defense of the defendant."

In *State v. Carragin*, 210 Mo. 351, 109 S. W. 553, 16 L. R. A., N. S., 561, it was insisted that there was a fatal variance between the instrument described in the information and the note offered in evidence. The information in that case did not allege and set out in its description of the forged instrument the indorsement of the defendant Carragin thereon, but the note offered in evidence had the indorsement of the defendant, the maker of the note, on it. It was expressly ruled in that case that the circuit court failing to find that there was any material variance, hence the omission in the information of the genuine indorsement of the defendant furnished no ground for the reversal of the judgment. It was also held in that case that the mere omission of the genuine indorsement of the defendant on the note did not constitute reversible error.

Numerous other cases by this court have made similar rulings, and in the comparatively recent case of *State v. Sharpless*, 212 Mo. 176, 111 S. W. 69, the rule as announced in the case of *State v. Carragin*, 210 Mo. 351, 109 S. W. 553, 16 L. R. A., N. S., 561, was unqualifiedly approved.

4. This brings us to the consideration of the insistence on the part of counsel for appellant that the testimony as developed upon the trial of this case did not tend to prove that the deposit slip set out in the indictment was signed at all by any officer of the bank. We shall not undertake to reproduce all of the testimony applicable to this proposition, but it is sufficient to say that we have read in detail the evidence of the witnesses testifying as to the deposit slip and signatures as alleged in the indictment, and in our opinion

the testimony very clearly tended to prove that the ⁵⁰⁸ deposit slip alleged in the indictment, and which was presented by the defendant as genuine, was signed by the cashier, Packard, with the addition "DeHart" or "D," one of the two. Mr. Ford, the president of the bank, in testifying as to what De Hart did, substantially stated that a deposit slip of \$100 was made out which recited: "Farmers' Bank of Cameron. Noah Jackson has deposited \$100, and DeHart signed 'C. E. Packard, Cashier,' by 'DeHart' or 'D,' one of the two, and placed it on file and he made a duplicate of the same and stamped it with a rubber stamp, 'Duplicate,' and handed it to Mr. Jackson and he took it and went on." Mr. DeHart testified to Jackson coming to the bank and presenting this duplicate slip. On cross-examination he said that of course it looked like his handwriting; he admitted that it was his handwriting. Then he fully testified in detail to the changes and alterations in that duplicate slip. Finally, in testifying about this slip, in answer to the question, "What is your best judgment now, or have you any judgment, as to whether that was the slip you wrote out and handed to him, or the one wrote by some one else?" he answered, "Why, my best judgment was that it was the one I handed him." The inquiry was further made by questions propounded: "That is your best judgment? A. Yes, sir. Q. And it was in your handwriting? A. Yes, sir." N. S. Goodrich testified that when Jackson presented the altered slip DeHart, in conversation with Jackson, stated the following: "Well, DeHart said he made out that ticket for \$100 and no more." DeHart was then talking to Jackson about the altered slip that he brought to the bank. This is a sufficient reference to the testimony of the witnesses. That the testimony as indicated clearly shows that the slip as presented to the bank by the defendant and as alleged in the indictment, was signed "C. E. Packard, Cashier, DeHart or D," is in our opinion, too plain for discussion.

⁵⁰⁹ 5. This leads us to the consideration of the instructions given by the court. We have carefully analyzed such instructions and find that they fully covered every phase of this case to which the testimony was applicable. They required the jury to find every essential element necessary to constitute the offense with which the defendant was charged. The court by instruction numbered 3 fully informed the jury that the defendant was presumed to be innocent, and that it devolved upon the state to prove his guilt beyond a reasonable doubt, and unless the state established his guilt, as charged in the indictment, to their satisfaction beyond a reasonable doubt, they should give the defendant the benefit of such doubt and return a verdict of not guilty. In addition to this instruction the court, upon behalf of the defend-

ant, repeated this information to the jury, and emphasized it by saying that it was not enough in a criminal case to justify a verdict of guilty that there may be a strong suspicion or even a strong probability of the guilt of defendant, but the law requires proof so clear and satisfactory as to leave no reasonable doubt of defendant's guilt.

Complaint is particularly made of instruction numbered 4. This instruction was as follows: "The jury are instructed that it is not necessary to prove that defendant is guilty by the testimony of witnesses who may have seen the offense committed. His guilt may be shown by proof of facts and circumstances from which it may be reasonably and satisfactorily inferred." While perhaps it may be said that it would have been more appropriate to have followed approved precedents respecting instructions upon this subject, yet manifestly there was no reversible error in the giving of that instruction, particularly so when taken in connection with the clear instructions of the court as ⁵¹⁰ to the nature and character of the proof necessary to warrant a conviction in the cause.

Complaint is made by the defendant upon the action of the court in refusing instructions requested by the defendant, marked A, B, C, D and E. We deem it unnecessary to reproduce those instructions. They have been carefully analyzed and considered. In our opinion they are fully covered by the instructions given by the court at the request of counsel for the state and those given at the request of the defendant. We repeat, the instructions as given fully covered every subject connected with the offense charged to which the testimony was applicable. There was no such substantial error in the giving or refusing of instructions as was sufficient to authorize this court in reversing this judgment.

6. We have fully indicated our views upon the controlling legal propositions disclosed by the record. The testimony developed upon the trial is fully indicated in the statement of this cause. It was fully sufficient to support the verdict as returned by the jury. The defendant, at the close of the state's evidence, declined to introduce any evidence whatever; he was content with relying upon the insufficiency of the state's showing made upon the trial. There was no effort on the part of the defendant to introduce any witnesses whose testimony would in any way tend to support the claim that \$11,000 in currency and \$8,000 in gold, as indicated by the deposit slip, had been deposited in the Cameron Bank. The evidence as introduced by the state clearly furnished such a substantial showing as authorized a submission of the cause to the jury, and while, as provided by statute, no improper inference should be drawn as to the guilt of the defendant

by reason of his failure to testify, ⁵¹¹ but it is significant that if a deposit was made of \$11,000 in currency and \$8,000 in gold, there was not some one other than the defendant who could give some explanation as to the possession of this amount of money by the defendant at that time, and as to where or from whom such money was obtained; however, it is unnecessary to discuss that phase of the case. As heretofore stated, the testimony as introduced by the state fully supports the verdict; in fact, we are unable to comprehend how the jury could have reached any other conclusion under the facts as developed in this cause.

Finding no reversible error, the judgment of the trial court should be affirmed, and it is so ordered.

All concur.

The Crime of Forgery is the subject of a note to *Arnold v. Cost*, 22 Am. Dec. 306. As to what instruments may be the subject of forgery, see the note to *Hendricks v. State*, 8 Am. St. Rep. 466. If an instrument is void on its face, it cannot be the subject of forgery; but if it is valid on its face, though invalid in fact, or under the proof, it may be the subject of forgery: *King v. State*, 42 Tex. Cr. Rep. 108, 96 Am. St. Rep. 792, and see cases cited in the cross-reference note thereto.

The Forging of an Instrument requesting a dealer to let the party signing have certain property, for which the latter agrees to settle, is the forgery of "an order," within the meaning of a statute defining as forgery the false making or forging of "an order for money or other property": *People v. Phillips*, 118 Mich. 699, 74 Am. St. Rep. 436. And where an instrument is executed amounting to an order for supplies and a promise to pay the amount thereof, the detaching of such promise amounts to a material alteration, and if done with a criminal intent constitutes forgery: *State v. Mitton*, 37 Mont. 366, 127 Am. St. Rep. 732.

IN RE SHULL.

[221 Mo. 623, 121 S. W. 10.]

CONTEMPT—Adjudication and Commitment.—Contempt of Court is a specific criminal offense; the adjudication is a conviction, and the commitment in consequence thereof is an execution. (p. 499.)

CONTEMPT—Commitment must State Particular Facts, not Conclusions.—A commitment of a witness for contempt does not meet the statutory requirements that it shall contain "the particular circumstances" of the offense and plainly and specially charge the contempt itself, where the order leading up to the adjudication simply recites that the witness was asked "proper and legal questions," which he refused to answer when directed by the court, and the adjudication merely recites that he was adjudged guilty of contempt "in treating the court disrespectfully," without stating the particular questions asked nor finding and adjudging the facts constituting the disrespect. (p. 500.)

CONTEMPT—Presumptions to Sustain Conviction.—Since Punishment for contempt is a criminal proceeding by which the citizen

is deprived of his liberty, presumptions and intendments will not be indulged to sustain a conviction therefor. (p. 500.)

CONTEMPT.—The Order of Adjudication for Contempt must State Facts which show the prisoner guilty of the offense, and not mere conclusions. (p. 500.)

HABEAS CORPUS—Violation of Order in Excess of Jurisdiction.—One imprisoned for the violation of an order or judgment in excess of jurisdiction can be discharged by writ of habeas corpus. (p. 501.)

Warren C. Rogers, for the petitioner.

⁶²³ GANTT, P. J. By this proceeding we are asked to review a commitment of petitioner by the circuit court of Buchanan county, for an alleged contempt.

⁶²⁴ It appears that on May 7, 1909, the petitioner appeared in Division No. One of the circuit court of Buchanan county, in obedience to a subpoena duces tecum, requiring his presence in said court to testify in a certain cause wherein Mrs. William E. Keller was plaintiff and Eva R. Roth and the Bank of North St. Joseph were defendants, and to bring with him certain tax bills mentioned in the petition in said cause, which the plaintiff therein sought to have canceled.

It appears that when said cause was called for trial by Hon. C. A. Mosman, the judge of said court, the plaintiff announced ready for trial, provided the tax bills called for in the subpoena were in court. Petitioner was then called to the witness-stand and was asked if he had said tax bills, and he answered that he did not have them when the subpoena was served and had not had them since that time in his possession or under his control. He declined and refused to answer when he last had them or how shortly before the service of the subpoena duces tecum upon him. Petitioner at all times objected to being interrogated because there was no case on trial. He insisted he was there to obey the subpoena duces, and it would be time enough when the plaintiffs and defendants had announced ready and the trial was begun to ask him for said tax bills, and plaintiff had no right to subject him to said examination in this manner before announcing ready in the cause and proceeding to trial.

After a lengthy parley between the opposing counsel, the court and the witness, the court finally directed him to answer whether he had said tax bills in his possession when a notice to produce them had been served upon him prior to the service of the subpoena duces, and petitioner refused on the ground that no foundation had been laid for such an order: that section 738, Revised Statutes of 1899, provided how plaintiff should proceed, but in any event he had stated he did not have the tax bills when the subpoena duces was served on ⁶²⁵ him, nor had he possession of them since that time, they were not in the possession of any agent of his

or subject to his control, and such a proceeding would be futile and unavailing, and he therefore requested the court not to require him to answer further under the circumstances, but the court required him to do so, and upon his refusal the court ruled it would commit petitioner for contempt.

Thereupon the following commitment was entered of record and was issued by the court:

“In the Circuit Court of Buchanan County, Missouri, Division No. One.

No. 18,858.

“Mrs. William F. Keller, Plaintiff,	}
vs.	
“Eva Roth et al., Defendants.	
“State of Missouri, Plaintiff,	
vs.	
“Samuel S. Shull, Defendant.	

“Now at this time Samuel S. Shull being in contempt of court, having treated the court disrespectfully in refusing to answer proper and legal questions propounded to him in this case while a witness on the witness stand in the case of Keller, Plaintiff, v. Roth et al., Defendants, No. 18,858, after it had been repeatedly ruled by the court that he should answer them and after being admonished by the court that in the judgment of the court the questions were legal and proper, and declining and refusing to answer them or any of them, saying to the court that he did not think the questions were proper and legal and that he would not answer them, and that he willfully and intentionally refused to answer such questions as were propounded to him after it had been decided by the court that the questions were legal and proper and should be answered by him as a witness:

626 “It is hereby ordered and adjudged that the said Samuel S. Shull is guilty of contempt of court in treating the court disrespectfully and he is hereby committed to the jail of Buchanan county and the sheriff of said county is hereby commanded to take charge of the body of the said Samuel S. Shull and commit him to jail and there safely keep him for a period of five days unless he shall in the meantime before the expiration of said five days come into court and make answers in court to the questions propounded to him.

“A true copy.—Attest:

“AMBROSE PATTON, Clerk.

“[Seal]

By J. H. FARMS, D. C.”

By virtue of this commitment the sheriff took petitioner into his custody and committed him to jail, and thereupon

petitioner sued out this writ of habeas corpus, and the sheriff has made his return and both parties have submitted the case to this court upon briefs.

Two grounds are advanced by the petitioner for his discharge, to wit: First, the court had no jurisdiction to adjudge petitioner guilty of contempt for refusing to answer the questions asked, because the cause of *Keller v. Roth* was not on trial and no question was up for decision, and the questions were irrelevant to any issue in said cause. Second, because the said commitment is void upon its face for the reason that it fails to state the facts which constitute a contempt of court.

Considering them in their reverse order, does this commitment comply with our statute which provides, "Whenever any person shall be committed for any contempt specified in this chapter, the particular circumstance of his offense shall be set forth in the order or warrant of commitment?"

⁶²⁷ Section 3576 provides, "It shall be the duty of the court or magistrate forthwith to remand the party, if it shall appear that he is detained in custody: . . . third, for any contempt, specially and plainly charged in the commitment, by some court, officer, or body, having authority to commit for a contempt so charged"; by section 1616, it is provided: "Every court of record shall have power to punish, as for a criminal contempt, persons guilty of any of the following acts, and no other: first, disorderly, contemptuous or insolent behavior, committed during its sitting, in immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority; second, any breach of the peace, noise or other disturbance, directly tending to interrupt its proceedings; third, willful disobedience of any process or order, lawfully issued or made by it; fourth, resistance willfully offered by any person to the lawful order or process of the court; fifth, the contumacious and unlawful refusal of any person to be sworn as a witness, or when so sworn, the like refusal to answer any legal and proper interrogatory."

Contempt of court is "a specific criminal offense and a fine imposed is a judgment, in a criminal case. The adjudication is a conviction, and the commitment in consequence thereof is execution": *Church on Habeas Corpus*, 2d ed., sec. 308; *Ex parte Kearney*, 7 Wheat. 38, 5 L. ed. 391. It is in recognition of this principle that the general assembly, by the foregoing statutory provisions, requires that when a citizen is committed to prison for a contempt the commitment itself shall contain "the particular circumstances of his offense," or in the language of section 3576, the contempt itself must be plainly and specially charged in the commitment. When the commitment in this case is tested in the crucible of the law it is found to fall far short of the requirements of

the statute. Similar statutes are found in other states. If we look at the recitals ⁶²⁸ of the order leading up to the adjudication of the contempt there is no effort made to state the particular questions, the refusal to answer which constituted the contempt. We are simply told that the petitioner had treated the court disrespectfully in refusing to answer proper and legal questions propounded to him. It is not even found that said questions were material and pertinent, but aside from this last consideration the statute requires the facts themselves to be stated, not merely the court's conclusion that the questions were legal and proper, and when we come to the adjudication of the contempt itself, it is not even put upon the ground of the refusal to answer questions, but the finding and the only finding is that petitioner had treated the court disrespectfully. In what manner or how the petitioner treated the court disrespectfully the court did not adjudge and state in its judgment. If it should be said it can be inferred by the matter of inducement set out in the record, the answer of all the courts is that as this is a criminal proceeding by which the citizen is deprived of his liberty, presumptions and intendments will not be indulged in order to sustain a conviction for contempt of court: *Hawes v. State*, 46 Neb. 149, 64 N. W. 699; *Batchelder v. Moore*, 42 Cal. 412. In *Wileox v. State*, 46 Neb. 402, 64 N. W. 1072, the witness refused to be sworn and testify. He was prosecuted for contempt and the court found him guilty. On review the supreme court, referring to the statute which provided that "the contumacious and unlawful refusal of any person to be sworn or affirmed as a witness, and when sworn or affirmed, the refusal to answer any legal and proper interrogatory," held that a judgment of contempt which found that the witness merely refused to be sworn and did not find that he also refused to affirm, was totally defective and that presumptions and intendments would not be indulged to sustain the conviction.

⁶²⁹ In California the statute requires that the court or officer make a statement of the facts. In *Ex parte Shortridge*, 5 Cal. App. 371, 90 Pac. 478, the order committing an attorney for contempt recited that he "interrupted" the court proceedings, without stating what he did, and it was held it did not comply with the statute requiring the court to recite the facts. The court quoted with approval the statement of the supreme court in *Schwarz v. Superior Court*, 111 Cal. 106, 43 Pac. 580, to wit: "The offense being criminal in its nature, both the charge and the finding and judgment of the court thereon are to be strictly construed in favor of the accused," and hence the order of adjudication must state facts which show the prisoner guilty of contempt, not mere conclusions, and such is the obvious meaning and purpose of

our statutes, sections 1619 and 3578, Revised Statutes 1899: 9 Cyc. 48 and 50. Without further discussion, we think the judgment of contempt and the commitment are fatally defective in not finding and adjudging the facts which would show petitioner had acted so disrespectfully toward the circuit court as to constitute a contempt within the statute. It is settled law in this state that one imprisoned for the violation of an order or judgment in excess of the jurisdiction of the court rendering it can be discharged by writ of habeas corpus. Having reached the conclusion that the commitment was insufficient in view of the stress of other work, we deem it unnecessary to discuss and determine the other points pressed in the brief of counsel.

The prisoner is discharged.

Burgess and Fox, JJ., concur.

A Judgment for Contempt, according to *Easton v. State*, 39 Ala. 551, 87 Am. Dec. 49, is valid without any recital of the facts which constitute the contempt; but it is proper for the court to so state the facts, and if as stated they do not amount to contempt, the prisoner may be discharged, but their statement is not necessary to the validity of the judgment. And in *State v. Galloway and Rhea*, 5 Cold. 326, 98 Am. Dec. 404, it is affirmed that at common law a general judgment for contempt—that is, a judgment which does not specify the particular cause of contempt on which the judgment is founded—is sufficient and valid; but this rule is departed from in Tennessee. That a warrant committing for contempt is not required to recite that the prisoner was able to perform the act for the refusal to do which he was committed to jail, see *In re Popejoy*, 26 Colo. 32, 77 Am. St. Rep. 222.

GRIMES v. MILLER.

[221 Mo. 636, 121 S. W. 21.]

PARTITION—Joinder of Ejectment With Partition.—An heir, denied recognition in his ancestor's estate, may join a count in ejectment with a count in partition, and succeeding in the first may proceed at once with his right to partition. (p. 502.)

PARTITION—Effect on Absent Heir not Made a Party.—If one leaves the state at a time when he has no property likely to be affected by his absence, remains away some twenty years, and twelve years after his departure his mother dies, leaving an estate which is partitioned the same year in a suit by heirs to which he is not made a party, they representing themselves to be the only heirs and subsequently selling the land to innocent purchasers, his rights in the property remain unaffected, and on his return he may enforce them, he having had no notice of the death, the inheritance or the partition, and there having been no inducement by him to the purchasers to buy or any act of estoppel except his absence from the state for more than seven years. (p. 503.)

Mytton & Parkinson and Charles C. Crow, for the appellants.

Chas. F. Strop, Henry M. Ramey, Jr., and Eugene Silverman, for the respondent.

638 GANTT, P. J. This is an action in two counts, the first being ejectment for possession of an undivided one-fourth of the northeast quarter of the northeast quarter of section 26, township 56, range 35, all in Buchanan county, Missouri. The ouster was laid on the 19th of January, 1900. The second count was one for partition of the same land.

639 It was admitted that the plaintiff was the son of Mahala Grimes and that the said Mahala Grimes at the time of her death owned said real estate, and that if plaintiff had any interest it was a one-fourth interest, the only evidence offered by plaintiff being as to the value of the monthly rents and profits. It appeared from the evidence offered by the defendant that in 1896 a partition of the premises was had among all the heirs of Mahala Grimes, deceased, except the plaintiff herein, and he was not a party to said partition suit. In that action the premises were divided in kind and the defendant became the owner of the interest of the distributees and heirs by deeds from them about a year after that partition was made. Upon this state of facts the circuit court rendered judgment for possession of the one-fourth interest in said property to which he was entitled as the son of Mahala Grimes. The cause then proceeded on the second count of the petition, and the same evidence and the same admissions were offered together with the judgment in ejectment on the first count. And thereupon the court rendered a decree of partition adjudging plaintiff was entitled to one undivided one-fourth of the said premises and the defendant three-fourths. It was agreed and the court so adjudged that the lands could not be divided in kind without injury to the rights of the parties, and accordingly it was ordered sold and the proceeds divided according to the rights of the parties as adjudged. From that judgment the defendants have appealed.

1. Section 593, Revised Statutes of 1899, provides that "the plaintiff may unite in the same petition several causes of action, whether they be such as have heretofore been denominated legal or equitable or both, where they all arise out of: first, the same transaction or transactions connected with the same subject of action." The subject matter of this action is the ⁶⁴⁰land and the parties are the same, and we can see no reason why the count in ejectment was not properly joined with the count in partition: *Morrison v. Herrington*, 120 Mo. 605, 25 S. W. 548; *Lane v. Dowd*, 172 Mo. 167, 72 S. W. 622; *Scarborough v. Smith*, 18 Kan. 399. Indeed it seems

too plain for discussion that where an heir is denied recognition in the division of his ancestor's land he has no other recourse except to bring his action in ejectment to compel a recognition of his right, and if he succeeds therein, there is no reason why he should not proceed at once with his right to partition.

2. The real reason alleged by the defendants for the reversal of this judgment is that the plaintiff's family and the defendants who purchased from them believed that the plaintiff was dead at the time that the defendant acquired her interest in the lands in controversy.

The evidence tended to show that the plaintiff left Buchanan county twenty-one years before December, 1905, and had not been heard from until 1900 or 1901. That in 1896 his mother, Mahala Grimes, died, the owner of the fee in this land, and in the same year a granddaughter of Mahala Grimes instituted a partition suit in the circuit court of Buchanan county against Cicero Smith and Homer Smith, alleging in her petition that she and the said Cicero and Homer Smith were the sole and only children and grandchildren of Mahala Grimes, deceased, and the said defendants Homer and Cicero Smith in their answers in said partition suit admitted the said allegations to be true, and thereupon the court found that the said Effie Thomas and the said Cicero and Homer Smith were the sole heirs at law of the said Mahala Grimes, deceased, and judgment in partition was rendered and said land divided among the said Effie Thomas and the said Cicero and Homer Smith, and ⁶⁴¹ thereafter the said Cicero and Homer Smith and Effie Thomas conveyed their several interests in said lands to the defendant Henry Miller, and the said Henry Miller then conveyed the same to Elgie Miller. Defendants invoke the presumption of death arising from the absence of the plaintiff from Buchanan county, and insist that the plaintiff having created this legal presumption by his absence is now precluded from claiming against an innocent person who purchased said land in good faith after a decree in partition between the remaining heirs at law. As to the partition suit between Effie Thomas and Cicero and Homer Smith, the plaintiff herein was no party thereto and of course is not bound by the decree in that case. This is too plain for discussion. It is not pretended that there is any evidence of any inducement by the plaintiff to the defendants in this case to purchase the land, or that he did any act which would estop him from claiming his interest in this land, unless it is his absence from the state for more than seven years.

In *Scott v. McNeal*, 154 U. S. 34, 14 Sup. Ct. Rep. 1108, 38 L. ed. 896, the supreme court of the United States said: "The fact that a person has been absent and not heard from

for seven years may create such a presumption of his death as, if not overcome by other proof, is such *prima facie* evidence of his death, that the probate court may assume him to be dead and appoint an administrator of his estate, and that such an administrator may sue upon a debt due to him. But proof, under proper pleadings, even in a collateral suit, that he was living at the time of the appointment of the administrator, controls and overthrows the *prima facie* evidence of his death and establishes that the court had no jurisdiction, and the administrator no authority; and he is not bound, either by the order appointing the administrator, or by the judgment in any suit brought ⁶⁴² by the administrator against a third person, because he was not a party to and had no notice of either."

It was not shown that the plaintiff knew that his mother was dead or that she left an estate or that he had any knowledge whatever of the former partition proceedings between the other heirs. When plaintiff left this state he had no property here that was liable to be affected by his absence, and his mother did not die until twelve years after his removal from the state, and there is absolutely no evidence, as already said, that he had notice of his mother's death, or that she left an estate to which he was an heir. In the case of *Scott v. McNeal*, above referred to, the supreme court of the United States referred to the case of *Lavin v. Emigrant Industrial Sav. Bank*, 18 Blatchf. 1, 1 Fed. 641, in which it was held that letters of administration upon the estate of a living man, issued by the surrogate after judicially determining that he was dead, were null and void as against him; that payment of a debt to an administrator so appointed was no defense to an action by him against the debtor, and that to hold such administration valid against him would deprive him of his property without due process of law within the meaning of the fourteenth amendment of the constitution of the United States. "This court concurs in the proposition there announced, 'That it is not competent for a state by a law declaring a judicial determination that a man is dead, made in his absence and without any notice to or process issued against him, conclusive for the purpose of divesting him of his property and vesting it in an administrator for the benefit of his creditors and next of kin, either absolutely or in favor of those who innocently deal with such administrator.' The immediate and necessary effect of such a law is to deprive him of his property without any process of law whatever, as against him, although it is done by process of law against other people, his next of kin to whom ⁶⁴³ notice is given. Such a statutory declaration of estoppel by a judgment to which he is neither party nor privy, which has the

immediate effect of divesting him of his property, is a direct violation of this constitutional guaranty."

So in this partition suit between plaintiff's brothers and niece; he was not made a party to the suit and of course his rights were unaffected thereby. We have given due consideration to the argument of defendant's counsel that if this case is affirmed they will have paid their money for a portion of this land and will lose it, but this is no answer to the claim of the plaintiff that this is his property and that he has done no act and been guilty of no representation or inducement to mislead the defendants. He is not responsible for the fact that his brothers and niece made representations in their suit for partition to the effect that they were the only heirs at law of Mahala Grimes. To deny him his recovery in this case would be to deprive him of his property without due process of law, and leave him absolutely without remedy for the loss of his estate. On the other hand, the defendants had it within their power to require their grantors to give them warranty deeds and a perfect abstract of title before investing their money in this land. The equity of the case coincides in our opinion with the plain law of the case and that is that the circuit court properly decreed this one-fourth of this land to belong to the plaintiff and its judgment is therefore affirmed.

Burgess and Fox, JJ., concur.

Proceedings Against Absentees.—The appointment of an administrator for the estate of an absentee who is supposed to be deceased, but who in fact is alive, is void: Springer v. Shavender, 116 N. C. 12, 47 Am. St. Rep. 791; Springer v. Shavender, 118 N. C. 33, 54 Am. St. Rep. 708; Carr v. Brown, 20 R. I. 215, 78 Am. St. Rep. 855. As to the constitutionality of statutes providing for the administration and distribution of estates of absentees, see Nelson v. Blinn, 197 Mass. 279, 125 Am. St. Rep. 364; New York Life Ins. Co. v. Chittenden, 134 Iowa, 613, 120 Am. St. Rep. 444; Selden's Executor v. Kennedy, 104 Va. 826, 113 Am. St. Rep. 1076, and cases cited in the cross-reference note thereto; and as to the constitutionality of statutes providing for suits against unknown owners to quiet title to land, see Title and Document Restoration Co. v. Kerrigan, 150 Cal. 289, 119 Am. St. Rep. 199; note to McClymond v. Noble, 87 Am. St. Rep. 358.

OHLMANN v. CLARKSON SAWMILL COMPANY.

[222 Mo. 62, 120 S. W. 1155.]

JURISDICTION—Service by Publication.—The Use of the Initials of the Christian Name of the defendant is not sufficiently accurate to acquire jurisdiction by constructive notice in proceedings to divest him of land. But this rule is relaxed where estoppel has played. (p. 508.)

JURISDICTION—True Name of Defendant.—In notice by publication the defendant should be accurately designated by his true name. (p. 508.)

JURISDICTION—Service by Publication—Rule of Strictness.—Service by Publication, being highly technical, must be strictly pursued in order to acquire jurisdiction; constructive service must be viewed critically, to prevent, so far as can be, irreparable injury. (p. 509.)

JURISDICTION—Tax Suit.—The Real Record Name of the Land Owner, the name in which he took title as distinguished from the colloquial name he is known by in the neighborhood of the land and to which he answers among those who know him, should be used in designating him in an order of publication in a tax suit. (p. 509.)

NAMES—Abbreviations and Nicknames.—"Mike" is not a universally known abbreviation of "Michael"; it is not an abbreviation at all, accurately speaking, but rather a nickname. (pp. 511, 512.)

JURISDICTION—Tax Suits—Abbreviated Christian Name.—In proceedings to sell the land of a nonresident for delinquent taxes, an order of publication against "Mike Ohlman" is insufficient to confer jurisdiction where the name of the record owner is "Michael Ohlmann." (pp. 507, 513.)

R. I. January, Arthur T. Brewster and Sam. M. Brewster, for the appellant.

Dinning & Dinning, for the respondents.

64 LAMM, P. J. Suit under section 650, Revised Statutes of 1899. Plaintiff, a resident of Illinois, sued the Clarkson Sawmill Company (joining divers other parties as codefendants) in the Reynolds circuit court to quiet title to the south half of section 35, township 32, range 2—the sawmill company alone making defense.

Judgment went in favor of that defendant on the southwest quarter of said section and, as to the southeast quarter, dismissing the cause. Plaintiff comes here.

The petition alleges, *inter alia*, that the sawmill company claims under a quitclaim deed from certain Cartys and others. The answer of that company was a general denial, barring an admission that it held an adverse claim to the southwest quarter and an allegation that it owned the southwest quarter by a fee simple title. It pleads a misjoinder of causes of action, admits the quitclaim deed by the Cartys, but denies it makes any claim to the southeast quarter under that deed.

Plaintiff introduced a patent from the United States to the south half of said section 35, of date September 1, 1859, recorded December 7, 1866. This patent runs to "Michael Ohlmann."

Defendant, over objection and exceptions saved, introduced a tax deed from Harrison, sheriff of Reynolds county, dated May 29, 1879, purporting to convey ⁶⁵ the south half of section 35 to G. J. Carty. Sundry objections were made below to this tax deed and are now pressed. But unless it is necessary to develop and determine other phases of the case, we need heed but one, viz.: that the deed does not purport to convey the title of Michael Ohlmann, patentee, but runs against the title of "Mike Ohlman." Carty's bid was sixteen dollars for the half section, and the land was knocked down to him for that sum. Whether this sheriff's deed was put of record does not appear.

Supplementing that deed with evidence that certain Cartys and others were the sole heirs of G. J. Carty, the sawmill company introduced a quitclaim deed of date September 5, 1903, conveying to it the title of said heirs in the locus.

Thereupon plaintiff read into the record the petition, authenticated tax bill, made a part thereof, order of publication and judgment in the tax suit—from all which it appears that the suit was instituted in 1878 in the name of the state to the use of Carter, collector of revenue in Reynolds county, against "Mike Ohlman" as owner of a certain nine hundred and sixty acres of land, including said south half, for delinquent taxes: that the back tax bill certified the owner's name to be "Mike Ohlman"; and that the order of publication ran against "Mike Ohlman" as a nonresident. The judgment followed the petition, back tax bill and order of publication in that particular.

No possession is alleged or proved by either side.

Waiving, for the present, all other questions raised on the record (some of them of no little gravity) we confront the first, viz.: Did Michael Ohlmann's title as patentee pass by a sheriff's deed purporting to convey the title of "Mike Ohlman," when the deed is based on a judgment for taxes on constructive service with no appearance by defendant—the petition, ⁶⁶ order of publication and judgment describing the owner as "Mike Ohlman"?

(a) The question goes to jurisdiction and due process of law. No man may judicially lose his property without his day in court. A day in court proceeds on notice. So, due process of law and jurisdiction depend on notice. By Revised Statutes, section 9303, it is ordained that tax suits shall be brought "against the owner of the property." By this is meant the record owner unless the fact is known, or the purchaser have notice, that the record owner is not the true

owner. When summons is actually served on the right individual by the wrong name, the error becomes immaterial because he has notice of the suit and may appear if he choose and plead a misnomer. But absent actual notice when the law for convenience substitutes a constructive notice, the name of the individual defendant obviously becomes one of the essentials and of the very life of the notice. "Names are like definitions in mathematics, though less exact," says Woodward, J., in *Jones' Estate*, 27 Pa. 336. "The use of names (he continues) is to describe the individual of whom we speak, so as to distinguish him from all other persons."

(b) There will be found a variety of cases decided by us giving voice to the gravity and significance of accuracy in the use of the Christian name of a defendant where his land is sought to be taken from him through jurisdiction acquired in a suit by constructive notice. Thus, the settled doctrine has come to be that the use of the initials of the Christian name is not sufficiently accurate for such purpose: *Gillingham v. Brown*, 187 Mo. 181, 85 N. W. 1113; *Evarts v. Missouri etc. Min. Co.*, 193 Mo. 433, 92 S. W. 372; *Burkham v. Manewal*, 195 Mo. 500, 94 S. W. 20, and cases cited. The rule is relaxed where estoppel has play—for instance, where the record title was taken by the owner in the initials of his Christian name, and he was served ⁶⁷ by such initials: *Elting v. Gould*, 96 Mo. 535, 9 S. W. 922. There is a case (*Mosely v. Reily*, 126 Mo. 124, 28 S. W. 895, 26 L. R. A. 721) seemingly holding against the general rule, but that case itself was finally sustained only on the theory of estoppel: *Turner v. Gregory*, 151 Mo. 100, 52 S. W. 234. Use of initials in procuring a license to marry and in being married in accordance with the license was held to create an estoppel so that a judgment of divorce granted against defendant on publication identifying him by his initials was held valid: *McDermott v. Gray*, 198 Mo. 265, 95 S. W. 431.

There is a line of cases holding that the law recognizes only one Christian name and that some freedom may be taken with the initial of a middle name: *Howard v. Brown*, 197 Mo. 36, 95 S. W. 191; *Morrison v. Turnbaugh*, 192 Mo. 427, 91 S. W. 152. But in the last case the true name of the defendant appeared in the petition, the affidavit for an order of publication and the order itself. The trouble arose by clerical slip in the judgment. In the *Howard* case (197 Mo. 36, 91 S. W. 152), where the defendant's name was Henry P. P. Brown and he was sued as Henry T. Brown, significance was given to the fact that his name was grouped with his mother, his sisters and his nephews, comprising the immediate Brown family to which he belonged—thus identifying him in that way. These cases in nowise militate against

the rule that in notice by publication the defendant should be accurately designated by his true name.

If the law tolerated slovenliness or pranks in this regard, then slovenliness and pranks might ripen into a custom and open the door to great mischief. Constructive service at best is harsh. It is service not in substance and fact, but of a sort to which the name of service is attached from necessity. That method of service, being highly technical, must be strictly pursued. Thus it was said in the Turner case (151 Mo. 100, 52 S. W. 234): "Where resort is had to this method, a ⁶⁸ substantial, even rigid, observance of the law is required, otherwise the judgment will be void" (citing cases). And in the Morrison case (192 Mo. 427, 91 S. W. 152), it was held that "constructive service must be viewed critically in order to prevent, so far as can be, irreparable injury." And this rule of strictness was applied in each case directly to the use of the true name of the defendant.

The Turner case (151 Mo. 100, 52 S. W. 234) has met the approval of this court many times. It is a landmark in the law and establishes the proposition that in constructive service the real record name of the land owner, the name in which he took title (as distinguished from the colloquial name he was known by in the neighborhood of the land and to which he answered among those who knew him) should be used in designating him in an order of publication in a tax suit. Turner's record name was Singleton V. Turner. By that name he was designated in the deed by which he took title, his name appearing there no less than four times. Though grantee, he signed that deed by that name. The "V" in his name stood for Vaughn. While a resident of Missouri he lived in Holden, say, fifteen miles from the land. In Holden he was usually called "Vaughn Turner." He went by that name in the neighborhood of the land. He was known as Vaughn from his youth up. When he went to California and took up a residence there, he continued to be called Vaughn. He was sued for taxes as "Vaughn Turner." That name runs through the whole record—petition, order of publication, judgment and deed. In business transactions he usually signed his name "S. V. Turner." It was held that the deed was void, and that ruling and the reason underlying it apply vehemently to the case at bar.

(c) We are cited to many cases by counsel for defendant in which the right party has been sued and served with process, but in which profert has been ⁶⁹ made of some document signed with an abbreviated name or in which it has been urged there was a variance between the proof and allegation arising from misnomer, etc. But none of those cases touch the vital point of jurisdiction and due process of law. For instance:

In *Fenton v. Perkins*, 3 Mo. 23, a question arose whether a certain oral contract called for a note signed by John Mickle. The contention was the contract called for one signed by John McMickle. It was ruled that McMickle might be bound under a note signed as Mickle, but that defendant had no right to impose on plaintiff the risk of proving that Mickle was intended for McMickle. In discussing the case it was held that abbreviations of men's given names are so common that, without any violation of the laws of the land the courts may take judicial notice of them. It will be seen that the question in that case arose on the sufficiency of the evidence to identify the subject matter of the contract.

In *Weaver v. McElhenon*, 13 Mo. 89, the suit was on a note and defendant was sued by his true Christian name, Christopher. But the note was set forth in the petition and it was signed "Christy" or "Christ" McElhenon. The defendant demurred. It was ruled that the defect, if any, could not be reached by demurrer, but by a motion to exclude the note as evidence on account of variance. The court also ruled that the signature to the note was a well-known abbreviation of Christopher, and the logic of the ruling was simply that Christopher, if he liked, could dub himself "Christy" or "Christ" and by signing his name that way bind himself on a note when impleaded under the name of Christopher.

In *Moseley's Admr. v. Mastin*, 37 Ala. 216, an abbreviation, "admr.," was used in the complaint. Exception was taken to that and the court held "admr." meant "administrator."

⁷⁰ In *Goodell v. Hall*, 112 Ga. 436, it was ruled that "judicial notice will be taken of the ordinary and commonly used abbreviations and equivalents of Christian names." That language must be read with the case, viz.: Eliza M. Hall held title to certain land. She made application under the Georgia statutes to have it set apart as a homestead, signing the application "Elizabeth M. Hall." Subsequently she mortgaged the land as Eliza M. Hall. The mortgage being foreclosed, she made claim that her homestead was not subject to mortgage. This, because her application to have it set apart as a homestead had been sustained. In offering the application in evidence it was objected to because made by "Elizabeth M. Hall." The court ruled that Eliza was an abbreviation of Elizabeth, and, if not so, that at least parol evidence was admissible (and was admitted) to show the identity of Elizabeth M. with Eliza M.

In *Jones' Estate*, 27 Pa. 336, a judgment was recovered against Abel Jones. It was entered on the lien docket against "A. Jones." Other judgments were obtained against Jones and entered on the lien docket. The real estate of Abel

Jones was sold at sheriff's sale, and, on making distribution between judgment creditors, the auditor disallowed the judgment entered on the lien docket in the name of "A. Jones." Proof was made that Abel Jones signed his name in no other way but "A. Jones," and that there was no other Abel or A. Jones in the county. It was ruled on appeal that the object of the docket entry was to give the public notice who was bound and that the entry was sufficient.

In *Rupert v. Penner*, 35 Neb. 587, 53 N. W. 598, 17 L. R. A. 824, the proposition was announced that a deed correctly describing the grantor as Archibald T. Finn, with an acknowledgment designating the grantor as Archibald T. Finn and identifying him as known to the officer to be the person whose name is affixed to the instrument and who executed ⁷¹ the same, and which deed was signed "Arch T. Finn." was sufficient to convey the title of Archibald T. The question arose over the admission of the deed in evidence: See in this connection *Houx v. Batteen*, 68 Mo. 84.

McGregor v. Balch, 17 Vt. 562, was a *scire facias* upon a recognizance. The defendant pleaded nul tiel record. At the trial plaintiff gave in evidence a record of the recognizance in which Balch's Christian name is set forth as "Barney D." Objection was made to this evidence. The court ruled that there was no controversy but that "Barney" and Barnabas are used for the same name, and that as defendant was known by the name of "Barney" as well as Barnabas, the objection was properly overruled.

In *Sparks v. Sparks*, 51 Kan. 195, 32 Pac. 892, a question arose on a motion to quash a deposition. The notice to take specified the place as the office of "Dan Ray." The deposition was actually taken at the office of Daniel E. Wray. Wray was identified in the notice as an "attorney at law of Versailles, Missouri." There was no claim made there was any other person of that name or sounding like his in that place, or that the parties were misled. In view of that fact and of the further fact that "Dan" is an abbreviation of Daniel and that Ray and Wray are idem sonans, a motion to quash was held properly overruled.

Other cases cited are of a similar character and none go to the point of due process of law or jurisdiction, or in any wise impugn the reasoning of *Turner v. Gregory*.

(d) We cannot find it ever ruled by any respectable court that "Mike" is a universally known abbreviation of Michael. We are asked to take judicial cognizance that it is a universally recognized equivalent of that name. We decline to do so. It is sometimes used flippantly to designate anyone, as in the colloquialism, ⁷² "Sure Mike," or in the other, "Are you Mike?" or, "You think you're Mike." But this figurative and slangy use is too broad and proves too much.

We are of the notion there is something Celtic about "Mike"—a tang or flavor of the old sod—and that its usage among Teutons is either malapropos, mythical or scant. The name "Michael Ohlmann" is self-evidently German, and we have no call to judicially determine "Mike" as applicable to a nationality not shown to have adopted its use at the fireside as part of the mother tongue.

In this connection it is not without some appreciable weight that there is no evidence tending to show that Ohlmann was known as "Mike" where he lived in Illinois, or in Missouri where his land lay, or that he answered to that name or tolerated such easy familiarity. So far as we can see, it is left to the tax officers and circuit court of Reynolds county to be the first to joke or trifle with his name—this, too, when engaged in enforcing tax laws, serving him with summons and solemnly enforcing the state's lien and separating him from the ownership of his estate (no joking matter, withal), and when the records of Reynolds county showed his title was got and held in the name of Michael.

(e) Michael is a baptismal name sacred in meaning and hallowed by sacred legends—witness: Saint Michael, Michaelmas, or the great archangel whose prowess is vouched for in accredited annals of those dim wars seen by the mind's eye of the blind Milton, in which the Great Enemy of Mankind thrust forth by his sword, pitched headlong flaming, so that (as the record runs):

"From morn

To noon he fell, from noon to dewy eve,

A summer's day; and with the setting sun

Drapp'd from the zenith, like a falling star."

73 It ill becomes the law, moving with dignity and venerating sacredness, to deal in flippant vein with such a name as Michael, literally in Hebrew, "Who is like God?"

If we were to hold that an order of publication might deal with those abbreviations in names commonly known to all men, yet "Mike" is not an abbreviation of Michael any more than of Micah, Micaiah, Micha, Michah, Michaiiah, Michal, or others mentionable. But "Mike" is not an abbreviation at all, accurately speaking. It is to all intents and purposes a mere diminutive, a nickname—a corruption. Now, nicknames are in a sense nicked names—names that are snipped, whittled off. They are names given in contempt, derision or sportive familiarity—a familiar or opprobrious appellation: Webster's International Diet., tit. "Nickname." As such appellations they have no place in those judicial publications of notice by which courts acquire jurisdiction. Otherwise we would have Amelia Jones notified by an order of publication directed to "Sis" Jones; or William Brown under the title of "Bub" or "Bill" or "Buck" Brown; or,

if the hypothesis be indulged that the master sculptor and painter were alive and so fortunate as to own real estate in Missouri, he would be brought in under the name of "Mike" Angelo; or Winfield Scott (in like hypothesis) under the name of "Fuss-and-Feathers" or "Hasty-Plate-of-Soup" Scott; or Thomas H. Benton as "Old Bullion" Benton.

But we have pursued the matter far. We think the deed was void because the Reynolds circuit court never acquired jurisdiction over Michael Ohlmann. This view of the matter precludes the necessity of considering other questions made.

The judgment is reversed and the cause remanded with directions to enter a judgment in favor of plaintiff adjudging title in him to all the land in his patent.

All concur.

Proceedings Against Persons by Other Than Their Full or Real Names are discussed in the note to Proctor v. Nance, 132 Am. St. Rep. 563. The principal case will be found cited at page 570 of this note.

The Doctrine of Idem Sonans is the subject of a note to Thornily v. Prentice, 100 Am. St. Rep. 322.

MAIER v. BROCK.

[222 Mo. 74, 120 S. W. 1167.]

MARRIAGE—Presumption of Dissolution of Prior Marriage.—

Where a man first marries in Germany, and after immigrating to America there contracts not less than three other marriages, all of which are valid if the first marriage has been dissolved, it will be presumed after his death, when the first wife demands dower in his estate, that the first marriage has been dissolved by divorce, and she has the burden to prove the contrary. This presumption is strengthened by the fact that he lived a number of years in another state before taking up his permanent abode and contracting the three last marriages in the jurisdiction where he died, that he once visited the first wife after he had married again and requested their daughter to return to America with him, and that his reputation in the community was good; and the presumption is not rebutted by the fact that the first wife never again married, that no divorce was ever granted in the jurisdiction of her domicile, and that in Germany his name was "Josef Maier," but in America he was known as "Joseph G. Meyer." (pp. 514, 522, 526.)

NAMES are *Idem Sonans* if the Attentive Ear Finds Difficulty in distinguishing them when pronounced, or common and long-continued usage has by corruption or abbreviation made them identical in pronunciation; and it is not necessary that they should be spelled alike if the pronunciation is the same. (p. 525.)

MARRIAGE—Presumption in Favor of Validity.—Whenever a marriage has been shown the law indulges the presumption that it is valid, and the burden is cast upon those who question its validity to show its invalidity by strong and persuasive evidence, leaving no

room for reasonable doubt in the mind of the chancellor; this is a presumption of more than ordinary strength, it is one of the strongest known to the law. (p. 528.)

Henry Leist and Thomas & Hackney, for the appellant.

McReynolds & Halliburton, for the respondents.

81 WOODSON, J. The plaintiff brought this suit for the assignment of dower in the circuit court of Jasper county.

The petition was in the usual form. The answer was a general denial, and a plea that plaintiff was an alien, a resident of Germany, and had never resided in this country. The reply was a general denial of the new matter contained in the answer.

The evidence showed that plaintiff was married to one Josef Maier on January 24, 1865, in the Empire of Germany, and that they lived together as man and wife until the spring of 1866, when he left her and came to the United States. Shortly after he reached this country she heard from him once, but no more until the year 1885, when he visited his old home in Germany, when she went to see him, and there saw him for the last time. He was known in this country by the name of Joseph G. Meyer. She never knew of his using any other name than that of Josef Maier, and heard of his death, in Carthage, Missouri, through a report of a life insurance company which had issued a policy on his life.

There was considerable evidence introduced tending to show that Josef Maier and Joseph G. Meyer were one and the same person, but as there is practically no dispute but what they were one and the same person, it would be useless to burden this statement with a copy of that evidence. Plaintiff never remarried and remained true to her marital vows.

Joseph G. Meyer died in Jasper county, February 3, 1904, seised of the real estate described in the petition. He went to that county sometime between the year 1872 and 1874, and took with him a second wife, who lived with him on this farm until her death. On March 12, 1885, he married Marie Balduff, in the city of St. Louis, and lived with her on this land until her death. Of that marriage two daughters were born, **82** who were grown young ladies at the time of the trial of this cause. He then married a woman by the name of Cumberledge, from whom he was divorced; and subsequent thereto, on January 17, 1902, he married Nora Carl, of Jasper county, and lived with her until his death; and of which marriage a posthumous child was born.

No one in this country ever heard of his having been married in Germany until this suit was brought. Meyer was a German-born citizen and had never applied for naturalization

in Jasper county. This record shows that he had been an industrious, hard-working, good citizen while he lived in this state, but it fails to show where he lived from the time he came to this country, in 1866, up to the time he went to Jasper county.

No instructions were asked or given.

The court found for the defendants, and plaintiff appealed.

1. There can be no serious question, in the light of the evidence preserved in this record, but what Joseph G. Meyer, mentioned in the evidence, was one and the same person who married the appellant in Germany in the year 1865, under the name of Josef Maier; nor can there be any question but what he was married at least three times subsequent to his coming to this state, and presumably once before that date.

Upon these facts rests the main legal proposition involved in this case. Counsel for respondents contend that the subsequent marriages in this country raised a presumption that Joseph G. Meyer was divorced from appellant after coming to this country and prior to his said marriages in this state.

This question has been so recently and so ably discussed by Judge Graves, in the case of *Johnson v. St. Joseph R. R. Co.*, 203 Mo. 381, 101 S. W. 641, I feel it would be a useless waste ⁸³ of time for me to do more than quote from his opinion what he said upon this question. The question involved in this case is identical with the one which was involved there. On page 402 he uses this language:

“By this instruction, when applied to the facts of this case, the defendants are required to assume the burden of proving by negative proof that there had been no dissolution, by divorce, of said prior marriage. Defendants in fact assumed that burden and did prove that, in two places of residence established by deceased, no divorce had been procured, and further by showing that the first wife had procured no divorce. The question, however, for us to determine, is whether or not this instruction properly places the burden of proof, and if it does, it was a question for the jury to determine whether or not the burden had been successfully carried. The cases upon this point are by no means harmonious. We start with every presumption in favor of the validity of the marriage of plaintiff and deceased. Singular to say, a case from our own court, *Klein v. Laudman*, 29 Mo. 259, is the basis of practically all the law cited by plaintiff in support of this instruction, and in fact the basis of several potent decisions not cited by plaintiff. So that it devolves upon us to say whether that case properly declared the law, and whether or not other courts, citing and approving it, have properly analyzed and applied the doctrine announced therein.

"In the Klein case (29 Mo. 259), Klein and his wife had sued Laudman and wife for slander. Defendants denied the speaking of the words and in effect denied that Klein and Margaret Klein, the plaintiffs, were husband and wife. Mrs. Klein had stated that she had been previously married in Germany and these admissions were proven. Based upon that proof, the trial court gave this instruction for defendants:

⁸⁴ " 'If the jury find from the evidence that the plaintiff Margaret Klein was married in Germany to another person than Leonard Klein, the plaintiff, then such relation is presumed to continue; and it devolves upon the plaintiffs to prove to the satisfaction of the jury that such marriage was legally terminated before the date of the marriage certificate, read in evidence, or they cannot recover.'

"In discussing this instruction, Napton, J., who delivered the opinion, said: 'We think the first instruction which the court gave, in this case, at the instance of the defendants, was erroneous. There was no presumption that a marriage, which was proved to have existed at one time in Germany, continued to exist here after positive proof of a second marriage de facto here. The presumption of law is, that the conduct of parties is in conformity to law, until the contrary is shown. That a fact, continuous in its nature, will be presumed to continue after its existence is once shown, is a presumption which ought not to be allowed to overthrow another presumption of equal, if not greater, force, in favor of innocence. The fact of a marriage in Germany, which was established in this case by the declaration of one of the plaintiffs, was entirely consistent with the validity of the marriage de facto, which, beyond all dispute, existed between the parties here, and after they had produced their marriage certificate, with proof of cohabitation as husband and wife since its date, the presumption is that this marriage was a lawful one, and that the former marriage in Germany, if any such was established, had been dissolved. There was not any evidence in this case, so far as the bill of exceptions shows, that the first husband of Mrs. Klein was still living; but if this had been established, we think she was still entitled to the benefit of the favorable presumption that the first marriage had been dissolved by a divorce, and that it was not incumbent on her, ⁸⁵ in this character of action and under the pleadings in this case, to produce a record of the judicial or legislative proceedings by which the divorce was effected.'

"And on page 263, Judge Napton further said: 'There was no proof that her first husband was living; and if there has been, the woman was still entitled to the charitable presumption that a divorce from her first husband had enabled her to marry a second time. But the court directed the jury

to presume the invalidity of the second marriage, unless proof positive of a dissolution of the first was produced.'

"In the case of *Waddingham v. Waddingham*, 21 Mo. App. 609, a case on the facts very much like the case at bar, as the wife was shown to have been previously married to one Charles Gavin, Ellison, J., after citing and quoting from the *Klein* case (29 Mo. 259), and speaking of the *Klein* case, and the one he then had under consideration, says: 'I can see no escape of plaintiff's case from the reasoning in that case. Here Charles Gavin is shown to be still alive, yet the supreme court maintains that so strong is the presumption of innocence as to the second marriage proven in fact, that the law will infer the first was dissolved. So, then, if we concede all plaintiff maintains as to the sufficiency of his proof to establish a marriage between defendant and Charles Gavin, yet an actual marriage with plaintiff being conceded, the presumption in favor of defendant's innocence will raise the inference that her marriage with Gavin was dissolved.'

"In the later case of *Leech v. First Nat. Bank*, 99 Mo. App. 681, 74 S. W. 416, Ellison, J., says: 'Ordinarily a deposit of money by a third person to the credit of another, being for his benefit, will be presumed to have been accepted by him. But this is only true of a lawful transaction. It is not true where the presumption would establish an unlawful act, or participation in an unlawful act. For the primary ⁸⁶ presumption is always in favor of innocence. . . . This, though things once shown to exist are presumed to continue. But if their continuance would develop a crime, the presumption would cease and be succeeded by one of innocence. Thus, if it be shown that a man and woman were married and lived together as husband and wife, and one of them is shown to have afterward married another person, on a trial of bigamy, the presumption of innocence will overcome the presumption of the continuance of the former marriage, and it will be assumed, in lack of other evidence, that the first marriage was, in some way, dissolved. The cases on this head are discussed in *Waddingham v. Waddingham*, 21 Mo. App. 609. And an apt illustration of the power of the presumption of innocence to overcome other presumptions is found in *Klein v. Laudman*, 29 Mo. 259.'

"On the other hand, we have the doctrine of the *Klein* case criticised by the St. Louis court of appeals, by Barclay, J., in case of *Winter v. Supreme Lodge Knights of Pythias*, 96 Mo. App. 1, 69 S. W. 662, where he says: 'In a number of instances, instructions have been condemned for telling the jury in negligence cases that the law presumes every man to exercise ordinary care, or equivalent language expressing as a rule of law the idea that the conduct of an intelligent person is presumed to be in conformity to the law until the

contrary is shown. That rule is declared to be a "presumption of law" in *Klein v. Laudman*, 29 Mo. 259. But the statement of it in the form aforesaid has been held erroneous in a number of cases, some of which we mentioned, more could be cited: *Palmer v. Missouri Pac. R. R. Co.*, 76 Mo. 217; *Myers v. City of Kansas*, 108 Mo. 480, 18 S. W. 419; *Lynch v. Metropolitan St. R. R. Co.*, 112 Mo. 420, 20 S. W. 642; *Schepers v. Union D. R. R. Co.*, 126 Mo. 665, 29 S. W. 712; *Nixon v. Hannibal & St. J. R. R. Co.*, 141 Mo. 425, 42 S. W. 942. These decisions are all positive authority for the proposition that in the face of evidence permitting an inference⁸⁷ contrary to a disputable presumption, it is not correct to throw the presumption into the scale, as it is said, in giving the law to the triers of fact.'

"Outside of Missouri there are cases upholding the *Klein* case. One of these is the case of *Hunter v. Hunter*, 111 Cal. 261, 52 Am. St. Rep. 180, 43 Pac. 756, 31 L. R. A. 411. In that case Mrs. Hunter had first married a man by the name of Joseph Milam in February, 1858, she being then fifteen years of age. She lived with Milam ten days, when she was taken away by her parents. In July, 1862, she married Hunter and lived with Hunter for twenty-five years or more, when Hunter brought suit to have the marriage with him declared void. In that case, Temple, J., says: 'But it is said the marriage of the parties to this suit took place only about four and one-half years after the marriage to Milam, and it will be presumed that Milam was alive, in the absence of proof to the contrary. There was no proof tending to show that Milam was dead, or that his chance of life was below the average; therefore, it is contended the court should have found that he was alive. This presumption of the continuation of life is, however, overcome by another. It is presumed that a person is innocent of crime or wrong: Code Civ. Proc., sec. 1963. There is also a presumption, and a very strong one, in favor of the legality of a marriage regularly solemnized. Rather than hold a second marriage invalid, and that the parties have committed a crime or been guilty of immorality, the courts have often indulged in the presumption of death in less than seven years, or, where the absent party was shown to be alive, have allowed a presumption that the absent party has procured a divorce. A more correct statement, perhaps, would be that the burden is cast upon the party asserting guilt or immorality to prove the negative—that the first marriage had not ended before the second marriage.'

⁸⁸ "The latter part of the above quotation goes to the exact question raised on the instruction in this case, i. e., where is the burden of proof placed?

"In *Schuchart v. Schuchart*, 61 Kan. 597, 78 Am. St. Rep. 342, 60 Pac. 311, 50 L. R. A. 180, Johnson, J., cites the Klein case with these remarks: 'The marriage in this case, as we have seen, was formally celebrated and as every presumption of the law is in favor of matrimony, the burden is on the plaintiff to show illegality, even though it may involve the proving of a negative. To establish his case, the plaintiff was therefore required to prove, not only that Porteous was living, but that the marriage relation of the defendant with him had not been dissolved by divorce. He did show that Porteous was still living, but failed to show that a divorce had not been granted to Porteous from her: *Boulden v. McIntire*, 119 Ind. 574, 12 Am. St. Rep. 453, 21 N. E. 445; *Klein v. Laudman*, 29 Mo. 259; *Hadley v. Rash*, 21 Mont. 170, 69 Am. St. Rep. 649, 53 Pac. 312.'

"Another case citing and quoting from the Klein case is that of *Boulden v. McIntire*, 119 Ind. 574, 12 Am. St. Rep. 453, 21 N. E. 445. In this case Limes, the first husband of Mrs. Boulden, was alive and at the trial. The former marriage to Limes was conceded. The second marriage was within seven years. In the Boulden case, Coffey, J., says: 'In the absence of proof to the contrary, it would undoubtedly be presumed, in favor of the validity of her marriage with Boulden, that Limes was dead. In the absence of any showing to the contrary, what reason can be assigned, under the circumstances, for not presuming that the marriage relation between her and Limes had been dissolved by a legal divorce before her last marriage? It is urged that to require the appellants to prove that Eliza Street had not been divorced from Charles Limes prior to the date of her marriage with Boulden would be requiring them to prove a negative. As we have seen from the authorities above cited, the law requires ⁸⁹ the party who asserts the illegality of a marriage to take the burden of that issue and prove it, though it may involve the proving of a negative.'

"This case, like the case from California, fixes the burden of proof.

"Leaving for the present those cases wherein the Klein case is cited, approved and applied, let us take up a few cases where the facts are somewhat similar to the case at bar, and see what the courts are holding. The first among the number is *Coal Run Coal Co. v. Jones*, 127 Ill. 379, 8 N. E. 865, 20 N. E. 89. Mary Jones, administratrix, an alleged widow of Thomas D. Jones, brought action for the death of Jones, which occurred November 19, 1883. One Mary Evans was offered as a witness for the coal company. The marriage of Mary Jones to Thomas D. Jones, deceased, in La Salle county, Illinois, February 19, 1875, was practically conceded. The witness Mary Evans testified that she was married to

Thomas D. Jones, November 16, 1867, in Wales; that Jones deserted her and that she subsequently married Evans and lived with him as his wife; that she was never divorced from Jones. This evidence was excluded. The court says: 'This evidence was excluded. It is contended it should have been received, as showing that Mary Evans, and not the plaintiff, was the lawful widow of Thomas D. Jones, and that the facts of this case distinguish it from *Conant v. Griffin*, 48 Ill. 410, where there was an attempt to show that another one than the plaintiff there was the true widow of deceased, and it was held that which one was the true widow was immaterial; that that fact would only become important when the administrator was called upon to make distribution. It is claimed that here it is important which one is the true widow, as Mary Evans, by her conduct, had absolved the deceased from any legal liability for her support, and that she had sustained no pecuniary injury by his death. However this may be, we think the ⁹⁰ evidence was properly excluded, as not showing the invalidity of the second marriage of Jones. The second marriage being shown in fact, the law raises a strong presumption in favor of its legality, which we do not regard as overcome by mere proof of a prior marriage, and that the first wife had not obtained a divorce: See *Johnson v. Johnson*, 114 Ill. 611, 55 Am. Rep. 883, 3 N. E. 232. The husband might have obtained such divorce, and left him free to contract the second marriage.'

"In *Johnson v. Johnson*, 114 Ill. 611, 55 Am. Rep. 883, 3 N. E. 232, cited in the foregoing case, the court, per Shope, J., said: 'But if the law raises the presumption that the former husband was alive at the date of the last marriage, from the fact that seven years had not then elapsed since the last knowledge of him, it also, in the absence of proof to the contrary, presumes that the parties, in contracting such marriage, and in subsequently cohabiting, were innocent of immorality or crime, and that there was no legal impediment to its consummation. When a marriage is shown in fact, the law raises a strong presumption in favor of its legality, and the burden is with the party objecting to its validity to prove that it is not valid: *Bishop on Marriage and Divorce*, secs. 457, 458. Presumptions of this class are not conclusive, but are sufficient, in general, to shift the burden of proof: 1 *Greenleaf on Evidence*, secs. 33-35. These presumptions of innocence, and of the validity of the marriage, conflict with the presumption of life; and if neither presumption is aided by proof of facts or circumstances co-operating with it, the presumption of the validity of the marriage has generally been held to be the stronger, and to prevail over the presumption of the continuance of the particular life; and this is so held although the time elapsing between the last knowl-

edge of the former husband and the second marriage is much less than seven years.'

"As to the burden of proof the doctrine is thus announced in 19 American and English Encyclopedia of Law, second edition, ⁹¹ 1209: 'As a result of the doctrine that all presumptions are in favor of marriage, the invalidity of a marriage cannot be established like any other question of fact, as every presumption must be overcome by satisfactory proof. The burden of proof is always on the party attacking the validity of the marriage.' And further, upon the same page, the author says: 'The party having the burden of proof must overcome every presumption in favor of the marriage alleged to be invalid, even though this may require the proof of a negative.'

"On the question of burden of proof, even though it require the proof of a negative, the supreme court of the United States, through Justice Wayne, in the case of *Patterson v. Gaines*, 6 How. 550, 12 L. ed. 553, says: 'But there is no force in this objection for another reason. When, in the progress of a suit in equity, a question of pedigree arises, and there is proof enough, in the opinion of the court, to establish the marriage of the ancestor, the presumption of law is, that a child of the marriage is legitimate, and it will be incumbent upon him who denies it to disprove it, though in doing so he may have to prove a negative.'

"In cases of the character involved in this record, the following cases declare in favor of the presumption of divorce, although there may be evidence of a former valid marriage: *Johnson v. Johnson*, 114 Ill. 611, 55 Am. Rep. 883, 3 N. E. 232; *Boulden v. McIntire*, 119 Ind. 574, 12 Am. St. Rep. 453, 21 N. E. 445; *Blanchard v. Lambert*, 43 Iowa, 228, 22 Am. Rep. 245; *In re Edwards*, 58 Iowa, 431, 10 N. W. 793; *Leach v. Hall*, 95 Iowa, 611, 64 N. W. 790; *Parsons v. Grand Lodge*, 108 Iowa, 6, 78 N. W. 676; *Hull v. Rawls*, 27 Miss. 471; *Klein v. Laudman*, 29 Mo. 259; *Hadley v. Rash*, 21 Mont. 170, 69 Am. St. Rep. 649, 53 Pac. 312; *Carroll v. Carroll*, 20 Tex. 731; *Coal Run Coal Co. v. Jones*, 127 Ill. 379, 8 N. E. 865, 20 N. E. 89; *Harris v. Harris*, 8 Ill. App. 57; *Cartwright v. McGown*, 121 Ill. 388, 2 Am. St. Rep. 105, 12 N. E. 737.

"Along the same line, in *Hynes v. McDermott*, 91 N. Y. 451, 43 Am. Rep. 677, it is said: 'The ⁹² law presumes morality, and not immorality; marriage, and not concubinage; legitimacy and not bastardy. Where there is enough to create a foundation for the presumption of marriage, it can be repelled only by the most cogent and satisfactory evidence.'

"And Lord Lyndhurst, in *Morris v. Daviss*, 5 Clark & F. 163, says: 'The presumption of law (the presumption of the validity of a marriage shown) is not lightly to be repelled.'

It is not to be broken in upon or shaken by a mere balance of probability. The evidence for the purpose of repelling it must be strong, distinct, satisfactory and conclusive.'

"And Lord Campbell said in *Piers v. Piers*, 2 H. L. Cas. 331, it could only be negatived 'by proving every reasonable possibility.'

"In *Harris v. Harris*, 8 Ill. App. 57, the court says: 'When it is shown that a marriage has been consummated in accordance with the forms of the law, it is to be presumed that no legal impediments existed to their entering into matrimonial relations, and the fact, if shown, that either or both of the parties have been previously married, and, of course, at a former time having a husband or wife living, does not destroy the prima facie legality of the last marriage. The natural inference in such case is, that the former marriage has been legally dissolved, and the burden of showing that it had not been rests upon the party seeking to impeach the last marriage. The law does not impose upon every person contracting a second marriage the necessity of preserving evidence that the former marriage has been dissolved, either by the death of their former consort or by a decree of court, in order to protect themselves against a bill for a divorce or a prosecution for bigamy.'

"Along the same line fall the cases of *Yates v. Houston*, 3 Tex. 433; *Dixon v. People*, 18 Mich. 84; *Greensborough v. Underhill*, 12 Vt. 604.

93 "On the other hand, there are cases against this proposition, such as *Williams v. Williams*, 63 Wis. 58, 53 Am. Rep. 253, 23 N. W. 110; *Rhode Island Hospital Trust Co. v. Thorndike*, 24 R. I. 105, 52 Atl. 873; *Wilson v. Allen*, 108 Ga. 275, 33 S. E. 975. Several others are cited, but are not exactly in point.

"At the argument of this cause, we are frank to state that upon this instruction number 4, we were of the opinion that this trial court was in error. But an examination of the authorities has convinced us to the contrary.

"Under the weight of authority, the second marriage, when shown to have been legally entered into, that is, in due form of law, is clothed with every presumption of validity. Such is the doctrine announced by Bishop. If its validity is attacked, the burden of proving the invalidity is upon the party attacking it. And if in assuming this burden, which the law demands, it becomes necessary to prove a negative, he must do so. The law presumes death after seven years, why not presume divorce? The courts seem to look upon the presumption of innocence as the stronger and greater presumption, and in order to sustain the presumption of innocence, will indulge the presumption of divorce, rather than find the party guilty of bigamy. To say the least, the weight of

judicial opinion places with the party attacking the burden of proving the invalidity of the second marriage. This is all the instruction required.

"Again, the facts of the case are not specially inviting to a strained construction. The first wife for nearly ten years was living with another man, by whom she evidently had two children. She settled with defendants for one hundred dollars, and hardly thought she was entitled to that sum. She made no claim to more and upon the receipt of the one hundred dollars agreed to and did testify. It is true that upon hearing of the death of Johnson a year afterward, she married the man with whom ⁹⁴ she had been living for ten years, using the one hundred dollars paid her by defendants for that purpose.

"But without going into further detail we are of the opinion that there was no error upon the part of the trial court in giving said instruction. The presumption of innocence, which is stronger than all counter presumptions in such cases, casts the burden of proof upon the party denying the validity of the marriage, even to the extent of proving a negative. This in no way conflicts with the recent case of Snuffer v. Karr, 197 Mo. 182, 94 S. W. 983, 7 Ann. Cas. 780, for the reason that in the Snuffer case it was an admitted fact that there had been no dissolution of the first marriage. The case was so argued and so presented. The validity of the first marriage was attacked, but if found to be valid, its nondissolution was a conceded point. This being true, there was no place for presumption of divorce."

Counsel for appellant do not question the correctness or wisdom of the rule of evidence discussed and indorsed by Judge Graves in the Johnson case (114 Ill. 611, 55 Am. Rep. 883, 3 N. E. 232), but insist that "the presumption of a valid marriage springing from the proof of the three marriage ceremonies performed in America is rebutted by the proof that the marriage with the plaintiff, Barbara Maier, is valid, that Barbara Maier was still living and had been true to her marital vows, and that the first marriage had not been dissolved in the jurisdiction where she lived." In support of their contention they cite and rely upon the following authorities: 8 Ency. of Evidence, p. 464; Cole v. Cole, 153 Ill. 585, 38 N. E. 703; Gilman v. Sheets, 78 Iowa, 499, 43 N. W. 299; Barnes v. Barnes, 90 Iowa, 282, 57 N. W. 851; Ellis v. Ellis, 58 Iowa, 720, 13 N. W. 65; Williams v. Williams, 63 Wis. 58, 53 Am. Rep. 253, 23 N. W. 110; note to Pittinger v. Pittinger, 89 Am. St. Rep. 202-206; and Casley v. Mitchell, 121 Iowa, 96, 96 N. W. 725.

The principal, if not the only, authority cited by counsel for appellant which lends special force to their contention, and which it is contended distinguished it from the Johnson

case, 114 Ill. 611, 55 Am. Rep. 883, 3 N. E. 232, is the case⁹⁵ of Casley v. Mitchell, 121 Iowa, 96, 96 N. W. 725. In that case, the court uses the following language:

"That the John Casley who was married to the plaintiff in 1863 is the identical person who became the owner of the property in question under the assumed name of John Wallace does not admit of doubt and indeed is not seriously questioned.

"Some four years after his marriage to the plaintiff, John Casley left his wife at St. Just, England, for the purpose of seeking employment elsewhere. For some three months thereafter the plaintiff received letters and remittances from him, but thereafter heard nothing from him and for many years did not know his whereabouts.

"John Casley went to Germany from England after he abandoned the plaintiff, and there he assumed the name of John Wallace, and was married under that name in 1873. After his second marriage he removed to the northern part of England, where he and his new wife, Elizabeth Wallace, lived eight or ten months, and from there they came to the United States and located first in Pennsylvania. In 1875 he came to Iowa, and the year after his second wife joined him here. In 1877, they removed to Colorado where they resided about a year, and from there they came back to Iowa, where they lived together as husband and wife until the death of Casley, in 1898. During all of this time he went under the assumed name of John Wallace and acquired and held property in that name.

"There is no evidence in the record tending to show that he had at any time or place procured a divorce from the plaintiff. She did not procure one from him nor did she ever have any knowledge or notice that he had procured or attempted to procure any divorce from her. Neither did the plaintiff have knowledge that Casley had again married.

⁹⁶ "No presumption that Casley had obtained a divorce from the plaintiff before or after his marriage in Germany can be indulged in, and the case of Blanchard v. Lambert, 43 Iowa, 228, 22 Am. Rep. 245, and later cases based upon facts similar thereto are not controlling here. . . . This case is clearly within the rule announced in Ellis v. Ellis, 58 Iowa, 720, 13 N. W. 65, where it is said: 'There must be something based on the acts and conduct of both parties inconsistent with the continuance of the marriage relation before the presumption should be indulged.'

"No presumption that a divorce was obtained by Casley should obtain in this case. But, even if such presumption might reasonably be indulged in, it would be fully overcome by the fact that he deserted his former wife without any

cause whatever, and that he thereafter married and lived far from her under a false name."

The Iowa court seems to have laid much stress upon the fact that Casley, when he left England and came to this country, changed his name to Wallace, and was married in this country under that name. But we do not attach much importance to the alleged change of name in the case at bar, for the reason that there was no change made in fact. After coming to this country he retained the same name, but spelled it "Joseph Meyer" instead of Josef Maier. The former is the way many, if not most, Englishmen and Americans of that name spell it; and it was perfectly natural for him, after coming to this country to make it his home and after becoming associated with Americans, to write his name in English, and when so writing it to write it Joseph Meyer instead of Josef Maier. How else would he have written it—Myer, or one of the various other ways it is spelt in English? But had he done so, the same sinister motive could and doubtless would have been charged against him for so doing. The mere fact that he used one of the English ways⁹⁷ of spelling his name after coming to this country signifies that he had no secret or sinister motive for so doing, for the reason that such change in spelling was in fact no change of name in reality. Inquiry here for him would not have been hindered in the least by that change of spelling, and he could have been identified just as readily after changing the spelling of his name as he could have been prior to that time, which fact is shown by the ease with which appellant identified him in this case. But it is said he added the initial "G" to his name also after coming to this country. Why that was done the evidence does not show. Appellant testified that "according to all she knew he had only one surname. Why he put the 'G' after Josef I do not know." She did not say positively that he had no other surname, and said nothing whatever regarding his middle Christian name.

She testified that she first became "acquainted with Josef Maier in 1865 and married him January 24, 1865," consequently she knew him only a few days before they were married. She also testified that "my husband went to America in the spring of 1866," and she fails to state any other knowledge or information she had of him or his family. So from her own testimony she knew him but a little over one year prior to his departure for America, and that was more than forty years before she gave her testimony in this case; and it was for that reason doubtless she did not wish to state positively that he had no other Christian name besides Josef.

Under all of the decisions of this court, had Joseph G. Meyer procured service upon appellant in his divorce case by publication, under names as above written, that service would have been valid, for names are idem sonans if the attentive ear finds difficulty in distinguishing them when pronounced, or common and long-continued usage has by corruption or abbreviation ⁹⁸ made them identical in pronunciation. And it is not necessary that they should be spelled alike if the pronunciation is the same: *Simonson v. Dolan*, 114 Mo. 176, 21 S. W. 510; *Green v. Meyers*, 98 Mo. App. 438, 72 S. W. 128.

So, if we apply the rule of evidence announced by Judge Graves in the *Johnson* case (114 Ill. 611, 55 Am. Rep. 883, 3 N. E. 232) to the facts of this, then we have a much stronger presumption in favor of Meyer's divorce than we had in that case, for the reason that this is strongly corroborated by the facts, that prior to his coming to this state he had resided elsewhere in this country for some eight or ten years, during which time he could have and presumably did secure a divorce from appellant, for the reason that he brought with him to Carthage a woman to whom he claimed to have been married, and he introduced her to his neighbors as his wife. And, after taking up his residence in Jasper county, he was married three additional times to as many different women after his marital relations with each had been severed by death or divorce; and after having married at least twice in this country, he returned to his old home in Germany, where appellant, his first wife, and his daughter by her resided. They called upon him, but this record fails to disclose the character of the conversation which took place between him and appellant. It does show, however, that by persuasion he induced his daughter to agree to return with him to this country and live with him; but subsequently she changed her mind and declined to accompany him. So he returned to Carthage alone, and there resided upon the land in controversy with his various wives up to the date of his death. Presumably appellant and her daughter knew Meyer was residing at Carthage, otherwise the latter would not in all probability have agreed to come to this country without knowing the place of her destination. If he had not, in fact, been divorced from appellant at the time he visited her, in 1885, at her old home, then he was a ⁹⁹ bigamist, a criminal, and guilty of an offense punishable by imprisonment in the penitentiary. If that was true, surely he would not have made himself known to them, the persons against whom he had greatly sinned, and who, more likely than anyone else, would have called him to an accounting for his misdeeds; and much less would he have insisted upon his daughter returning to this country and liv-

ing with him, if he was then a felon, for the reason that her coming alone would have revealed his crime and subjected him to prosecution, imprisonment and infamy, and would also thereby have heaped shame and humiliation upon her and his wife and children in this country.

Besides this, the life he lived for thirty years at Carthage bespeaks much in his favor, and contradicts the idea that he was leading the life of a criminal and bringing into existence illegitimate children. He was very poor when he came to this country; he did not have the means with which to bring appellant with him, so she testified. But after he came to this state, he lived the life of an industrious, hard-working man; and by economy and frugality he accumulated sufficient means with which to purchase the farm in question, and provided a home for himself, wife and children. He was an honest, respected citizen, and reared and educated an intelligent, respectable family. All of these things are not in keeping with the conduct and life of a criminal, but, upon the contrary, strongly corroborate the wise and humane presumption that he was legally divorced from appellant prior to his coming to this state and prior to his first marriage in this country.

It is upon this alleged change of name, coupled with the evidence of appellant's good character, that counsel base their insistence that the presumption indulged in favor of the divorce and the validity of Meyer's subsequent marriages is overcome, and leaves the preponderance of the evidence upon the side of ¹⁰⁰ appellant. We cannot lend our concurrence to that contention, for the reason that there was no change of name in fact shown by the evidence, as was done in the Iowa case, where the name was changed from Casley to Wallace. In the latter case the change was complete and was evidently made for a fraudulent purpose; while in this there was no fraud shown, nor could any sinister motive be reasonably drawn from the change made in the spelling of his name; but, upon the contrary, the facts of the case indicate that the change in spelling the name in this case was reasonable and natural. And as regards appellant's good reputation, it may be said that this record fails to show that hers was any better than his was, except as to such unfavorable inference as may be drawn from the mere fact that he left her so shortly after their marriage. Why he abandoned her he could not tell, because his lips are closed by the seal of death, and hers by voluntary silence. She only said Meyer did not want her to go to America with him, but she did not explain why he did not want her to accompany him. He evidently had some reason for not wanting her to come, and, presumably, she knew that reason; and since she declined to

testify upon that question, we would not attach too much importance to the fact that he left her behind.

As has been repeatedly stated in the adjudged cases and written by law-writers of eminence, "The law presumes morality, not immorality; marriage, not concubinage; legitimacy, not bastardy." The consensus of opinion is that whenever a marriage has been shown the law indulges the presumption that it is valid, and the burden is cast upon those who question its validity to show its invalidity by strong and persuasive evidence, leaving no room for reasonable doubt in the mind of the chancellor. And as has been said, "This is a presumption of more than ordinary strength. It is one of the strongest known to the ¹⁰¹ law": *Pittinger v. Pittinger* (Colo.), 89 Am. St. Rep. 193, and exhaustive note on the subject; *Lampkin v. Travelers' Ins. Co.*, 11 Colo. App. 249, 52 Pac. 1040; 2 Nelson on Divorce and Separation, sec. 580; *Teter v. Teter*, 101 Ind. 129, 51 Am. Rep. 742; *Johnson v. Johnson*, 114 Ill. 611, 55 Am. Rep. 883, 3 N. W. 232; *Erwin v. English*, 61 Conn. 502, 23 Atl. 753; *United States v. De Amador*, 6 N. M. 173, 27 Pac. 488.

To lend our concurrence to the contention of counsel for appellant would be equivalent to holding Meyer was a bigamist and had lived the life of a criminal for thirty years in our midst; that his wives were concubines and his children bastards. Such a thought is abhorrent to all law and repulsive to every sense of right and justice, and no court would be justified in so holding, except where the evidence in a case should show such facts to be true beyond a reasonable doubt. Christian marriage is the very foundation upon which the family and home are based, and upon them the state and the republic rest; and without marriage and its legal maintenance the family circle would be dissolved, the home extinguished, and the state would become useless and the republic would decline; and in lieu thereof immorality, chaos and anarchy would reign supreme.

This view of the case renders it unnecessary for us to pass upon the question as to whether or not an alien is dowable in lands situate in this state, owned by her husband at the time of his death, who was also an alien.

We are, therefore, of the opinion that the trial was without error, that the judgment was for the proper parties, and that it should be affirmed. It is so ordered.

All concur.

Presumptions in Favor of the Validity of a Second Marriage, and the burden of proof to establish the termination or want of termination of the first marriage, and what evidence is sufficient therefor, are discussed in the note to *Pittinger v. Pittinger*, 89 Am. St. Rep. 198. Where a marriage is assailed on the ground that when it was contracted the woman had a husband living from whom she has never

been divorced, testimony that he had been absent, unheard of, for more than seven years prior to the death of her second husband is sufficient to uphold the marriage under the statutes of Massachusetts, on the ground that it had been entered into in good faith and followed by continued cohabitation after the removal of an impediment: *Turner v. Williams*, 202 Mass. 500, 132 Am. St. Rep. 511.

A Second Marriage Being Shown as a Fact, a Strong Presumption is raised in favor of its legality, which is not overcome by mere proof of a prior marriage, and that the first wife has not obtained a divorce. The party attacking the second marriage has the burden of proof to show that neither party thereto has obtained a divorce: *Potter v. Clapp*, 203 Ill. 592, 96 Am. St. Rep. 322.

The Doctrine of Idem Sonans is the subject of a note to *Thornily v. Prentice*, 100 Am. St. Rep. 322.

McKEE v. RUDD.

[222 Mo. 344, 121 S. W. 312.]

CORPORATION—Liability for Representations in Charter.—A creditor cannot rely upon statements made in the articles of association filed by a business corporation, and upon proof of the falsity thereof recover against the persons signing the articles in an action for fraud and deceit, since these representations are not made to secure credit, but to the Secretary of State to procure a charter. (p. 541.)

STATUTE OF FRAUDS.—Representations Made by the Incorporators and Officers of a corporation with reference to its financial standing are made with reference to the credit or ability of "another person" within the meaning of the statute of frauds, and hence are not actionable if not in writing. (p. 544.)

STATUTE OF FRAUDS—Pleading.—A General Denial is Sufficient to Raise the statute of frauds in an action for fraud based upon representations as to the financial ability of another; and the statute is not waived by further language in the answer that the defendant "denies that at any time, either directly or otherwise, he made any representation to said plaintiff with reference to the solvency of said company." (p. 545.)

TRIAL—Objection to Testimony.—When upon the First Appearance of improper testimony counsel object and the objection is overruled, they are not required continuously to interpose a like objection to all similar testimony. The point once clearly made should stand for the whole trial. (p. 545.)

WAIVER is a Voluntary Act, and not an Act Forced upon a Party by the court. (p. 545.)

STATUTE OF FRAUDS—When not Waived During Trial.—A Defendant does not waive the statute of frauds, when he has once made timely objection to oral testimony on the issue and been overruled, by not repeating the objection as other similar testimony is produced, nor by afterward testifying to his understanding of the conversation, nor by requesting findings of fact based upon all the testimony, nor by requesting declarations of law not including the statute, nor by failing to mention the statute in his motion for a new trial which alleges the admission of incompetent evidence over objection, (pp. 545, 546.)

CORPORATION—Liability for Statements of Incorporators.—

A judgment of a creditor against incorporators of an insolvent company, in an action for deceit founded on their oral representations of solvency which the statute requires to be in writing, cannot be sustained on the ground that inasmuch as they are officers and stockholders who have not paid for their stock in money or anything equivalent thereto, the judgment is a righteous one which should be upheld. (p. 546.)

APPEAL—Reversal as to Nonappealing Defendant.—Where two defendants in an action of tort appeal jointly, and no case is made against either, the judgment will be reversed as to both, and the appeal not dismissed as to the one who failed to prosecute his appeal, if such dismissal would leave the other liable on the bond for the sum of the judgment. (p. 547.)

Chas. W. Webster and Francis C. Downey, for the appellants.

W. W. Calvin and Bruce Barnett, for the respondent.

348 GRAVES, J. Defendants were the incorporators of a Missouri business corporation styled the American Sand and Supply Company. Defendant Rudd had filed application in the United States Patent Office for letters-patent for a certain mechanical device and process by which to remove sand from a river and load the same onto cars. To demonstrate the feasibility of his invention and pending his application for patents thereon, he contracted to build a plant at Topeka, Kansas, for the Kaw River Sand Company, equipped with his invention or device for the price and sum of \$10,000. Rudd seems to have had no means, and he induced plaintiff, McKee, to go in with him and furnish money to the extent of \$5,000, with the understanding that McKee should be repaid out of the contract price and to share the profits of the venture which went to the construction and operation of the plant. McKee furnished in fact \$5,025. These two parties also had a further written agreement, by the terms of which Rudd was to organize a \$200,000 corporation³⁴⁹ to take in the "Rudd Sand Handling Apparatus and the Rudd and Meyers Portable Sand Plant" at the price and sum of \$100,000, in full paid-up stock and in which proposed corporation the said McKee, in consideration of \$2,000, was to have a four twenty-fifths interest in the said inventions, which interest was to be taken in said corporation for one hundred and sixty shares of full paid stock of the par value of \$100 per share. McKee was also to purchase five shares at \$100 per share. McKee was to pay both the \$2,000 and the \$500, when the plant to be constructed at Topeka was in successful operation.

Rudd did not organize the \$200,000 corporation, but instead he and his codefendants organized the corporation first herein named, having a capital stock of \$300,000. It appears that for some reason they did not want McKee in the cor-

poration, and it was finally determined that they would buy him out, so accordingly it was agreed between the officers of the new corporation, that such corporation should take over all of McKee's interest at the price of \$5,500. The final culmination of the deal was a written contract of date January 13, 1904, although there had been a previous written contract on December 23, 1900, which was destroyed upon the execution of the January contract. By the last-named contract McKee sold and assigned his interest in both of the written contracts which he had with Rudd to the American Sand and Supply Company. The Topeka plant was only then partially constructed, but McKee had therein \$5,025. McKee and Rudd both signed the contract, and as to the consideration to be received by McKee, who was in the contract designated as party of the second part, the contract reads:

"First party as a part of the consideration passing from it has this day paid to second party in cash the sum of five hundred dollars and has executed and has delivered to second party its two promissory notes, ³⁵⁰ one for five hundred dollars dated January 12, 1904, payable thirty days after date, without interest, and one for forty-five hundred dollars, dated January 12, 1904, payable on or before sixty days after date, with interest at six per cent per annum from date until maturity, and eight per cent per annum after maturity."

The party of the first part was the American Sand and Supply Company, and Rudd was the third party, as the parties to the contract were designated. McKee was paid the \$500 in cash and upon maturity was paid the \$500 note. The \$4,500 was never paid. McKee sued the corporation and got judgment, but an officer with an execution failed to find property.

Thereafter McKee filed a petition which was the origin of this suit. The petition upon which trial was had is an amended petition and the corporation is not a party. Under the first petition it was a party and a receiver was appointed, who qualified, but was later discharged. The receiver found no assets and upon the dropping out of the defendant corporation from the case, was likewise dropped out and directed to return what he had to the corporation.

Omitting caption the petition upon which the cause was tried reads:

"Plaintiff states that on or about the——day of December, 1903, defendants filed with the Secretary of State of Missouri, duly authenticated articles of incorporation, under the name and style of American Sand and Supply Company; and represented to said Secretary of State and the state of Missouri that said company had a capital stock of \$300,000, and further represented to said Secretary of State and to the state of Missouri that of said capital stock \$150,000, or

one-half thereof, was actually paid up in cash in good and lawful money of the United States; that upon the strength and belief of said representations, ³⁵¹ articles of incorporation were issued to said company.

“That in truth and in fact all of said representations were false, fraudulent and untrue, and defendants and each of them then and there well knew that the same were false, fraudulent and untrue.

“That said pretended corporation was insolvent at that time, and said capital stock was not paid up nor any part thereof, which facts defendants and each of them well knew.

“That said pretended corporation never had any legal existence and no legal authority to do business as a corporation in this state, for the reason that said articles of association were procured by false and fraudulent representations, knowingly made by defendants as aforesaid; and that said pretended corporation had no assets and was insolvent from its inception, as defendants and each of them well knew.

“That defendants and each of them falsely and fraudulently represented to this plaintiff that said pretended corporation was a duly and legally organized corporation; that one-half of its capital stock, amounting to \$150,000, was actually paid up in good and lawful money; that said company was solvent and was ready to comply with any and all contracts it might make and that it was amply able to meet any and all liabilities it might incur.

“That plaintiff, believing said representations to be true and relying upon them as true; and further relying upon the articles of association of said company, and the statements therein, was induced to extend credit to said pretended corporation and did loan to said pretended corporation the money for which the judgment hereinafter mentioned was obtained, and sued said company as a corporation as they purported and pretended to be.

“That plaintiff is a creditor of said company and pretended corporation and has judgment against it in ³⁵² the sum of \$4,570, with interest from the date of its rendition, and the same is still unpaid, and cannot be collected.

“That plaintiff contracted with said company, pretended corporation, in good faith, believing it to be what its articles of association warranted it was, viz., solvent, and as so held out and represented to plaintiff by defendants, and each of them.

“Wherefore, in consideration of the acts, defaults and representations, knowingly, fraudulently and falsely made by defendants as herein set out, plaintiff says he is damaged in the sum of \$4,570, with interest from the — day of —, 1904; he therefore asks judgment against defendants and each

of them, jointly and severally, and as partners, in the sum of \$4,570, with interest and costs."

To this amended petition the defendant Wear (1) moved to strike it from the files for reasons in a motion stated, (2) moved to strike out certain redundant and irrelevant matter from the petition, and (3) moved to make the petition more definite and certain. All these motions were overruled and thereupon the following answer was filed by Wear:

"Comes now the defendant F. E. Wear, answering for himself alone the amended petition herein by the plaintiff filed:

"Protesting against the order of the court entered in this cause on the fourteenth day of January, 1906, ordering and directing this defendant to answer to the said amended petition, and objecting and excepting to said order compelling this defendant to answer a pleading so manifestly insufficient to be answered unto, as is the said amended petition herein filed by said plaintiff, and waiving no objection or exception that might be taken to said amended petition, though so answering, this defendant denies each, all and every the matters and things in said amended petition contained.

353 "Defendant admits, however, that the Secretary of State of Missouri issued to the American Sand and Supply Company a certificate of incorporation, and states that said American Sand and Supply Company now is, and at all times in said petition referred to was, a corporation duly incorporated and doing business under and by virtue of the laws of the state of Missouri.

"Defendant specially denies that at any time he made any representations whatsoever to said plaintiff, either directly or indirectly, as to the legality of the organization of said American Sand and Supply Company or as to the payment up of one-half of its capital stock, or any part thereof, in good and lawful money, or otherwise, and denies that at any time, either directly or indirectly, he made any representation to said plaintiff with reference to the solvency of said American Sand and Supply Company.

"Defendant further specially denies that said plaintiff at any time extended any credit to said American Sand and Supply Company or loaned any money to said American Sand and Supply Company, or that said plaintiff ever relied upon any representations made by the defendant with reference to the solvency of said corporation and so relying re-loaned any money or extended any credit to said corporation.

"Whether plaintiff is a creditor of said corporation, and has a judgment against it in the sum of \$4,570, or for any other sum, this defendant has no knowledge sufficient whereon to found a belief, and this defendant does not know whether any such judgment, if the same exists, is unpaid and cannot

be collected. Wherefore, defendant asks that if such allegation be material to the issues in this cause, plaintiff be compelled to prove the same.

³⁵⁴ "Wherefore, this defendant prays that he go hence without day, and recover his costs herein incurred."

Neither of the three motions hereinabove mentioned have found a place in the bill of exceptions, so far as the abstract shows. The abstract shows no answer for the other defendants, nor does it show a reply to the answer of defendant Wear. The trial, which was before the Hon. Frank P. Walsh, as special judge, proceeded as if reply had been filed. No jury was used. Trial resulted in judgment for plaintiff in the sum of \$4,570, from which defendants Wear and Rudd appealed, after unsuccessful motions for new trial and in arrest of judgment.

The only abstract of record before us is labeled, "Abstract of Record, with Complete Bill of Exceptions by Appellant, F. E. Wear," and this perhaps accounts for the absence of Rudd's answer in the record. No brief is filed here for Rudd, and we have filed in the case a motion to dismiss the appeal of Rudd for the reason of his failure to file abstract of record and brief within the time prescribed by law and our rules. Rudd acknowledges receipt of a copy of such motion. This motion we took with the case.

As usual the evidence was conflicting as to whether any statements or representations were made to plaintiff by the defendants concerning the solvency of the corporation. When the plaintiff sought to make this proof the following occurred:

"Q. Now, just state to the court what was said at that time by the defendants, or any of them; state what was said by each defendant, if you remember, regarding this company. I am talking about what was said regarding the company, the American Sand and Supply Company.

"Mr. Downey: Defendant Wear objects to the question because it is incompetent, irrelevant and immaterial, and because, under the statute of frauds in this state, any statement of that description would ³⁵⁵ be wholly inadmissible, and appears to call for parol testimony concerning the credit and financial standing of the American Sand and Supply Company and its ability to pay its debts.

"Mr. Webster: Defendant Rudd makes the same objection.

"Objection overruled by the court. To which action and ruling of the court the defendant, Wear, and the defendant, Rudd, at the time duly excepted."

Plaintiff, it appears, wanted the cash rather than the notes prior to the execution of the contract of date January 13th. The strongest evidence in the record for the plaintiff we

shall quote. Plaintiff, in describing the representations made to him, among other things, said:

“Q. (Interrupting.) State his language, Mr. McKee. A. Well, as I stated to his honor a while ago when Mr. Hutchings made the statement, Mr. Rudd acquiesced and said, ‘Yes, that’s so,’ and Mr. Wear.

“The Court: That is, nodded his head up and down? A. Yes, sir.

“Q. State what Mr. Rudd said, if anything. A. He didn’t say anything in language, any more than that, he said, ‘Yes, that’s so.’

“Q. Well, state all Mr. Hutchings said, state all that he said. A. Well, Mr. Hutchings said that the company was solvent, that he had \$15,000 in stock in the company, in the treasury, and Mr. Rudd said that he had sold \$1,600 to Mr. Armstrong, that they had at that time \$16,500 in cash in the treasury, and Mr. Wear had taken \$10,000 worth of stock, and Mr. Peckham had taken twenty thousand, subscribed for twenty thousand, and Mr. Waltner, I believe it was, ten thousand, and there was some other names, but I can’t remember them that were stated as having subscribed, taken stock in this company, and that this money would all be paid in, and by the time ³⁵⁶ this note would mature it would all be in to meet the note, but as they had these other plants in contemplation in these two cities, to erect the sand plants, they wanted to use this money that was already on hand for to start those plants and start their business going, and if they paid me, they would have to borrow money to carry on these other operations, and they might as well give me a note and pay me interest on it as to pay interest to anyone else.

“The Court: Now, let me understand. Who did you claim said that? A. Mr. Hutchings.

“The Court: Who was present? A. Mr. Rudd and Mr. Wear—they were all present and they all acquiesced in it.

“The Court: That is stricken out as not responsive.

“Q. State what they did or said? A. They nodded their heads in approval and said, ‘Yes, that’s so.’ . . .

“Q. Now, Mr. McKee just state to the court what conversation you had with Mr. Wear; if you had any conversation with him, state what that was, at this time. A. The conversation with Mr. Wear was in regard to my taking this note, this note for the claim, and, as I stated, I wished them to pay me in cash, instead of taking the note, and Mr. Wear says to me, he says, ‘McKee, why don’t you take that note?’ and he says furthermore, ‘You are a damned fool if you don’t take that note.’ He says, ‘That note is all right and will be paid.’ And he says, ‘You take that note and I will see that it is paid.’ And I should have stated that we went out of

his office at that time and he made that—told me that in the—I believe it was in the safe—in the safe room. We stepped out into that, I believe, and he made that statement to me there. Then we came back into the house again and Mr. Hutchings says, ‘Well, what are you going to do?’ and I says I would like to have my cash, and Mr. Wear ³⁵⁷ says, ‘McKee, you take that note; I will see it is paid,’ and he looked me straight in the eye and I looked him straight in the eye, and I says, ‘All right, I will take the note; you put the seal of the corporation on the notes.’ They put the seal of the corporation on the notes and I took the notes.

“Mr. Downey: Now, I desire to move that all that portion of this answer which tended to show or prove that Mr. Wear orally said that he would see that note was paid be stricken out.

“The Court: That motion is sustained. That will be stricken out; I will not consider that.”

Later in explaining the portion stricken out the court said:

“The Court (interrupting): I have stricken out that portion of the testimony where he stated he stepped into the vault part of the office with Mr. Wear and where Mr. Wear assured him individually that he would see the note paid. I mean that part of the conversation. I do that so you will know what I am taking into consideration to base my finding on, whatever it is.”

Then the plaintiff proceeds:

“Q. I want to ask you this question, whether or not anything was said to you regarding the articles of incorporation at all? A. Yes, sir.

“Q. By these defendants? A. Yes, sir.

“Q. State which one of them said it and what he said. A. Why, they all told me that they were incorporated.

“Q. Did you know for what amount? A. \$300,000.

“Q. How did you know that? A. They said so.

“Q. What further was said about this money or stock being paid up, if anything?

“Q. What was said by any of these defendants regarding the amount of stock paid up, what was said ³⁵⁸ by any one of them, and who it was, and what he said? A. Well, Mr. Hutchings said that he had paid for \$15,000 of stock and Mr. Rudd said that Mr. Armstrong had paid for—had paid \$1,600 for three thousand shares of stock, and that these other parties had subscribed for stock, and that it would be paid and to assure me of the positiveness of the note being paid he said, ‘Why, Mr. Wear has—’

“The Court (interrupting): That will be stricken out.

“Q. Just state what he said and leave out the other part. A. Mr. Wear says—Mr. Hutchings says, ‘Why, Mr. Wear has taken \$10,000 of stock, and that is as much again as your

claim amounts to, and that is a perfect guaranty to you that the note will be met when it is due; Mr. Wear, president of the Wear Coal Company, you are not afraid of him, are you?’

“Q. Was Mr. Wear present at that time? A. Mr. Wear was present at that time when Mr. Hutchings made that statement, ‘You are not afraid of him, are you?’ and Mr. Wear looked at me and smiled, as much as to say, ‘Why, Mr. McKee—’

“Q. Never mind about that. Just state what was said. A. ‘Mr. Wear’s stock alone is as much more as your note and is amply sufficient to meet your obligation.’

“Q. Now, what was said, if anything, respecting what he had in it? A. He said that he had \$15,000 and he had that in—had subscribed five thousand more.

“Q. What had you to do with organizing this corporation? A. I had nothing at all.”

A witness, McCoy by name, describes the talk thus:

“Q. Now, Mr. McCoy, just state what you heard there between the parties, plaintiff and defendants, and who said it: A. Mr. Hutchings made the proposition ³⁵⁹ to Mr. McKee to purchase his interest by the giving him of a note for \$500, \$500 in cash, the note for \$500 due in thirty days, and a note for \$4,500 due in sixty days, for the purchase of his interests in the contract he had with Mr. Rudd. Mr. McKee asked them if they had intended to give him the money instead of the notes, and they said that they had the money—

“Mr. Downey: Wait a minute. We object to that as incompetent, irrelevant and immaterial.

“Q. Who? A. Mr. Hutchings said that they had the money, but owing to their obligations, which they expected in the construction of other plants, and the finishing of this plant at Topeka, which they expected to take over, that they had not the money then on hand, and with the extension of sixty days’ credit by Mr. McKee they would have time to get the money to meet his obligation when due.

“Q. Mr. McCoy, what did they say—what was said by these defendants, or any of them? State what each one of them said, if they did say anything, with respect to this corporation that was about to purchase this interest from Mr. McKee. A. Mr. Hutchings told Mr. McKee that the note that he would take was perfectly good, that the note they had offered him was good for the simple reason they had the money, but he said—then Mr. McKee asked him in case he took his note, if they would put their personal indorsement upon it, and they says no, that it wouldn’t increase the value of the notes at all, that the notes as given by the corporation with the signature of Mr. Hutchings as treasurer and secretary and Mr. Wear as president would make it just as good as though it had their personal indorsements.

"Q. What was said, if anything, regarding this corporation? That is, its paid-up stock or capital stock or whatever it was? A. Mr. Hutchings said that he had subscribed for \$15,000 of the stock and had paid for it, and it was his intention to subscribe ³⁶⁰ for another additional \$5,000; that Mr. Beckham had subscribed for \$2,000.

"Q. Was there anything said regarding Mr. Beckham, about who he was at that time, do you remember? A. No, I don't think—not that I know of.

"Q. Now, what else did Mr. Hutchings say, if anything, that you remember? A. He said that—Mr. Hutchings said that this stock being subscribed as it was, that the money was ready for them whenever they had the stock ready to deliver to these parties and demanded the money, that it was the same as cash to them, but it would take a few days for them to get that money in for the stock, consequently they didn't wish to spend out all the money they had at that time for payment of Mr. McKee in cash.

"Q. Was there anything else that Mr. Hutchings said that you recall now at this time? A. At the taking of these notes?

"Q. Anything else that he said concerning this corporation, its ability, etc., anything further than you have stated? A. Only that it was perfectly solvent and able to take care of any obligation that it would make.

"Q. Can you recall the language that he used? A. That is the language that he used. 'This corporation is perfectly solvent and capable of taking care of any obligation that they might make.'

"Q. Was there anything said by Mr. Hutchings—

"Mr. Downey (interrupting): I understand, if your honor please, of course that all this goes in subject to the objection we made to the same class of testimony that Mr. McKee testified to.

"The Court: No, I didn't understand that.

"Mr. Downey: Then we move to strike out all the testimony of this witness which has reference to any verbal statements made by any of these parties at the meeting in the office of Mr. Wear with reference ³⁶¹ to the solvency of the corporation; we move to strike it out for the reason that it is incompetent, irrelevant and immaterial, and does not tend to prove any of the issues in this case, and for the further reason that the petition does not state any cause of action predicated upon statements of that kind.

"The Court: I can't rule on this until he finishes the cross-examination. Let the record show that all the proper objections were made to all this testimony and I will let the ruling go back.

"To which action and ruling of the court the defendants at the time duly excepted.

"Q. Was that all that Mr. Hutchings said, Mr. McCoy, that you can recall? A. That is all that Mr. Hutchings said that I recall.

"Q. Was there anything said about this corporation, about its capacity, that is, the size of the corporation and the number of shares, or things of that kind, capitalization? A. Why, he stated that they were incorporated for \$300,000, was all the statement about the corporation.

"Q. Did he state where they were organized, under the laws of what state they were incorporated? A. That they were organized under the laws of the state of Missouri for that amount.

"Q. Now, do you recall anything that Mr. Rudd said at that time? A. No, I don't. Mr. Rudd didn't have anything to say.

"Q. I will ask you who was present when these representations were being made? A. Mr. Wear, Mr. Rudd, Mr. Frank Wear, Mr. Rudd, Mr. Hutchings, Mr. Armstrong and Mr. McKee.

"Q. I will ask you if anything was said there at that time about one Mr. Armstrong having paid in some money to the corporation? A. Mr. Armstrong was issued a stock certificate at this meeting.

"The Court: I will sustain Mr. Downey's objection to all that testimony, except the statements that ³⁶² were said to have been made there that the company was solvent and that it was capitalized for \$300,000.

"Q. Do you recall the circumstances, Mr. McCoy, of Mr. McKee and Mr. Wear going into a near-by room? A. Mr. Wear got out of his chair and says: 'Mac, step out, I want to speak to you,' and they went out of the door. I don't know where they went.

"Q. Do you remember of them coming back? A. Yes, sir.

"Q. What was said when they came back, if anything?

"Mr. Downey: That is objected to as incompetent, irrelevant and immaterial. Objection overruled by the court. To which action and ruling of the court the defendants at the time duly excepted.

"A. Mr. Wear said, 'Mac, you'd better take that note,' and then following up on the objection of Mr. McKee, he says, 'Well,' he says, 'I'll take the note if you'll indorse it personally.' Mr. Wear says: 'Mac, that wouldn't add one iota's value to the note, because it is just as good as though we indorsed it personally.' He says, 'You will be a fool if you don't take that note.' He says, 'You take it and I will see that it is paid.'

"Mr. Downey: We move to strike out all this answer for the reason it is incompetent, irrelevant and immaterial.

"The Court: Let that last be stricken out."

The evidence for the defendant was to the effect that no statements were made as to the solvency of the corporation and no statements as to stock purchases, except that Hutchings had bought and paid for \$10,000 worth of stock and was going to take \$5,000 more, and that one Armstrong had bought some and paid \$1,600 thereon, and that others had spoken of buying. This sufficiently states the case for a disposition of the questions raised, with the exception of some ³⁶³ matters which can be more appropriately noted in the course of the opinion.

1. Taken in the broadest sense, the proof which we have purposely quoted at some length tends to show, as plaintiff claims, (1) that the incorporators of the American Sand and Supply Company imposed upon the Secretary of State in procuring their charter, and that plaintiff, relying upon the representations of the charter, was deceived, and extended credit to said corporation, by reason of which he lost his money and was defrauded; (2) that defendants pointed to the charter and thereby made the representations of the charter their own representations, and (3) that defendants knowingly and falsely misrepresented the standing and condition of the corporation to which plaintiff was induced to extend credit. Of these in their order.

In this paragraph we shall take the first, and in separate paragraphs follow with the other contentions.

Under the proof, the charter of the corporation showed that two-thirds of the capital stock thereof had been "actually paid up in lawful money of the United States," whilst the records of the corporation show that it was paid up by assignments of patents then applied for, but not yet granted. Now segregating this proof from all other proof which go to the other questions suggested, was this sufficient to take plaintiff's case to the jury? It must be borne in mind that defendants interposed demurrers to the testimony, both at the close of the plaintiff's case and at the close of the whole case. The question then is under this branch of our inquiry, can a creditor rely upon statements made in the articles of association filed by a business corporation, and upon proof of the falsity thereof be permitted to recover against the parties signing the articles of incorporation in an action ³⁶⁴ for fraud and deceit? Defendants in this case were all signers of the articles of association, which recited that two-thirds of the stock, i. e., \$200,000, had been paid in actual cash. As a fact it had not been so paid, but had been paid as above indicated. The value of the assigned patents, which had only been applied for at the time, is a question of dispute by the

evidence. Nor does it appear that patents were ever issued, except by the naked statement of counsel.

These representations, whether false or true, were not made to the plaintiff. These were the representations made to the Secretary of State to procure a certificate of incorporation, and not to the plaintiff to secure credit. This whole matter has been so thoroughly gone over by this court that it would be useless to review the case law. It has been fully reviewed in *Webb v. Rockefeller*, 195 Mo. 57, 93 S. W. 772, 6 L. R. A., N. S., 872, which case disapproves of *Hyatt v. Van Riper*, 105 Mo. App. 664, 78 S. W. 1043. on this question. The *Webb* case was passed upon March 29, 1906, and this case was tried prior thereto. The learned trial judge was evidently trying to follow the *Hyatt* case, and was thereby led into error.

So that in view of the *Webb* case it must be held that the plaintiff could not rely upon the bare statements of the articles of association for false statements upon which to predicate an action for fraud and deceit. This for the reason that such statements were not made to him for the purpose of securing credit, but to the Secretary of State to procure a corporate charter. The cases are reviewed in the *Webb* case and we shall not go further here. The case of *Hunnewell v. Duxbury*, 154 Mass. 286, 28 N. E. 267, 13 L. R. A. 733, elaborates the question and might be read with interest.

2. Passing now to the second question in our paragraph 1 suggested, how stands plaintiff's case? In discussing the question which we have just disposed ³⁶⁵ of in our first paragraph, the supreme court of Massachusetts in *Hunnewell v. Duxbury*, 157 Mass. 1, 31 N. E. 700, reached the same conclusion that this court reached in the *Webb* case (195 Mo. 57, 93 S. W. 772, 6 L. R. A., N. S., 872), but at page 6 of that opinion the court, in speaking of what was and what was not said in a conversation out of which grew an extension of credit, uses this language:

"Assuming that the statement of Dowd 'that they had filed a declaration and were now prepared to go on and push the business of advertising,' referred to the certificate of August 11, 1885, the statement was not of such a nature or made under such circumstances as to justify a finding that it was intended or designedly allowed by him or by the other defendants to influence or deceive the plaintiff into accepting the notes. If he had said in substance or in terms, 'If you wish to know the standing of the corporation, it has filed a declaration at the statehouse, which you can examine,' the case might have stood differently, at least as to Dowd. But the subject of the conversation was not the financial standing of the corporation, or the amount of the capital stock, or the manner in which it had been paid in or invested, but the

nature and operation of its mechanical devices and the probability of their successful use. The evidence discloses no other reference to the certificate on the part of any of the defendants, and to draw from this incidental mention of the fact that it has been filed an intention on the part of Dowd or of any of the defendants to induce or allow the plaintiff to be influenced by its statements as to the amount and payment of the stock would be unreasonable. The jury would not, therefore, have been justified, by all the circumstances which the evidence tended to show, in finding that the defendants intended by means of the representations contained in the certificate to influence the conduct of the plaintiff with reference to his claim against the corporation, and under the rule ³⁶⁶ laid down in the former opinion, the presiding justice was correct in not allowing this contention of the plaintiff to be passed upon by the jury."

It will be noted that the language here used was largely *arguendo*, and really *dictum*, because the question was not involved. Upon this case, plaintiff clings with tenacity, and especially to that portion of the remarks, "If you wish to know the standing of the corporation, it has filed a declaration at the statehouse, which you can examine." He overlooks paragraph 2 of the same opinion which we shall quote and comment upon in our succeeding paragraph.

But applying the evidence in the record to the sole question we now have in hand, it is altogether insufficient. Plaintiff had never read the articles of association. The most he says is that he saw some papers on the table which he took to be the articles of association. He does say that he understood that the corporation was a Missouri corporation; and that it had a capital stock of \$300,000. but at no place does he say that defendants or either of them told him that the stock had been subscribed and paid as in the articles of association stated. No claim by plaintiff that defendants said, "Here are our articles of association and the statements therein made as to the payment of the capital stock are true." We are not saying that such statement, had it been made and proved to be false, would have been actionable, in view of what shall follow herein, but make the suggestion to show that the case at bar does not fall within the supposed case made by the Massachusetts court. In fact, in view of the conclusion finally reached by that court in the Hunnewell case, we do not deem it material whether the statements were made one way or the other. In this case, however, the proof does not point to the fact that defendants or either of them said, "Here are the articles of association. They speak the truth as to our financial ability. You read them." ³⁶⁷ Nor does the proof tend to show that they or either of them used words to that effect. The whole conversation was as to what had

been subscribed and paid in by different parties which strongly tended to show an adverse condition from that shown by the articles of association.

Upon this point we hardly think the plaintiff was entitled to go to the jury.

3. Casting aside the articles of association, all the representations as to the present ability of the company to pay its debts were oral statements. Not a line was in writing nor signed by either of the defendants. Our statute, Revised Statutes 1899, section 3422, reads:

“No action shall be brought to charge any person upon or by reason of any representation or assurance made concerning the character, conduct, credit, ability, trade or dealings of any other person, unless such representation or assurance be made in writing, and subscribed by the party to be charged thereby, or by some person thereunto by him lawfully authorized.”

This statute is of English origin and has found its way into the statutes of many of our states. Its purpose is a beneficial one. It withdraws from the public the temptation of saying that we would not have credited A, except for the fact that B said he was solvent, unless the representation of B was in writing. Philips, P. J., speaking for the Kansas City court of appeals in *Weil v. Schwartz*, 21 Mo. App. 372, has well said of this statute:

“The history of the first enactment of this statute by the English parliament furnishes most persuasive proof that its designs and purpose were to cut up by the roots the great evil of the frequency and success of such actions based on mere loose verbal representations, by requiring the action to depend exclusively on ³⁶⁸ the written undertaking, duly signed, by the party sought to be held: See *Lyde v. Branard*, 1 Mees. & W. 101, Parke B.; 1 *Smith's Lead. Cas.*, 4th ed., 144-146; *Savage v. Jackson*, 19 Ga. 305. As said by Benning, J., in the case last cited: ‘When a statute says that a promise to answer for the debt of another shall not bind, does it not say that any less things shall not bind?’ I cannot understand how under this statute, if a part may rest upon a verbal representation, why the whole may not. If a part may be verbal and a part in writing, how much of each is essential to make the sum total of the *causa injuria*? Where shall the dividing line be drawn? The tendency of such a rule would be to invite the substitution of judicial discretion, and the caprice of the triers of the fact, for the more certain and explicit rule of the statute, until by imperceptible strokes of the keen blade of judicial construction, in ready hands, the purpose of the statute would either be whittled away altogether, or so weakened as to afford little protection against the very evil Lord Tenderden sought to uproot.”

Nor is the rule different as to the officers of a corporation under the terms of this statute. The representations of such parties are upon the same basis as others. Massachusetts has a similar statute, and in *Hunnewell v. Duxbury*, 157 Mass. 1, 31 N. E. 700, upon a second appeal of that case, the court said: "It is well settled that representations made by officers of a corporation with reference to its financial standing or means are made with reference to the credit or ability of another person within the meaning of the Public Statutes, c. 78, par. 4: *Kimball v. Comstock*, 14 Gray, 508; *Wells v. Prince*, 15 Gray, 562; *Mann v. Blanchard*, 2 Allen, 386; *McKinney v. Whitting*, 8 Allen, 207. The plaintiff does not deny the correctness of this proposition, but contends that a statement that another person is possessed of certain ³⁶⁹ specific property does not come within the provisions of the section, and need not be in writing in order to be actionable. We cannot accede to this proposition. The statute is a general one, purposely broad in its terms, and intended to prevent an understood mischief. It is to be so construed as to make it effectual to prevent the fraud at which it was aimed. To exclude from its operation statements as to the ownership of specific property, if made concerning the 'credit, ability, trade, or dealings' of another who is said to be the owner of the specific property, would deprive it of force. The statements of the defendants, except the certificate, were all oral, and all related either to the assets and property of the corporation or to its prospects of success. The latter were under no circumstances actionable, being necessarily matters of opinion. To the former the statute of frauds applies, and prevents the plaintiff from recovering, because they were merely oral, and not in writing." See, also, the case of *Koch v. Sumner*, 145 Mich. 358, 116 Am. St. Rep. 302, 108 N. W. 725, 9 Ann. Cas. 225.

A statute could not be broader in terms than is ours. It was enacted for the purpose of relieving parties from uncertainties of litigation which might follow loose language, by requiring all statements to be in writing before the same should be actionable. In this case counsel recognize the extent of the statute as fully as we have done, but undertake to argue that there has been a waiver thereof. At this point suffice it to say that unless there has been a waiver of the statute no case was made by the plaintiff, because none of the alleged representations were in writing. The question of waiver we take next.

4. There is no plea of the statute of frauds, or of that section claimed to be a protection to the defendants. It is not claimed, however, that the statute ³⁷⁰ of frauds has to be pleaded, but it is admitted that a general denial is sufficient to raise the statute. The plaintiff urges that there was a waiver of the statute, and this he says occurred in several

ways: (1) by the peculiarity of the answer filed; (2) by the failure to make proper objections to the testimony offered in the course of the trial; (3) by the defendants voluntarily testifying to the conversations; (4) by requesting a finding of facts upon their testimony; (5) by requesting declarations of law not including the statute; and (6) by a failure to mention the statute of frauds in the motion for new trial.

(a) In the answer is a general denial and this, it is admitted, is sufficient to raise the statute, but for other language used later in the answer. The language relied upon is, "and denies that at any time either directly or otherwise, made any representation to said plaintiff with reference to the solvency of said American Sand and Supply Company." We are not of opinion that this language following in a separate paragraph of the answer is sufficient to rob the defendants of the full benefits secured to them by the first paragraph of the answer which was a general denial pure and simple.

(b) At the first appearance of a witness, the plaintiff McKee, to testify to oral statements, the defendants objected and planted themselves behind the statute. We have set out the objection in the statement and will not repeat. The objection was again renewed when witness McCoy was on the stand, but after much of his testimony was in, but the trial court said, "I can't rule on this until he finishes the cross-examination. Let the record show that all the proper objections were made to all this testimony and I will let the ruling go back."

So that from the record the point was well preserved. When upon the first appearance of improper testimony the counsel raises the statute of frauds, ³⁷¹ and his objection on that ground is then overruled, he is not required to continuously interpose a like objection to all similar testimony. A point once clearly made should stand for the whole trial. To continuously object to the same character of testimony after the trial court has said it was proper approaches disrespect for the ruling of the court. The defendants at the first opportunity made clear their position and were not bound to continuously worry the trial court with objections which had once been overruled.

(c) Nor did they waive the objection to such oral proof by afterward voluntarily testifying to the alleged conversations. Defendants had urged that plaintiff was not entitled to make proof of his allegations by parol evidence, but their objections to oral proof was overruled. It will not do to say because, after this ruling of the court, they then testified to their understanding of the same conversation, they thereby waived the question as to the validity of oral proof. Waiver is a voluntary act, and is not an act forced upon a party by the court. After the court ruled that parol evidence was proper, then it would be unfair to say that defendants could

not give their version of the conversation without waiving their rights under the objection first interposed.

(d) Nor was there a waiver by requesting a finding of facts based upon all the testimony. If the court, by wrong and adverse rulings, forced the defendants to put in testimony that they would not have put in but for the adverse ruling, and which they were, in justice to themselves, forced to put in by reason of such adverse ruling, then there is no waiver by the mere fact that the defendants asked a finding of facts based upon the whole evidence. By wrong and adverse rulings the court had fixed the plane upon which the battle was to be waged, and it illy becomes one who has received the benefits of such rulings to cry waiver.

³⁷² (e) What we have just said applies with equal force to the next contention, that there was a waiver by reason of requests for declarations of law.

(f) Lastly it is said that the motion for new trial fails to mention the statute of frauds. Grant this to be true, but the motion does allege that the court admitted improper and incompetent evidence over the objections of the defendant, which is sufficient without seeking further for other grounds. As we are impressed by this record there is nothing waiving the statute of frauds.

5. Finally the plaintiff urges that inasmuch as the defendants were officers and stockholders of the corporation, and had not paid their stock in money or anything equivalent thereto, his judgment is a righteous one and should be sustained. In support of this we are cited to the following cases: *Steam Stone Cutter Co. v. Scott*, 157 Mo. 520, 57 S. W. 1076; *Van Cleve v. Berkey*, 143 Mo. 109, 44 S. W. 743, 42 L. R. A. 593; *Hunnewell v. Duxbury*, 154 Mass. 286, 28 N. E. 267, 13 L. R. A. 733; *Fogg v. Pew*, 10 Gray, 409, 71 Am. Dec. 662; *Hindman v. First Nat. Bank*, 50 C. C. A. 623, 112 Fed. 931, 57 L. R. A. 108; *Bradley v. Poole*, 98 Mass. 169, 93 Am. Dec. 144.

All of these cases were discussed and reviewed in *Webb v. Rockefeller*, 195 Mo. 57, 93 S. W. 772, 6 L. R. A., N. S., 872. The two Missouri cases were actions against stockholders of a corporation by creditors, the gravamen of the charge being that they had not paid up their stock. They were not actions for fraud and deceit as is this case, if in fact the petition herein states a good cause of action at all. In this case the defendants are not sued as stockholders who had not paid up their stock, for Wear had only one share of the par value of \$100, and now has a judgment against him for nearly \$5,000. There may be some language in *Steam Stone Cutter Co. v. Scott*, 157 Mo. 520, 57 S. W. 1076, wherein this court made some remarks which were beyond the scope of the case and as such should be considered obiter dicta. The whole

373 matter is so thoroughly and to our minds properly covered in the Webb case (195 Mo. 57, 93 S. W. 772, 6 L. R. A., N. S., 872), that we dismiss it without further comment. Under these views the judgment as to the defendant Wear must be reversed.

This leaves but one question, and that is what should be the action of the court upon the motion to dismiss the appeal of defendant Rudd. That question we take next.

6. As suggested in the statement the defendant Rudd does not appear here by brief. The abstract of record is here, but under the name of F. E. Wear, appellant. This abstract prints the bill of exceptions in full. The action is one in tort wherein in law one or all might be found liable. The record is such, however, that if a jury found against one defendant, it would be hard to find in favor of the other. Under the evidence all the talk as to the condition of the corporation was by one Hutchings, and it is claimed that Rudd and Wear assented to what he said, either by gesture or word of mouth. When the judgment was entered, both Rudd and Wear appealed, filing a joint affidavit of appeal. During the whole trial, each of them by their respective counsel made the same objections and preserved the same exceptions. When they came to appeal, they jointly appealed, and each of them signed the appeal bond, with two sureties thereon. To affirm this judgment as to Rudd, or to dismiss his appeal as prayed, which would amount to the same thing, would work a great injustice. From what we have indicated no case was made either against Rudd or Wear, yet if we dismiss Rudd's appeal, Wear and the other parties would be liable on the bond for the sum of this judgment. Wear could in no way have compelled Rudd and his counsel to follow up their appeal, but when we have all the facts before us, as we have, should we, after finding that there is no liability upon either defendant, yet leave **374** the case in such condition that the successful defendant would be liable for the full judgment? We think not. Rudd's act in failing to prosecute his appeal amounts to a fraud in law upon Wear. If Rudd is so anxious to have judgment go as against him he can yet submit to such a judgment in the lower court, at a time and in a manner that will not work grave injustice to another.

There might be drawn from the facts before us other reasons for refusing this motion, but we prefer to put it upon the broad ground that we will not permit a legal fraud to work an injustice in this court, where we have full control of the case as well as of our own rules.

The judgment as a whole is therefore reversed.

We feel better satisfied with this result each time we read the petition and the evidence. It is extremely doubtful whether or not the petition states facts sufficient to make it

good in an action for fraud and deceit, and under the whole evidence we are convinced that plaintiff was not seriously misled as to the character of corporation with which he was dealing. Further, whilst he had a judgment against the corporation for the full amount of his note, it is not clear that the corporation received value received for the note.

Plaintiff's money had been expended long before he dealt with the corporation, and at the time he only parted with his equity in the sand plant at Topeka, and his right to go into a corporation of the character of the one we now have under consideration. Just what these rights parted with by plaintiff were worth is not made wholly clear by the record.

Let the judgment as to both defendants be reversed.

All concur.

If the Officers of a Foreign Corporation File a Certificate stating the amount of capital subscribed for and the amount paid, as required by statute, one who finds it on file and is induced by misstatements therein to take the note of the corporation cannot maintain an action against the officers for fraud. Such certificate is not addressed to or intended for the public, but is to obtain the right to do business in the state; and the general rule is that one who relies on misstatements in regard to the financial condition of a corporation must, in order to found an action upon such misrepresentations, bring himself within the class of persons for whom the representations were intended and who therefore had a right to rely on them: See the note to *Henry v. Dennis*, 95 Me. 24, 85 Am. St. Rep. 390.

CASES
IN THE
SUPREME COURT
OF
MONTANA.

MONSON v. LA FRANCE COPPER COMPANY.

[39 Mont. 50, 101 Pac. 243.]

EMPLOYER'S LIABILITY — Construction of Statute.—The words "or person" in the Montana statute, providing that iron cages must be used for lowering and elevating men in deep mines, were omitted by the commissioner in revising the codes, evidently through inadvertence, and should be inserted in the text as it now stands. (p. 555.)

EMPLOYER'S LIABILITY — Constitutionality of Statute.—The Montana statute providing that iron cages of a specified kind must be used for lowering and elevating men in deep mines is sustainable as a proper exercise of the police power. (p. 555.)

EMPLOYER'S LIABILITY—Rule of Ordinary Care.—The common law requires no more of a master than to exercise ordinary care to furnish his servant with reasonably safe appliances, reasonably competent fellow-servants, and a reasonably safe place in which to work; and while a correspondingly greater measure of care is always required whenever the hazard is greater, the exercise of ordinary care, as this expression must be interpreted in the light of the circumstances of each case, always discharges the master from liability. (p. 555.)

EMPLOYER'S LIABILITY—Proximate Cause of Injury.—Even when a master has been guilty of a failure to exercise ordinary care for the safety of his servant, there must be shown a causal relation between his fault and any injury for which it is sought to hold him liable. (p. 555.)

EMPLOYER'S LIABILITY—Statutory Precautions for Safety.Where the statute declares that a master shall adopt specific precautions for the safety of his servants, as that he shall use iron cages of a specified kind for lowering and elevating men in deep mines, the rule of reasonable care is no longer the measure of his duty. His compliance with the command of the legislature becomes imperative, and any failure to observe the required precautions or to provide the prescribed appliance is such a breach of duty as renders him liable for any injury caused by his disobedience. (p. 555.)

EMPLOYER'S LIABILITY—Statutory Precautions for Safety.Where the legislature declares the duty of an employer to provide for the safety of employés, its judgment is binding; and it is beyond the

power of courts to inquire whether the particular precaution or appliance required is the best or wisest. (p. 556.)

EMPLOYER'S LIABILITY—Statutory Duty—Proximate Cause.

In an action for injuries to an employé based on the failure of the employer to furnish safe appliances prescribed by statute, the plaintiff must not only prove the injury but he also has the burden to show that it was proximately caused by the master's disobedience of the statute. (p. 556.)

EMPLOYER'S LIABILITY—Evidence of Proximate Cause of Injury.—While the efficient cause may be shown by indirect evidence in an action for injuries to an employé based on the failure of the employer to furnish safe appliances prescribed by statute, yet it cannot be established by that character of evidence unless the circumstances are such that they not only furnish support to the particular theory advanced, but also tend to exclude any other reasonable theory. (p. 556.)

SUICIDE.—The Law Indulges the Presumption That a Person Takes Ordinary Care of his own affairs including his life. (p. 558.)

Gunn & Rasch and Chas. R. Leonard, for the appellant.

Breen & Hogevoll, for the respondent.

53 BRANTLY, C. J. Action by plaintiff, as administratrix of the estate of John Monson, her deceased husband, for damages on account of his death in the course of his employment as a pumpman by the defendant corporation in one of its mines in Silver Bow county.

In the complaint F. Augustus Heinze, the manager of the corporation, William A. Kidney, the superintendent of the mine, and Albert Frank, employed as mining engineer, are joined with the corporation as defendants. Defendant Heinze was never served with summons. During the trial the action was dismissed as to defendants Frank and Kidney, and thereafter it proceeded against the corporation alone. As to this defendant, it is alleged that at the time of the death of plaintiff's intestate it was engaged in operating the Lexington mine in Silver Bow county; that there is a vertical shaft in said mine to the depth of fourteen hundred feet, in which cages were used for the purpose of lowering and hoisting the employés; that it was the duty of the defendant to provide these cages with doors to prevent the employés from slipping or falling therefrom while they were being lowered or hoisted; and that the defendant failed to perform this duty, with the result that the deceased, while riding in one of the cages in pursuit of his duties as pumpman, under the direction of the defendant, fell from it and was **54** killed, to the damage of plaintiff in the sum of twenty-five thousand dollars. Judgment is demanded for this amount.

The answer, admitting that the defendant was engaged in operating the mine, that there is a vertical shaft therein as alleged, and that the deceased was in its employ at the time of his death, denies generally all the other allegations con-

tained in the complaint. It also alleges affirmatively contributory negligence on the part of the deceased, Monson, and that the risk incident to the use of the cages as alleged was assumed by him. Upon these allegations there was issue by reply. At the close of plaintiff's case in chief defendant moved for a nonsuit, on the ground, among others, that the evidence did not show what was the cause of Monson's death. The motion was denied. When the hearing of the evidence was concluded, motion was made by defendant for a directed verdict. This motion was also denied. The plaintiff had verdict and judgment for four thousand dollars. The defendant has appealed from the judgment and an order denying it a new trial.

The following is a full statement of the evidence submitted to the jury: On January 26, 1908, the defendant was operating the Lexington mine at Butte. The working shaft, fourteen hundred feet in depth, is vertical and has three compartments. One of these is used for pumps. The other two are provided with double-decked cages for lowering and hoisting men and materials. The timbering is constructed in the usual way, in sets, consisting of horizontal wall plates and upright corner pieces of twelve by twelve lumber, the lagging being of two-inch planks. The spaces between the plate timbers, or dividers as the witness designated them, separating the compartments are open, except that in the working compartments there are upright pieces at each end in the middle, to which are nailed guides for the cages. The sets are about five feet in height. It does not appear definitely what the dimensions of the different compartments are, but the working compartments are of sufficient size to permit the use of cages having doorways in the side, of forty-one inches, and to allow a space of two or three inches ⁵⁵ for the cages to clear the wall plates and foot sills at the various levels. Including this space, the horizontal distance from the cages to the lagging, when moving between the wall plates, is fourteen or fifteen inches. This leaves openings at the sides of the cages, as they pass from plate to plate, of forty-one inches in length by fourteen or fifteen inches in width, being sufficient in dimensions to permit a man to slip or fall out. Just here it may be stated that, to guard against this danger, cages used in vertical shafts of a greater depth than three hundred feet, or not exclusively for sinking, are required by statute (section 8536, Revised Codes) to be cased in on three sides with sheet iron or steel not less than one-eighth of an inch in thickness, and on the fourth side to be provided with doors or gates of the same material, hung on hinges or adjusted to slide. They are also required to be covered by a substantial iron or steel bonnet, to furnish protection against anything falling from above. The cages in use by the defendant at the time of Monson's death were so constructed as to meet the re-

quirements of the statute as to bonnet and sheathing. The doors were hung on hinges, and so adjusted that, when the cages were not in actual use for lowering and hoisting men during the changes of shifts, they could readily be taken off and set aside, and this was done whenever the cages were used in hoisting ore or waste or lowering timbers and other material. Each cage was also furnished on each deck with a handbar, which passes across it overhead. This was used as a handhold by the miners while the cage was in motion. The company usually had an employé, called a "topman," whose duty it was to put the doors on when a cage was in use by the men, and also to see that they were securely latched or locked before the cage was moved. At each station where men got on and off there was a station tender to open and close the doors. The superintendent, the engineers, and foremen, when engaged in inspection or similar duties, commonly used the cages without the doors or other device for protection, depending for safety on the handbar alone. The same course was pursued by the timbermen when they would be engaged in lowering ⁵⁶ timbers. The deceased was working on night shift. One pump was installed at the station at the fourteen hundred foot level. This was used to raise water up to the six hundred foot level to a tank installed there; thence it was pumped to the surface by a second pump, which was operated from that station. These two pumps were kept at work alternately, each for four hours during the shift. The deceased went on shift at 11 o'clock in the evening. After changing his clothes in the dry-room, he asked the engineer in charge of the hoist to lower him to the fourteen hundred foot level. Neither the topman nor the station-tender was usually on duty at that hour. Neither was on duty at this time. The pumpmen were expected to put the doors on a cage when they wished to use it. Usually they omitted to do this, relying for protection on the handbar. The deceased never stopped to put them on even when he took the plaintiff or her friends with him to visit the mine, which he frequently did. He did not put them on at this time. After starting to get into the cage on this evening, he turned back and handed the engineer fifteen dollars in bills, saying: "Here is fifteen dollars. You can keep it for me." Then, upon turning away, he looked back, saying: "I don't care whether you blow it in or not. I might not need it again." The witness stated that other employés at the mine had at other times left their money with him because there was danger of getting it wet while at work. He thought deceased was joking when he made the last remark. At this time the face of deceased appeared unusually pale. He used the upper deck of the cage. There is nothing in the record to show what he did after the engineer let him off at the lower pumping station, until some time after 2 o'clock the next

morning. In the meantime the cage had been brought to the surface, but had not been used, nor had the doors been put on. Upon a signal from the fourteen hundred foot level, the engineer returned the cage. Immediately afterward he received a signal to hoist to the six hundred foot level. This he did, setting the upper deck at the station. He observed no jar or irregularity in the movement of the ⁵⁷ cage during its ascent; it being, as he stated, so heavy that impact against some solid body was necessary to produce a perceptible jar while it was in motion. The cage not being released as the engineer expected, he feared that something was wrong; so he requested two miners who had just come to the surface by the other working compartment to make an inspection. They took the cage by which they had been hoisted and descended to the six hundred foot level, where they found the other cage standing as the engineer had placed it. Searching as they descended from that level, they finally found Monson's body at a point about sixty feet from the fourteen hundred foot level, stretched across the compartment through which he had been sent down, his head and shoulders resting on one of the dividers on one side, and his feet in the same position on the opposite side, while the hips were resting on or against one of the wall plates. Its position was such that a cage could not pass it. To use the language of one of the witnesses who found the body: "I don't see what was holding him. He was swinging right across the shaft." The face was bruised and cut, but there were no broken bones and no evidence of any other wound. No blood was found except upon the divider, upon which his head rested. The lunch basket of the deceased was found in the cage. There is no evidence whether any cut or bruise upon the face was mortal. During the early evening, before Monson went to work, he attended the theater with plaintiff. While there he remarked twice to plaintiff that he could hear water "rolling." She attached no significance to these remarks, explaining that she also heard a noise, but did not know whether it was on the stage or caused by the cars on the street. Monson had been hurt at this mine some months before. As a result he had grown nervous, and after his recovery entertained a dread of the mine. Upon returning from the theater he had lunch with plaintiff, and, to use her language, "seemed all right." He had been spitting blood during the day; this trouble being occasional and apparently the result of his previous hurt. On parting with plaintiff he gave her forty dollars, all the money he had, except fifteen dollars which ⁵⁸ he retained, saying he intended to lend it to a friend at the mine. She tried to induce him not to go to the mine that night. He usually gave his pay checks to plaintiff. He was a large man, weighing

one hundred and seventy-five or one hundred and eighty pounds, and was apparently strong and healthy.

The first contention made is that the evidence is not sufficient to warrant a submission of the case to the jury. It is said that the evidence does not show, or tend to show, that the death of Monson was caused by the failure of defendant to see that a door was on the cage at the time Monson was lowered, and then afterward supposedly raised from the fourteen hundred foot level; in other words, while it may be conceded that the evidence is sufficient to establish negligence on the part of the defendant in failing to see that a door was attached to the cage at the time it was used by Monson, there is no evidence showing any causal connection between this negligence and the death itself.

The statute declares: "It is unlawful for any corporation [or person] to sink or work, through any vertical shaft where mining cages are used, to a greater depth than three hundred feet, unless said shaft shall be provided with an iron-bonneted safety cage, to be used in the lowering and hoisting of the employés thereof, said cage to be also provided with sheet iron or steel casing not less than one-eighth inch in diameter; doors to be made of the same material shall be hung on hinges, or may be made to slide, and shall not be less than five feet high from the bottom of the cage, and said door must be closed when lowering or hoisting the men. Provided, that when such cage is used for sinking only, it need not be equipped with such doors as are hereinbefore provided for. The safety apparatus, whether consisting of eccentrics, springs or other device, must be securely fastened to the cage, and must be of sufficient strength to hold the cage loaded at any depth to which the shaft may be sunk. The iron bonnet of the aforesaid cage must be made of boiler sheet iron, of good quality, of at least three-sixteenths of an inch in thickness, and must cover the top of such cage in such manner as to afford the greatest protection to life and limb from ⁵⁹ anything falling down said shaft. It shall be the duty of the mining inspector and his assistant to see that all cages are kept in compliance with this section and to also see that the safety dogs are kept in good order. Every person or corporation failing to comply with any of the provisions of this section is punishable by a fine of not less than three hundred dollars, nor more than one thousand dollars": Rev. Codes, sec. 8536.

Section 705 of the Penal Code of 1895 declared that mining cages, subject to the provisos mentioned, should be protected by an iron bonnet. This was amended by the act of 1897 (Laws 1897, p. 245), which went a step further, and declared that, subject to the same provisos, they should also be sheathed in with sheet iron or steel casing or wire netting

of a prescribed strength, and should be provided with doors of the same material hung on hinges or adjusted to slide. The act of 1903 (Laws 1903, p. 125), now the section of the code above quoted, amended this provision by requiring the casing to be of sheet iron or steel. From this provision, as enacted, the words "or person" were omitted by the commissioner in the revision of the codes, evidently through inadvertence, and should be inserted in the text as it now stands. In *State v. Anaconda Copper Min. Co.*, 23 Mont. 498, 59 Pac. 854, this court sustained the code provision as amended by the act of 1897 as a proper exercise of police power by the state; its manifest design being "to guard against the dangers incident to lowering and elevating men in deep mining shafts."

In the absence of legislation touching the duties of the master, his obligations toward his servant are defined by the rules of the common law, and extend no further than to require him to exercise ordinary care to furnish the servant with reasonably safe and suitable appliances for his use in the performance of his work, reasonably competent fellow-servants, and a reasonably safe place in which to work: *Longpre v. Big Blackfoot Milling Co.*, 38 Mont. 99, 99 Pac. 131. While a correspondingly greater measure of care is always required whenever the hazard is greater, the exercise of ordinary care, as this expression must ⁶⁰ be interpreted in the light of the circumstances of each case, always discharges the master from liability. Even when he has been guilty of a failure in his duty, there must always be shown a causal relation between his fault and any injury for which it is sought to hold him liable. He may be held responsible only when to his lapse of duty is directly attributable the wrong complained of, as any given effect may be attributed or assigned to its efficient cause. When the state has, as in the statute, *supra*, declared that the master shall adopt certain specified precautions, the rule of reasonable care is no longer the measure of duty. The necessity for his compliance with the command of the legislature becomes imperative, and any failure on his part to observe the required precautions or to provide the prescribed appliances is such a breach of duty as will render him liable for any injury caused by his disobedience. Mr. Labatt, in his work on Master and Servant, after referring to the fact that many courts hold such disobedience negligence *per se*, while others hold it to be merely evidence of culpability, says: "That the former of these theories is the correct one can scarcely be doubted. A doctrine the essential effect of which is that the quality of an act which the legislature has prescribed or forbidden becomes an open question upon which juries are entitled to express an opinion would seem to be highly anomalous. The command or prohibition of a permanent body which represents an entire

community ought in any reasonable view be regarded as equivalent to a final judgment upon the subject matter which renders it both unnecessary and improper that this question should be submitted to a jury": 2 Labatt on Master and Servant, sec. 799. As was pointed out by Mr. Justice Hunt in *State v. Anaconda Copper Min. Co.*, 23 Mont. 498, 59 Pac. 854, so long as there is no constitutional limitation upon the power of the legislature to declare the rule of duty, its judgment is binding, and it is beyond the power of the courts to inquire whether the particular precaution or appliance required is the best or wisest. In *Hunter v. Montana Central Ry. Co.*, 22 Mont. 525, 57 Pac. 140, this court, following the weight of authority, held that a railroad ⁶¹ company whose employes in charge of a train failed upon approaching the crossing of a highway to observe the precautions required by a statute for the protection of the public (Civ. Code 1895, sec. 908 [Rev. Codes, sec. 4289]) was chargeable with negligence. There can be no distinction between the effect of a statute designed to protect the public generally at railroad crossings and one designed to secure safety to servants engaged in hazardous employments. Whether the violation of such a statute is properly designated as negligence or not, the master is responsible for his failure to observe it. But it does not follow that he may be held to respond in damages for an injury not shown to have been the proximate result of his disobedience. As in cases where the rule of ordinary care applies, the plaintiff must prove, not only the injury, but also that it was proximately caused by the negligence alleged (*Pierce v. Great Falls & Canada Ry. Co.*, 22 Mont. 445, 56 Pac. 867; *Shaw v. New Year Gold Min. Co.*, 31 Mont. 138, 77 Pac. 515; 1 Thompson on Negligence, sec. 45; 2 Labatt on Master and Servant, sec. 803), so in cases where it is sought to hold the master for nonperformance of a statutory duty the evidence must tend directly to show that the fault was the cause of the injury. And, as Mr. Labatt observes: "The nonexistence of a legal connection between the negligence and the injury is predicable whenever, for aught that appears, the accident might have happened even if the defects in question had not existed, or if the precautions which were omitted had been taken. The master cannot be held liable if his negligence was merely a condition as opposed to the efficient cause of the injury": 2 Labatt on Master and Servant, sec. 803. The burden is always upon the plaintiff in such cases to show the causal relation between the negligence and the injury. The efficient cause may be shown by indirect evidence, but even in a civil case a theory cannot be said to be established by such evidence, unless the circumstances are such, not only that they furnish support for the particular theory, but also tend

to exclude any other reasonable theory: *Shaw v. New Year Gold Min. Co.*, 31 Mont. 138, 77 Pac. 515.

⁶² Analyzing the facts shown by the evidence before us, and testing it by these rules, we find the neglect of duty on the part of the defendant and the death of the deceased established beyond question; for assuming, without deciding, that the requirements of the statute were met by the defendant by providing doors such as are shown to have been in use at the time of Monson's death, the duty to see that they were in place at any time when the cages were used to lower or hoist employés was a continuing one, which could not be delegated. But no fact or circumstance appears from which any reasonable conclusion may be drawn that this neglect of duty bears a direct proximate causal relation to the death of deceased. There is no direct evidence that the deceased got into the cage at the fourteen hundred foot level; but, assuming that this fact is established by the statement of the engineer that he set the cage at that station in reply to a call from the deceased, that the lunch basket of the deceased was found in the cage, and that his body was found, as it was, about sixty feet above the fourteen hundred foot level, there is no evidence as to how the deceased got out of the cage, or whether he died from a sudden stroke of disease, and then fell to the position in which his body was found, or died after he got out of the cage, having fallen out by reason of such a sudden stroke. There is nothing to show whether he died from natural causes or from the violence of a fall, or from being squeezed by the cage as it passed the timbers. Indeed, it does not appear, even by remote inference, that he fell any distance. The cuts and bruises on the face do not appear to have been mortal. The fact that they were there and that there was blood on the timber is as consistent with the idea that the deceased died a natural death as with the idea that he was killed by being caught between the cage and the timbers or by a fall. Very little additional evidence tending to show death by violence would have been sufficient to distinguish the case from *McGowan v. Nelson*, 36 Mont. 67, 92 Pac. 40, *McAuley v. Casualty Co.*, 37 Mont. 256, 96 Pac. 131, and *Olsen v. Montana Ore Pur. Co.*, 35 Mont. 400, 89 Pac. 731; but, as it stands, it must be held to fall within the principle ⁶³ of all of them. Any other conclusion upon such evidence would be a determination of the rights of the parties upon speculative and conjectural inferences, which is not permissible. The case is distinguishable from *Hollingsworth v. Davis-Daly Estates Copper Min. Co.*, 38 Mont. 143, 99 Pac. 142, in that the facts and circumstances surrounding the death of Hollingsworth tended to show that the efficient cause of it was the fall into the shaft which had been left in a dangerous condition by the defendant in a place where the

employés were expected to go in pursuit of their employment. In that case the conclusion seemed inevitable that the negligence of the defendant caused the injury. Here such a conclusion would be a mere guess.

We have not noticed in this discussion a contention incidentally made by defendant's counsel, that the evidence tends to show that deceased committed suicide. We do not think the peculiarities of his conduct during the evening, in view of the explanation given by the witnesses, would justify any such conclusion, especially so in view of the presumption which the law indulges that a person takes ordinary care of his own concerns, including his life.

The court was in error in denying the motion for nonsuit. This conclusion renders it unnecessary to consider other grounds of the motion or alleged errors based upon the refusal of the court to submit certain instructions. The judgment and order are reversed.

Reversed.

Mr. Justice Smith and Mr. Justice Holloway concur.

The Duty of Mine Owners to Prevent Injury to Their Employés is the subject of a note to *Wellston Coal Co. v. Smith*, 87 Am. St. Rep. 557.

The Doctrine of Assumption of Risk and Contributory Negligence in the law of master and servant is discussed in the notes to *Houston etc. Ry. Co. v. De Walt*, 97 Am. St. Rep. 884; *Brazil Block Coal Co. v. Gibson*, 98 Am. St. Rep. 289.

An Employer Who Violates a Statutory Duty Imposed upon Him for the better protection of his employé's cannot, according to the better view, invoke the doctrine of assumption of risk or perhaps of contributory negligence when sued by an injured employé: See the note to *Houston etc. Ry. Co. v. De Walt*, 97 Am. St. Rep. 891; and consult also the recent cases of *Whelan v. Washington Lumber Co.*, 41 Wash. 153, 111 Am. St. Rep. 1006; *Saxe v. Walworth Mfg. Co.*, 191 Mass. 338, 114 Am. St. Rep. 613; *Western Furniture etc. Co. v. Bloom*, 76 Kan. 127, 123 Am. St. Rep. 123; *Davidson v. Flour City etc. Iron Works*, 107 Minn. 17, 131 Am. St. Rep. 433.

MADISON RIVER LIVESTOCK COMPANY v. OSLER.

[39 Mont. 244, 102 Pac. 325.]

CONDITIONAL SALE—Remedies of Seller on Breach by Buyer.—Where the buyer under a conditional sale breaches the contract, the seller may treat the contract as rescinded and retake the property; or retake the property, but still treat the contract as in force but broken by the buyer and bring an action for damages occasioned by the breach; or waive the breach and insist upon payment for the property. (p. 560.)

CONDITIONAL SALE—Effect of Wrongful Retaking of Property.—Where the seller wrongfully retakes possession of the property sold under a conditional sale, this constitutes a violation of the terms of the contract and the buyer may treat it as rescinded. (p. 561.)

CONDITIONAL SALE—Rescission by Seller—Quantum Meruit.—Where the seller wrongfully retakes cattle conditionally sold, the buyer may treat the contract as abrogated; and in an action by the seller on the purchase notes, the buyer may maintain counterclaims upon the quantum meruit for pasturage and labor in keeping the stock. (p. 561.)

CONDITIONAL SALE—Election of Remedies by Seller.—Where the buyer under a conditional sale breaks the contract, the seller has an election of remedies, but having chosen the one he will pursue, the choice becomes irrevocable; he cannot retake the property, renounce the contract, and at the same time insist upon payment under the contract. (p. 561.)

CONDITIONAL SALE—Breach by Buyer.—Where the Buyers of Cattle under a conditional sale agreed to furnish hay for the animals to the extent of four hundred tons annually, the fact that they furnished only two hundred and fifty tons between December 22d and the following spring does not necessarily constitute a breach of the contract, inasmuch as the requisite amount of hay might vary greatly with the seasons. (p. 562.)

A. C. Gormley, Geo. R. Allen and S. V. Stewart, for the appellant.

Geo. H. Stanton and J. A. McDonough, for the respondents.

247 HOLLOWAY, J. On December 22, 1903, the Madison Livestock Company entered into a contract with the defendants for the conditional sale by the plaintiff company to the defendants of certain cattle, horses and harness. The contract provides that the cattle should be paid for at the rate of thirty-two dollars and fifty cents per head; that the plaintiff should furnish certain supplies and money; that defendants should have possession of the property; that payment should be made by defendants in five years; and that the title to ²⁴⁸ the property should remain in the plaintiff until payment was fully made. The contract contains this provision: "And it is further agreed that if at any time the parties of the second part fail to comply with their part of this agreement, and the said party of the first part shall feel insecure, then the said party of the first part shall, on demand, have the quiet and peaceable possession of such cattle and stock." The defendants evidenced their indebtedness to the plaintiff by two promissory notes, the latter of which was secured by chattel mortgage. In the spring of 1904 the plaintiff, presumably assuming to act under the provision of the contract quoted above, took possession of the property, or rather such portion as was then in existence—fifty head of cattle having died in the meantime. While by the terms of the contract the purchase price was not to be paid until five years from December 22, 1903, one of the notes was made payable on demand, and the other was made payable one year after date. When the property was retaken by the plaintiff, credit was given upon one of the notes for eleven thousand two hundred

dollars, presumably the market value of the property retaken. In 1905 the plaintiff brought this action to enforce payment of the balance due on the first note and to foreclose the mortgage securing the second. To the complaint the defendants interposed an answer denying any indebtedness, setting forth the history of the transaction, and alleging that the defendants had fully performed all the terms of the contract by them to be performed and that the retaking of the property by the plaintiff was wrongful and without the consent, and against the will, of defendants. The answer also contained three separate counterclaims—for hay fed to the stock by the defendants, for pasturage furnished by them, and for work and labor done in handling the property—all of which was alleged to have been furnished and done by the defendants at the special instance and request of plaintiff. There was a reply, which put in issue all the new matters set forth in the answer. Upon the trial the jury returned a verdict in favor of the defendants for four thousand six hundred and seventy-five dollars, and judgment was entered thereon, from which judgment the plaintiff appeals. The ²⁴⁹ specifications of error relied upon raise but two questions: (1) Do the counterclaims state causes of action in favor of the defendants and against the plaintiff? (2) Was the plaintiff in any event entitled to recover the unpaid portion of the purchase price after crediting the value of the property retaken, or for the value of the stock which had died?

1. It is insisted that the hay and pasturage furnished were furnished and the work done was done under the contract of December 22, 1903, and the defendants cannot recover anything therefor. Apparently the hay and pasturage were furnished and the work was done under the contract in the first instance; and it is elementary that under the contract the defendants are not entitled to recover. But it is alleged in the answer that the plaintiff wrongfully took the property from the possession of the defendants, and the jury so found in a special finding. The plaintiff insists that the defendants breached the contract, but the evidence upon that is conflicting, and the jury found against it upon that issue. But, assuming that plaintiff's contention is correct, it then might have had any one of three remedies: (a) It might have treated the contract as rescinded or abrogated and have retaken the property; or (b) it might have retaken the property, but still treated the contract as in force but broken by the defendants and brought an action for damages occasioned by the breach; or (c) it might have waived the breach and have insisted upon payment for the property: 8 Current Law, 1818; Williston on Sales, sec. 579; 1 Mechem on Sales, sec. 615. Apparently the plaintiff, contending that the defendants had violated the contract, undertook to pursue the first of these remedies, but,

having retaken the property wrongfully, as the jury found, what, if any, remedies were then available to defendants? The authorities are unanimous in holding that they might have successfully prosecuted an action in claim and delivery to recover the possession of the property. Since the jury found that the plaintiff's act in retaking the property was wrongful, such retaking constituted a violation of the terms of the contract, and, such being the case, the defendants might ²⁵⁰ likewise treat the contract as rescinded: 7 Am. & Eng. Ency. of Law, 2d ed., 124; 9 Cyc. 639. The act of plaintiff in retaking the property under the circumstances as disclosed by this record and as found by the jury is treated by some courts and text-writers as amounting to a rescission of the contract, by others as a renunciation of the contract, and by others still as amounting to a determination to treat the transaction as "no sale," in which event there would be a total failure of consideration; but by whatever term designated it amounts, in fact, to a complete abrogation of the contract, so far as plaintiff is concerned, and leaves the defendants free to likewise treat the contract as abrogated, or to pursue any other remedy allowed them by law. If, then, the contract was by these acts of the parties abrogated, there was not any consideration whatever for either note sued upon by the plaintiff. The defendants, having furnished their feed and pasturage for, and done their work upon, plaintiff's property, may maintain their several counterclaims upon the quantum meruit: 7 Am. & Eng. Ency. of Law, 2d ed., 152, and cases cited.

2. Was the plaintiff entitled to recover for the value of the stock which was not retaken? It is insisted that the loss for the stock which died fell upon the purchasers. Whether it did or not is a much mooted question, but one which is not before us. As said above, if plaintiff deemed that the defendants had broken the contract, it had its election of remedies, and, having chosen the remedy which it would pursue, its choice became irrevocable. Upon the plainest principles of justice it cannot retake the property, renounce the contract, and at the same time insist upon payment under the contract: *Parke & Lacy Co. v. White River L. Co.*, 101 Cal. 37, 35 Pac. 442; *Holt Mfg. Co. v. Ewing*, 109 Cal. 353, 42 Pac. 435. The rule is stated in 15 Cyc. 262, as follows: "An election once made, with knowledge of the facts, between coexisting remedial rights which are inconsistent, is irrevocable and conclusive, irrespective of intent, and constitutes an absolute bar to any action, suit, or proceeding based upon a remedial right inconsistent with that ²⁵¹ asserted by the election, or to the maintenance of a defense founded on such inconsistent right"; and the authorities in support of the text are cited at length.

Having elected to treat the contract as rescinded, the plaintiff also elected to take the property as it found it, and cannot now insist upon payment of any part of the contract price. Treating of a contract of this particular character, Meehem in his work on Sales, section 615, says: "He [the vendor] may treat the contract as rescinded upon the default of the buyer, and recover his goods. If he does this, he has no other remedy." In Williston on Sales, section 579, the author says: "If the seller exercises his right to reclaim the goods, it is generally held an election to rescind the contract, and thereafter an action for the price or any unsatisfied balance of it is not allowed": See, also, 2 Current Law, 1588, note.

It is urged by counsel for appellant, in effect, that there is not any evidence to support the finding that the retaking of the property by the plaintiff was wrongful. The contract contains this provision: "Said parties of the second part further agree . . . to make ample provisions for the care of said stock by erecting sheds, and providing food to the extent of 400 tons of hay annually." Assuming, as we may, that by this provision it was intended that the defendants should annually make ample provision for caring for the property by providing sufficient feed for such portion of the year during which feeding would be necessary, and that four hundred tons of hay were deemed sufficient for that purpose, it can hardly be urged that the mere fact that the defendants had only two hundred and thirty-five to two hundred and fifty tons of hay to feed from December 22, 1903, until the following spring, constituted a breach of the contract, which of itself warranted the plaintiff in retaking possession of the property. The provision above set forth must be interpreted in the light of conditions prevailing here. During one winter a very small quantity of feed might be sufficient, while during another four hundred tons of hay might be inadequate. But, if the two hundred and thirty-five or two hundred and fifty tons of hay which defendants had was sufficient properly ²⁵² to winter the stock during the remaining portion of the season of 1903 and 1904, after December 22, 1903, then it would be said that there was a substantial compliance with the above provision of the contract; and we think the evidence is sufficient to show that the hay which defendants fed to the stock practically completed the necessary feeding for that season. It must have been upon this theory that the jury found that plaintiff's act in retaking the stock in the spring of 1904 was wrongful.

We do not find any error in the record. The judgment is affirmed.

Affirmed.

Mr. Chief Justice Brantly and Mr. Justice Smith concur.

RIGHTS AND REMEDIES OF SELLER IN CONDITIONAL SALES WHEN BUYER DEFAULTS IN PAYMENT OF PURCHASE PRICE.*

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I. Scope and Explanations.

Many of the various questions pertaining to conditional sales of chattels have been previously discussed in this series. Contracts of this character have been very common, and though their validity, both upon reason and the overwhelming weight of authority is clearly established, they have been the occasion of much litigation, and it would be impracticable to attempt any discussion in a single note of all the various questions which have been before the courts regarding the rights and remedies of either of the parties to such contracts.

While we will give the general rule which shows all the remedies the seller may pursue upon breach of any of the conditions by the buyer, our discussion thereafter will be confined to the seller's right to recover possession of the goods from the buyer, where the latter defaults in payment of the purchase price, including the pleadings, evidence, defenses and judgments proper in such cases; but what may constitute a waiver by the seller of this right or an election to pursue some other remedy will not be considered.

II. Remedies of the Seller.

a. In General.—Several remedies are open to the seller in a contract of conditional sale when the buyer defaults in payment of the

***REFERENCES TO MONOGRAPHIC NOTES.**

Conditional sales: 37 Am. Rep. 664; 42 Am. Rep. 105; 94 Am. St. Rep. 210. Question whether transaction is mortgage or conditional sale: 1 Am. St. Rep. 63; 94 Am. St. Rep. 234.

Conditional sales as equitable mortgage: 4 Am. St. Rep. 699.

What constitutes conditional sales: 46 Am. St. Rep. 295.

purchase price. It was held in the principal case (*ante*, p. 558) that on the buyer's breach of the contract the seller has any one of three remedies: (a) he can treat the contract as rescinded and retake the property; or (b) he can retake the property and still treat the contract as in force, but broken by the buyer, and sue for damages occasioned by the breach; (c) he can waive the breach and insist upon payment for the property.

Likewise, the supreme court of Massachusetts in the recent case of *Frisch v. Wells*, 200 Mass. 429, 86 N. E. 775, 23 L. R. A., N. S., 144, held that the seller may treat the contract as an agreement for goods sold and delivered, and sue at once for the price, or in tort for conversion, or in replevin for the specific property.

It has also been held that, when the buyer breaches the contract, the seller may waive the right to declare a forfeiture for nonpayment and sue in equity to subject the property as in case of a lien: *Gigray v. Mumper*, 141 Iowa, 396, 118 N. W. 393; *Campbell Printing Press etc. Co. v. Powell*, 78 Tex. 53, 14 S. W. 245; *Hollenburg Music Co. v. Morris* (Tex. Civ. App.), 35 S. W. 396; *In re National Cash Register Co.*, 174 Fed. 579.

The seller's right to pursue either one of the remedies stated in the foregoing cases is abundantly established, but we now confine our attention to the single one of his right to recover the property.

b. Recovery of the Goods.

1. General Rule.—Where the seller of goods conditionally has not waived his right and the buyer is in default, the seller is entitled to possession of the property. The authorities are practically uniform in support of this proposition, but we cite some of the cases of more recent years which are directly in point: *Davis v. Millings*, 141 Ala. 378, 37 South. 737; *Stowers Furniture Co. v. Brake*, 158 Ala. 639, 48 South. 89; *Butler v. Dodson*, 78 Ark. 569, 94 S. W. 703; *Berger v. Miller*, 86 Ark. 58, 109 S. W. 1015; *Bell v. Old*, 88 Ark. 99, 113 S. W. 1023; *Nashville Lumber Co. v. Robinson* (Ark.), 121 S. W. 350; *Holt Mfg. Co. v. Ewing*, 109 Cal. 353, 42 Pac. 435; *Griffin v. Ferris*, 76 Conn. 221, 56 Atl. 494; *Stalker v. Hayes*, 81 Conn. 711, 71 Atl. 1099; *Stanton v. Smith* (Del.), 65 Atl. 593; *Scotch Mfg. Co. v. Carr*, 53 Fla. 480, 43 South. 427; *Wilmerding v. Rhodes-Haverty Furniture Co.*, 122 Ga. 312, 50 S. E. 100; *O'Neil v. Rogers*, 110 Ill. App. 622; *Smith v. Barber*, 153 Ind. 322, 53 N. E. 1014; *Hydraulic Press Mfg. Co. v. Whetstone*, 63 Kan. 704, 66 Pac. 989; *Bailey v. Napier* (Ky.), 117 S. W. 948; *Robinson v. Berry*, 93 Me. 320, 45 Atl. 34; *Pels v. Millen*, 192 Mass. 13, 77 N. E. 1152; *Frisch v. Wells*, 200 Mass. 429, 86 N. E. 775, 23 L. R. A., N. S., 144; *Ryan v. Wayson*, 108 Mich. 519, 66 N. W. 370; *Kerl v. Smith* (Miss.), 51 South. 3; *Coleman v. Reynolds*, 207 Mo. 463, 105 S. W. 1070; *Madison Livestock Co. v. Osler*, 39 Mont. 244, *ante*, p. 558, 102 Pac. 325; *Thompson Co. v. Baldwin*, 62 Neb. 530, 87 N. W. 307; *Proctor v. Tilton*, 65 N. H. 3, 17 Atl. 638; *Webber v. Osgood*, 68 N. H. 234, 38 Atl. 730; *Roach v. Curtis*, 191 N. Y. 387, 84 N. E. 283, 50 Misc. Rep. 122, 100 N. Y. Supp. 411, 115 App. Div. 765, 101 N. Y. Supp. 333; *Thomas v. Cooksey*, 130 N. C. 148, 41 S. E. 2; *Poirier Mfg. Co. v. Kitts* (N. D.), 120 N. W. 558; *Herring-Marvin Co. v. Smith*, 43 Or. 315, 72 Pac. 704, 73 Pac. 340; *Seanor v. McLaughlin*, 165 Pa. 150, 30 Atl. 717, 32 L. R. A. 467; *Kelly Springfield Rood Roller Co. v. Schlimme*, 220 Pa. 413, 123 Am. St. Rep.

707, 69 Atl. 867; *Straub v. Screven*, 19 S. C. 445; *Henderson v. Mahoney*, 31 Tex. Civ. App. 539, 72 S. W. 1019; *Lippincott v. Rich*, 19 Utah, 140, 56 Pac. 806; *Hyland v. Bohn Mfg. Co.*, 92 Wis. 157, 6 N. W. 170; *Gregory v. Morris*, 1 Wyo. 213.

2. Substantial Default of Buyer must be Shown.—While the foregoing cases establish beyond question that as a general rule the seller by conditional sale has the right to recover possession of the property in the event of the buyer's default, still, the title of the seller is not necessarily inconsistent with both the possession and the right thereto of the buyer, and hence it is an essential condition to the seller's right to retake that a substantial default of the buyer be shown: *Lambert v. McCloud*, 63 Cal. 162; *Richardson v. Great Western Mfg. Co.*, 3 Kan. App. 445, 43 Pac. 809; *Adams v. Wood*, 51 Mich. 411, 16 N. W. 788. Thus, when the vendor in a contract of conditional sale guarantees that the property sold will accomplish certain results, the title to remain in him till full payment is made, he is not entitled to possession until a default in payment after fulfillment of the guaranty: *Richardson v. Great Western Mfg. Co.*, 3 Kan. App. 445, 43 Pac. 809.

If no time is fixed by the contract for completing payment, the seller cannot recover possession of the goods until the buyer has had a reasonable time to complete the payment: *Adams v. Wood*, 51 Mich. 411, 16 N. W. 788.

Likewise in *Shields v. Bush*, 76 Hun, 226, 27 N. Y. Supp. 754, plaintiff purchased a cab from A, giving a bill of sale of an old cab for part of the price, and notes for the balance, and took a bill of sale from A which provided that the new cab should remain the property of A till payment of the notes. Plaintiff paid the notes, but the old cab was not called for by A and was injured through plaintiff's fault while in his possession. It was held that A could not seize the new cab he sold to plaintiff on the theory that A had defaulted in payment of the notes; that title to the old cab became vested in A and such title was not divested by A's failure to take possession.

3. Default in Installments.—When personal property is sold and the seller retains title as security for his purchase money, and the indebtedness matures in installments, he may recover possession of the property upon default in payment of any of the installments when due: *Berger v. Miller*, 86 Ark. 58, 109 S. W. 1015; *Scott v. Glover* (Ga. App.), 66 S. E. 380; *Robinson v. Berry*, 93 Me. 320, 45 Atl. 34; *Roach v. Curtis*, 191 N. Y. 387, 84 N. E. 283, 115 App. Div. 765, 101 N. Y. Supp. 333, 50 Misc. Rep. 122, 100 N. Y. Supp. 411.

4. Default in Payment of Interest.—The right of the seller to retake possession of property sold on condition, with title reserved, may be exercised upon the buyer's default in payment of the interest called for by the contract, though the principal has been paid. Thus, in *O'Hern v. Lipsett*, 154 Mich. 196, 117 N. W. 577, under a contract for the sale of bar fixtures, the purchase price was to be paid with interest in weekly installments, title being reserved in the seller. The buyer paid the principal in installments, but failed to pay the interest. There was nothing to show a waiver of the payment of the interest. It was held that the seller was entitled to take possession of the property for one payment of the interest.

5. Where Part Payment is Made on Goods.—Where a contract for the conditional sale of a cash register authorized the buyer to turn

in an old register at a specified valuation, and he failed to turn in the old register or to pay the amount specified, the seller was entitled to recover the new register, his remedy not being limited to the recovery of the old register or its value: *National Cash Register Co. v. Petsas*, 43 Wash. 376, 86 Pac. 662.

6. Sale of Merchandise to be Resold at Retail.—A stipulation, in an agreement to sell a stock of goods, that title to the same, except such as may be sold in course of trade, shall remain in the vendor until the purchase price is fully paid, and that the purchaser, by making fresh purchases, shall keep the stock equal to what it was at the time of sale, does not give the vendor title to the goods bought by the purchaser to replenish the stock: *Harding v. Lewenberg*, 174 Mass. 394, 54 N. E. 870.

Hence, where on a conditional contract for the sale of a stock of drugs, which the vendee was by the contract required to dispose of at retail and not to deplete, the vendee purchased and added to the stock other goods and then made default in payment of the purchase money promised for the original stock, it was held that the vendor was only entitled to recover possession of such of the original stock conditionally sold as remained undisposed of, the vendee's mixing of the goods absolutely purchased by him with those conditionally purchased being neither wrongful nor fraudulent: *Richardson Drug Co. v. Teasdale*, 52 Neb. 698, 72 N. W. 1028.

7. Nonperformance by Seller as Affecting His Right to Recover Possession.—A seller is not entitled to recover possession of property parted with under a contract of conditional sale, when he himself has not complied with the terms of such contract.

Thus, in *Heine Piano Co. v. Crepin*, 142 Cal. 609, 76 Pac. 493, plaintiff sold to defendant on monthly installments an S. piano, for five hundred and seventy-five dollars, reserving title until paid for. After some of the installments had been paid, plaintiff agreed to move and ship the piano to defendant at another town, but in fact removed the piano to its warerooms and shipped it to the manufacturers. Defendant objected to this and refused to accept another piano in lieu of the S. piano, as urged by plaintiff, but finally assented to a proposition made by the plaintiff to send her an H. piano, valued at four hundred and seventy-five dollars, with permission to use the same until she was permanently settled, when she might select from plaintiff's stock any piano of equal value with the S., plaintiff in the meantime to confer with the S. Company. Defendant continued to pay the installments until plaintiff had received five hundred and fifty-seven dollars and fifty cents, and then refused to make further payments unless the piano contracted for was delivered, and plaintiff brought this action to recover possession of the H. piano. The ownership of the piano was not denied in the answer of the defendant, and the sole issue presented for determination was the right to its possession.

It was held that plaintiff, not having complied with its agreement to provide defendant with an S. piano, was not entitled to recover possession of the H. piano without returning to defendant the installments she had paid.

And in *Gennells v. Bonlais*, 48 Wash. 310, 93 Pac. 421, it was held that the seller of personalty under a conditional sale may not recover the property for default of the buyer in making a payment, caused

directly and primarily by default of the seller in refusing to give a title free of lien, the purchaser having been ready and willing to pay at all time, upon getting a good title.

c. Mode of Retaking the Property.

1. **Without Legal Process.**—It has been held that, on default of the buyer in a contract of conditional sale, the seller may exercise his right of possession to the property by retaking the same without resort to the courts: *Proctor v. Tilton*, 65 N. H. 3, 17 Atl. 638; *Straub v. Sereven*, 19 S. C. 445; this doctrine was also upheld in *Stowers Furniture Co. v. Brake* (Ala.), 48 South. 89, and *Shireman v. Jackson*, 14 Ind. 459, with the qualification, however, that the retaking must be peaceable, the supreme court of Indiana saying in *Shireman v. Jackson*, 14 Ind. 459: "If a party can peaceably obtain, by his own act, the same redress which a court would afford him, he may do so."

It does not appear in any of these cases that the contract authorized the vendor to retake possession, but simply provided for reservation of title in the vendor until the purchase price was paid.

In *Wilmierding v. Rhodes-Haverty Furniture Co.*, 122 Ga. 312, 50 S. E. 100, and *Henderson v. Mahoney*, 31 Tex. Civ. App. 539, 72 S. W. 1019, the right of the seller to retake possession without legal process if he could do so peaceably was clearly upheld, but in both of these cases the contract stipulated that the purchaser might retake possession without resort to the courts, if the buyer defaulted.

Likewise, in *North v. Williams*, 120 Pa. 109, 6 Am. St. Rep. 695, 13 Atl. 723, where a contract for the sale of a piano provided that, on default in payment of any installments, the buyer should permit the seller's agent "to enter into and upon any premises where said piano may be, and without let or hindrance take away the same," it was held that the fact that the agent obtained entrance into the buyer's house by falsely representing that he had come to tune the piano, and took it away in pursuance of the authority given by the contract, did not make him a trespasser, or the taking unlawful, and it was unnecessary that he should at the time of taking, exhibit written authority from the seller.

But in *Van Wrenn v. Flynn*, 34 La. Ann. 1158, where the contract merely provided that in case of the buyer's default the seller could "retake possession," but did not specifically confer upon him the right to enter the buyer's premises to accomplish such retaking, it was held that the seller was not authorized to enter the house of the buyer in his absence, without his consent and without notice, and take away the goods.

There was no force used by the seller, in this case, to obtain an entrance to the buyer's home or in the removal of the goods, for the seller was admitted by the buyer's mother and sister who were occupying the house in the buyer's absence, and the only objection these occupants made when informed of the purpose of the seller's visit was a request that he refrain from taking the goods until the buyer's return.

In holding that the taking was unlawful, however, the court said: "No one appreciating the jealous care with which our law guards the sacredness of every man's house and his lawful possession of property against invasion or disturbance, otherwise than by proceedings taken under the sanction and through the agency of the public jus-

exchange for checks which could not be cashed until the day following.

It is claimed that the court committed error in his charge in submitting the question in good faith to the jury. A careful examination of this part of the charge shows that the court stated the law correctly. The following upon this question is taken from the charge:

"That the burden is upon the plaintiff in this case to show by a preponderance of the evidence that it is a bona fide holder of the check and the certification thereon for value. . . . If, after careful consideration of all the evidence, you are satisfied that the First National Bank, at the time it took the check, understood or believed that the certification was not valid, but, on the contrary, that it was made when Frank C. Andrews did not have money on deposit in the City Savings Bank to the credit of his account on the books of the bank sufficient to meet the amount of the check, then your verdict should be for the defendant. . . . If you are satisfied from all the evidence in this case bearing upon this question that on the fifth day of February, 1902, the First National Bank, or its officers, and more especially Frank Smith, its assistant cashier, had notice or knowledge of facts which would render the act of taking the certification of the City Savings Bank with the intention to rely upon it and collect it an act of bad faith, or in effect dishonest, then the First National Bank was not a bona fide holder of the certified check, and your verdict should be for the defendant. . . .

"Under these circumstances, a man may take a piece of commercial paper, relying upon its being good, and he is not bound to inquire of the maker of said paper as to the facts and circumstances surrounding its making, nor as to whether there are possible defenses; but, if he have knowledge of facts and circumstances which would make it dishonest or an act of bad faith for him to take the paper with the intention to enforce the collection thereof, then he is not a holder in good faith. So, in this case, if the officers of the First National Bank, or either of them, had knowledge that the City Savings Bank was certifying these checks of Frank C. Andrews simply because he had deposited collateral in the bank, and were not certifying ¹⁰³ upon money actually deposited in the bank and to his credit on its books, the First National Bank would not be a bona fide holder of this certified check."

The complaint defendant makes is, not that the law is not correctly stated, "but that there was failure in making the proper application of the principle to the case by explaining to the jury how such notice and knowledge might be established," etc.

Complaint is also made to this part of the charge, that the court did not charge as requested in three of the requests submitted, and that the jury were only permitted to consider facts and circumstances which in themselves were evidence showing actual notice and knowledge. These requests were as follows:

“(12) If the jury find that, at the time of the certification of the checks in question, Frank C. Andrews did not have actually standing to his credit upon the books of the bank the amount of said certifications, but that, on the contrary, at the times of said certification the account of the said Frank S. Andrews in the City Savings Bank was actually overdrawn in a large amount, then the jury are instructed that the certification, under the circumstances, is in violation of the provision of the state banking law, and is therefore illegal and void, and there can be no recovery thereon by the plaintiff, unless the jury find that it became the holder thereof in good faith, for full value, in the usual course of business, without notice of the defect or infirmity of the certification or the illegality thereof, and the burden is upon the plaintiff, the First National Bank, to show by a preponderance of proof that it became a holder in good faith of the said certification, for full value, in the usual course of business, without any notice of the illegality of the certification or of any defect or infirmity therein, before it is entitled to a verdict.

“(13) The jury are further instructed that if they find the facts and circumstances attending the use of certified checks, drawn by Andrews upon the City Savings Bank and purporting to be certified by it, and the manner in which the plaintiff used and treated such certified checks, were such as to invite inquiry, they will be sufficient upon which to base a finding or conclusion that the plaintiff bank did not receive the certification in question in good ¹⁰⁴ faith, providing the jury think that the plaintiff abstained from making the inquiry with reference thereto from a belief or a suspicion that such inquiry would disclose the invalidity and illegality of the certifications.

“(14) Notice and knowledge of the invalidity and illegality of said certification do not mean express notice or direct knowledge, but knowledge or the means of knowledge to which the party willfully shuts his eyes, and either actual knowledge of the illegality of the certification, or a course of conduct upon the part of the bank in its dealings with Andrews and the certified checks, from which the jury may find that it remained willfully ignorant thereof, will defeat the claim of good faith ownership by the plaintiff.”

In so far as the substance of these requests was refused, they were not proper to be given, as either not being in

ments received or notes given for the price, as a condition precedent to his right of recovery of the goods. In perhaps a majority of the state courts, such payments seem to be regarded as forfeited, and it is held that a return of such payments is not necessary as a condition precedent to the seller's right of recovery of the goods: *Kirby v. Tompkins*, 48 Ark. 273, 3 S. W. 363; *Latham v. Sumner*, 89 Ill. 233, 31 Am. Rep. 79; *Fairbanks v. Malloy*, 16 Ill. App. 277; *Fleck v. Warner*, 25 Kan. 492; *Duke v. Shackelford*, 56 Miss. 552; *National Cash Reg. Co. v. Ferguson*, 25 Misc. Rep. 363, 55 N. Y. Supp. 592; *Lippincott v. Rich*, 22 Utah, 196, 61 Pac. 526.

Thus, in *Kirby v. Tompkins*, 48 Ark. 273, 3 S. W. 363, plaintiff's sought to replevin a sewing machine which he had sold conditionally to defendant. The evidence showed the plaintiffs were the owners and entitled to possession of the machine, and there was nothing in the contract of sale requiring plaintiffs to give up the notes which had been given by defendant for part of the purchase price before they could resume possession of the property. It was held that an instruction by the court to the jury that plaintiffs could not maintain the action without first surrendering or offering to surrender the notes was erroneous.

And in *Fairbanks v. Malloy*, 16 Ill. App. 277, under the contract of sale, the title to the property was reserved in the seller, and on the buyer's default, the seller was authorized to take possession. At the time of the sale possession was given to the buyer, who afterward made partial payment of the purchase price and then defaulted. It was held that the seller could maintain an action of replevin to recover possession of the property without first tendering the money paid.

In *National Cash Reg. Co. v. Ferguson*, 25 Misc. Rep. 363, 55 N. Y. Supp. 592, by the conditional contract of sale the buyer agreed to pay three hundred and twenty-five dollars for the property, twenty-five dollars cash on delivery and notes, twenty-five dollars each for the balance, payable monthly, title not to pass "until the same is paid for in full." Default was made in payment of the notes, and in holding that the seller could recover the property in replevin without a return of the unpaid notes, Judge Maddox, speaking for the court, said: "Plaintiff's right to maintain this action does not, I think, depend upon a return or a tender of the unpaid notes at the time of the demand. The right of action, under the contract, accrued immediately upon default in payment, whereupon plaintiff had the right to repossess itself of the property in controversy."

But the doctrine supported by the foregoing cases has been opposed by some of the federal courts, for in *Latham v. Davis* (C. C.), 44 Fed. 862, it was held that, where a seller of personal property, by a contract which provides that the title shall remain in him until payment of the price, has received in part payment other goods, he cannot, on refusal of the purchaser to pay the balance, maintain replevin for the goods sold, without first returning the goods received in part payment.

And in *Segrist v. Crabtree*, 131 U. S. 287, 9 Sup. Ct. Rep. 687, 33 L. ed. 125, where the seller brought an action of trover against the buyer under a contract of conditional sale, it was held that the court properly charged, in effect, that the vendor could not retake the property sold, even if the sale were conditional, so long as he retained the notes.

Also, in *Shafer v. Russell*, 28 Utah, 444, 79 Pac. 559, it was held that an instruction that where chattels are sold to a vendee on condition that title shall not pass until full payment of the purchase price, all payments made prior to the vendee's default became forfeited to the vendor, was properly refused as an incorrect statement of the law. But this ruling was not called for by any contention over the seller's right to maintain replevin, without first returning the payments he had received, but with reference to the amount of damages recoverable for the unlawful detention of the property, and can therefore hardly be said to overrule the case we have previously noted of *Lippincott v. Rich*, 22 Utah, 196, 61 Pac. 526, holding that a conditional seller need not return non-negotiable notes given by the purchaser, before he can maintain an action to recover the property.

It seems, however, that if the buyer's default is due to any non-performance on the part of the seller, a return of the property received by the seller is a condition precedent to his right to recover the property. Thus, where, under a contract of conditional sale, the buyer delivered certain property in payment of part of the purchase price, but refused to make payment for the balance of the purchase price, on account of the seller's failure to deliver the goods sold in accordance with the terms of the contract, the seller is not entitled to recover the property delivered by it without tendering a return of the property received: *American Soda Fountain Co. v. Dean Drug Co.*, 136 Iowa, 312, 111 N. W. 534.

Also, a conditional seller, who, after default in payment by the purchaser, while proposing to replevy, intentionally leads the buyer to believe that he will repay the money already paid, and retake the property, and obtains the buyer's consent to this proposition, cannot thereafter stand on his original contract, and replevy the property without paying the money: *Carpenter v. Chase*, 64 N. H. 438, 14 Atl. 76.

And a conditional seller is not bound to offer to return payments he has received, before retaking the property, when the buyer leaves the jurisdiction, secretes himself, or asserts adverse title to the property: *Wall v. De Mitkiewicz*, 3 App. Cas. (D. C.) 109.

But in Wisconsin, where the statute (Stats. 1898, sec. 1770b, as amended by Laws 1899, p. 653, c. 351, sec. 27, Laws 1901, pp. 571, 620, cc. 399, 434, sec. 1, and Laws 1905, p. 932, c. 506, sec. 1) provides that every contract made on behalf of any foreign corporation which has not complied with the law shall be void on its behalf, but enforceable against it, and prohibiting an unlicensed corporation from transacting business or acquiring or holding or disposing of property in the state, it was held that an unlicensed foreign stock corporation engaged in the sale of pianos and musical instruments could not recover in replevin a piano sold by its agent under a conditional contract of sale, when no tender or return of the partial payments made thereon by the buyer had been made: *Duluth Music Co. v. Clancy*, 139 Wis. 189, 131 Am. St. Rep. 1051, 120 N. W. 854.

3. Necessity for Demand.—Where property is lawfully in possession of the vendee under a contract of conditional sale it seems to be generally recognized by the courts that the seller cannot maintain an action for the recovery thereof on default of the buyer until he has first made a demand for the goods: *Hydraulic Press Mfg. Co. v. Whetstone*, 63 Kan. 704, 66 Pac. 989; *New Home Sewing Machine*

Co. v. Botham, 70 Mich. 443, 38 N. W. 326; Davis v. Emery, 11 N. H. 230; Kimball v. Farnum, 61 N. H. 348; Wheeler & Wilson Mfg. Co. v. Teetzlaff, 53 Wis. 211, 10 N. W. 155; and especially is this true when a larger part of the purchase money has been paid: People's Furniture & Carpet Co. v. Crosby, 57 Neb. 282, 73 Am. St. Rep. 504, 77 N. W. 658.

But it has been held that repeated demands for uncompleted payments will obviate the necessity for demand as a condition precedent to recovery of the property. Thus, in Proctor v. Tilton, 65 N. H. 3, 17 Atl. 638, a horse was sold and delivered to the buyer upon payment of part of the price, the parties agreeing that title to the horse should remain in the seller until the balance of the purchase price should be paid. Payment was repeatedly demanded after a reasonable time had elapsed. It was held that the seller had the right to replevy the horse without a previous demand. The court distinguished this case from those of Davis v. Emery, 11 N. H. 230, and Kimball v. Farnum, 61 N. H. 348, by saying that in the former case demand was held to be necessary because by the terms of the contract the buyer had an election whether he would buy the property or not; and that in the latter case it was held necessary because the time of payment had been extended with the understanding that the vendee might pay what he could, and therefore the vendee's possession was lawful.

Where the vendor has accepted payments after the time the whole became due, demand is a condition precedent to the right of recovery: People's Furniture & Carpet Co. v. Crosby, 57 Neb. 282, 73 Am. St. Rep. 504, 77 N. W. 657; O'Rourke v. Hadcock, 114 N. Y. 541, 22 N. E. 33; Masby v. Goff, 21 R. I. 494, 44 Atl. 930.

But in Mathews v. Lucia, 55 Vt. 308, where a seller reserved the right to retake the goods upon the buyer's default, and after such default sued, attaching the goods, and then discontinued his suit and took the goods, it was held that if the seller, by accepting payments after they had become due, had waived the right to retake the property without a demand, his suit constituted a sufficient demand.

And, where one making a contract of sale, with provision for forfeiture for nonpayment of installments, promises an extension upon default of first payment, he is bound to give reasonable notice before attempting to declare a forfeiture: Young v. Ward, 115 Ill. 264, 3 N. E. 512.

Also, demand is a condition precedent to an action of trover for the goods: Jowers v. Blandy, 58 Ga. 379; Katz v. Diamond, 16 Misc. Rep. 577, 38 N. Y. Supp. 766; McIlugh v. Dinkins, 2 Brev. (S. C.) 324; but not if there has been an actual conversion: Katz v. Diamond, 16 Misc. Rep. 577, 38 N. Y. Supp. 766; Putnam v. McLeod, 23 R. I. 373, 50 Atl. 646.

In Scarboro v. Goethe, 118 Ga. 543, 45 S. E. 413, where the vendor, in an action of trover against the vendee, claimed title based on a conditional bill of sale, reserving title to himself in the property until the purchase price thereof was paid, it was held that no demand was necessary when it appeared that the defendant was in possession of the property, claiming title thereto, at the time of the action; his defense being that only a small balance of the purchase money was due of which he made tender.

When the contract of conditional sale provides that the seller may retake the goods whenever he pleases, previous demand is not neces-

sary. Thus where goods are sold and delivered under an agreement that until paid for they shall remain the property of the seller, who shall have the right in the meantime to take them away whenever he pleases, the seller has an implied irrevocable license to enter upon the buyer's land and take the property, without a previous demand, at any time before the whole of the price is paid: *Heath v. Randall*, 58 Mass. (4 Cush.) 195.

e. Defenses.—In an action by the seller of goods conditionally to recover the property, it is no defense that the seller had foreclosed a mortgage given to secure the purchase notes, the proceeds of the foreclosure being insufficient to pay the notes: *Montgomery Iron Works v. Smith*, 98 Ala. 644, 13 South. 525.

Neither can a vendee interpose as a defense in an action by the vendor to recover the property that he had been garnished as a debtor of the seller, and so prevented from making payment: *Briggs v. McEwen*, 77 Iowa, 303, 42 N. W. 303.

Nor can he set up in defense that title to the property is in a third person under a chattel mortgage executed by himself: *A. D. Puffer Sons Mfg. Co. v. May*, 78 Md. 74, 26 Atl. 1020.

But defendant may plead damages for the nondelivery of part of the goods sold, and an offer to pay the balance of the purchase money in excess of the damages which may be ascertained: *Ames Iron Works v. Rea*, 56 Ark. 450, 19 S. W. 1063.

And in an action by a vendor for the goods sold or the price thereof, it was a good defense that plaintiff's vendor reserved title in the goods in himself until notes given for the price were paid, that such notes were not paid, and that the property was seized in defendant's hands under execution against plaintiff based on such notes: *Mock v. Stuckey*, 96 Ga. 187, 23 S. E. 307.

And it is a good defense to an action by the seller of personalty, under a condition to recover the property, that the plaintiff failed to give a title free from liens, the buyer having been at all times ready and willing to pay upon receiving a good title: *Gennelle v. Boulais*, 48 Wash. 310, 93 Pac. 421.

f. Pleading.—A buyer who is still in possession of property under a contract of conditional sale cannot show failure of the seller's title in a suit by the seller to recover the property unless pleaded. Thus, in an action of trover for property held by defendant under a conditional sale from plaintiffs, there being no special plea whatever filed by defendant, nor tender back of the property, and it appearing that defendant is still in possession, and that his possession has not been disturbed by action or otherwise, it was not error to reject evidence tending to show that the title to the property was not in plaintiffs at the time of the conditional sale, though it may be true that since the sale other persons have asserted title and notified defendant not to pay plaintiffs for the property: *Ross v. McDuffie*, 91 Ga. 120, 16 S. E. 648.

In replevin for goods delivered under a conditional sale a declaration alleging that on a day named plaintiff was, by reason of the nonpayment of certain overdue notes entitled to retake the property which defendant unjustly detained and refused to deliver, etc., is not obnoxious to a demurrer on the ground that it does not appear therefrom that the notes were not paid before suit: *Tufts v. Johnson*, 29 Ill. App. 412.

So, also, when personal property is sold on condition that title was not to vest until payment, and notes are executed for the purchase, which remained unpaid, the notes need not be made a part of the complaint in an action to recover the property for failure to pay the price, since such action is not based upon the notes; nor is it necessary in such action to aver in the complaint that the property has not been taken for a tax, assessment or fine, or seized under an execution or attachment against the plaintiffs: *Payne v. Jane*, 92 Ind. 252.

g. Evidence.—In an action for the recovery of chattels sold conditionally, where the buyer gives notes for the price in the books of which is printed an agreement that the seller is to retain the title until the notes are paid, the buyer cannot, after having defaulted in payment, contradict the agreement by parol testimony: *Seymour v. Farquhar*, 93 Ala. 292, 8 South. 466.

And in an action to recover property sold by plaintiff to defendant with title reserved in plaintiff until payment of the purchase price, evidence of partial payments of the price is not admissible when offered for the purpose alone of showing payment by defendant of a sum greater than the agreed price of the portions of the property delivered: *Brandon v. Montgomery Iron Works*, 96 Ala. 506, 11 South. 540. A seller bringing replevin for goods conditionally sold must show that the price has not been paid, and the burden is also on him to show the right of possession in the identical property in controversy: *Brunson v. Volunteer Carriage Co.*, 93 Miss. 793, 47 South. 377.

When the sale and reservation of title are not admitted in an action to recover goods alleged to have been conditionally sold, the burden of proving continuance of the indebtedness is on the plaintiff: *Black v. Roberson*, 87 Ark. 641, 112 S. W. 402.

But where plaintiff in replevin shows that by agreement he sold the property in dispute to defendant, reserving title thereto in himself, the burden is on defendant to show performance of the condition as to payment: *Faisst v. Waldo*, 57 Ark. 270, 21 S. W. 436; and to this end evidence is admissible on the part of the buyer to show that the seller agreed that a part of the price was to be paid in labor: *Shaffer v. Sawyer*, 123 Mass. 294.

But in replevin by the owner of property against person having possession under a conditional contract of sale, evidence as to whether a third person, to whom defendants gave a mortgage on the property, took it to secure a debt due to a company of which he was agent is irrelevant: *A. D. Puffer & Sons Mfg. Co. v. May*, 78 Md. 74, 26 Atl. 1020.

Upon an issue whether the sale was absolute or conditional, it is competent for the seller to show that defendant, who had become insolvent after delivery of the property, at the time of the delivery was in notoriously bad credit: *Buswell Trimmer Co. v. Case*, 144 Mass. 250, 11 N. E. 549.

And, where in an action to recover goods purchased on conditional sale on default in an installment of the price, defendant testified that she thought the goods were being given her and that the contract was a receipt sent, but it was shown that she had written plaintiffs, asking for further time in which to pay, the question of her understanding of the transaction was not one for the jury, it appearing that she could read and had signed the paper, and her laches in not

reading the paper will not be construed into fraud: *Thomas v. Cooksay*, 130 N. C. 148, 41 S. E. 2.

h. Trial.—Where the evidence is conflicting as to whether a contract of conditional sale has been rescinded so as to entitle the seller to recover possession of the property, the question is one for the jury: *Wellden v. Witt*, 145 Ala. 605, 40 South. 126; and to same effect is *Levan v. Wilton*, 135 Pa. 61, 19 Atl. 945.

And in an action of replevin by the seller against the buyer to recover goods sold conditionally, when plaintiff did not rely upon the representations of defendant as to his solvency, but wholly upon the reservation of title as provided by the contract, evidence of defendant's representations as to his financial standing should be stricken out, and the sole issue as to whether plaintiff and defendant made a contract by which title to the goods was reserved in plaintiff should be submitted to the jury: *Pratt v. Burhaus*, 84 Mich. 487, 22 Am. St. Rep. 703, 47 N. W. 1064.

i. Judgments.—Where a seller brings replevin to recover goods conditionally sold defendant, and plaintiff's right to recover is admitted by the defendant's answer, and the only effect of the answer is to protect defendant against damages and costs, a judgment awarding defendant possession of the property is bad: *Kirby v. Tompkins*, 48 Ark. 273, 3 S. W. 363.

And, in replevin for goods by the seller thereof on a contract providing for title thereof in him until full payment of the purchase money, when the defendant pleads damages for the nondelivery of part of the goods sold, and an offer to pay the balance of the purchase money in excess of the damages which may be ascertained, the judgment for plaintiff should be that he have possession of the property if the defendant fail, in a reasonable time, to pay the balance of the purchase money in excess of the damages, and not that the property be sold to satisfy the balance found due: *Ames Iron Works v. Rea*, 56 Ark. 450, 19 S. W. 1063.

Under a contract of sale by which title remained in the seller till payment of all the purchase price, and he had right of possession in default of payment, it is error in a replevin suit by the seller, on default in payment, to hold that the purchaser has a special interest in the goods to the amount that their value exceeds the unpaid price, and to give him judgment against the seller therefor, as, even if the purchaser has a right to treat the contract as rescinded, he has at most a personal claim against the seller for the amount paid: *Ryan v. Wayson*, 108 Mich. 519, 66 N. W. 370.

And when plaintiffs sued in replevin for goods sold defendant, title to which plaintiffs had retained and which they had taken possession of under the replevin bond, judgment was properly entered for defendant, in the absence of proof of a return or tender to him of what he had paid on the purchase, as required by Revised Statutes of 1889, section 5181, in cases where the vendor retaining title retakes possession of the goods sold; but it was error to enter judgment in defendant's favor for the full value of the goods when he had paid only a small portion of the purchase money: *Burt v. Mears*, 41 Mo. App. 231.

In *O'Rourke v. Haddock*, 114 N. Y. 541, 22 N. E. 33, plaintiff had sold to defendant a canal boat, mules, and harness, retaining title to the boat as security for the price, and taking a mortgage on another boat owned by defendant as additional security. Afterward plaintiff

advertised that he would sell the two boats under the contract and mortgage respectively.

On an accounting then had it was ascertained that part of the purchase price of the boat was still due plaintiff. Before the day of sale of the boats, plaintiff seized the mule and harness on the ground that some of the purchase money was still unpaid. The value of the mule and harness exceeded the amount then due plaintiff. Thereafter plaintiff obtained possession of the boats in replevin and sold them. Plaintiff's attorney, who attended the sale, testified that the mortgaged boat was sold because the other had not brought enough to satisfy the amount alleged to be due plaintiff.

It was held that plaintiff's act showed that he elected to ratify the contract of sale, and the value of the mules taken having discharged the balance due on the price, a judgment in the replevin suit awarding a return of the boats with damages for their detention was proper.

In *A. D. Puffer & Sons Mfg. Co. v. Lucas*, 112 N. C. 377, 17 S. E. 174, 19 L. R. A. 682, plaintiff sued to recover a soda water machine delivered to defendant under a contract providing that there should be paid as rent three hundred and thirty dollars in installments, and that on full payment the title should rest in the defendant, but, if the installments were not paid as due, all claim of defendant to the machine should end. The jury found that there was seventy dollars due on the machine, but that defendant had sustained twenty-six dollars damages by reason of plaintiff's breach of contract to exchange for another machine. It was held that, to allow plaintiff to retake the machine, and declare all payments forfeited, is contrary to equity, and defendant should be allowed a reasonable time to pay the difference, and, if not then paid, a foreclosure sale of the machine should be had.

But where, in replevin, defendant pleads that he originally obtained possession from plaintiff under a conditional contract of sale for a certain price, and the property is sold by order of the court, without objections from defendant, and the proceeds applied in payment of the contract price, plaintiff is entitled to a judgment for the balance due on the contract price: *Hall v. Tillman*, 115 N. C. 500, 20 S. E. 726.

TOOLE v. WEIRICK.

[39 Mont. 359, 102 Pac. 590.]

MORTGAGE—Allegation of Tender in Case of Redemption.—It is generally not necessary that a bill to redeem should allege a tender, but it is ordinarily sufficient that the bill discloses a readiness and intention to pay the amount due. (p. 579.)

MORTGAGE—Allegation of Tender in Case of Redemption.—Where a deed absolute has been decreed a mortgage, and the amount due is unliquidated and uncertain, a bill for redemption need not allege a tender. (p. 579.)

MORTGAGEE IN POSSESSION—When Chargeable for Waste. A mortgagee is chargeable for waste committed by him while in possession, including permanent depreciation in the property resulting

from failure to make proper repairs or from reckless or improvident management. (p. 579.)

APPEAL—Failure to Specify Errors.—It is not the duty of the supreme court to search the record for errors, and consider those alleged in the briefs but not shown by specification. (p. 580.)

APPEAL—Presumption Against Error.—The Supreme Court Commences its investigation of every appeal with the presumption that the trial court did not err. (p. 580.)

TRIAL BY COURT—Statute Limiting Time for Decision.—A statute providing that upon the trial of a question of fact by the court its decision or findings must be filed within twenty days after the case is submitted is directory merely, and the failure of the court to render a decision within the time limited does not deprive it of jurisdiction to decide at a later date. (p. 580.)

MORTGAGE—Foreclosure and Redemption—Interest.—Upon foreclosure the mortgage debt becomes merged in the judgment, and the judgment draws interest at the rate of eight per cent under section 5214, Revised Codes. (p. 580.)

MORTGAGEE IN POSSESSION—Accounting for Use and Profits.—A mortgagee personally in possession is chargeable, on accounting, with the reasonable value of the use and occupation of the property, amounting to the fair rental value thereof; but if, by reason of his absence or other excuse, he is not personally in possession but depends upon the interposition of an agent whom he selects with due care and who exercises reasonable care to keep the property rented at a fair rental, the mortgagee is chargeable with rents actually received, not with the value of the use and occupation of the property. (p. 581.)

Breen & Hogewell and N. A. Roterling, for the appellant.

W. D. Kyle, for the respondent.

361 HOLLOWAY, J. On September 3, 1898, Jeremiah Hore executed and delivered to Elizabeth C. Whitney (now Elizabeth C. Myers) a conveyance in form a deed, by which he transferred to her lot 10, block 6, of Bernard's addition to Butte. Thereafter an action was commenced by Hore against Whitney to have the deed declared to be a mortgage. Upon the trial of that case special interrogatories were submitted and answered, and these findings adopted. The court decreed the deed to be a mortgage, and found that the net indebtedness from Hore to Whitney, secured by the mortgage, was \$1,785.13. This decree was entered on October 20, 1903, but for some reason Hore did not tender the money or receive the deed back for the property. Some time thereafter M. P. Gilchrist commenced an action to foreclose an attorney's lien upon lot 10. He made Elizabeth C. Myers a party defendant, and she filed an equitable counterclaim for the foreclosure of the mortgage mentioned in Hore v. Whitney. Upon the trial of that cause, the court found that there was then (December 20, 1905) due to Mrs. Myers the sum of \$1,616.06 after charging her with certain rent, which amount was declared to be a lien upon lot 10, superior to the lien of Gilchrist. A decree

of foreclosure was duly made and entered, which directed the sale of the property and the proper application of the proceeds. From that decree Mrs. Myers appealed to this court, with the result that the cause was remanded to the district court with directions to proceed to determine the amount of rent with which Mrs. Myers was properly chargeable: *Gilchrist v. Hore*, 34 Mont. 443, 87 Pac. 443. Pursuant to the directions of this court, the district court heard evidence, and thereafter modified the decree of December 20, 1905, to read that the amount then due Mrs. Myers was \$2,357.76. For some reason not apparent, there was not anything further done. A sale under the decree was not made, but Mrs. Myers continued in possession of ³⁶² the property. In the meantime Hore gave a deed to Gilchrist, by which he conveyed whatsoever interest he had in lot 10 to Gilchrist. In 1907 George Toole, as receiver of the estate of William B. Jenkins, a bankrupt, brought this present suit to quiet title, alleging that Jenkins' estate owned lot 10. Mrs. Myers, Gilchrist, and others were made defendants. By an equitable counterclaim, Gilchrist set forth the former proceedings, and asked that he be permitted to redeem lot 10, alleging that the reasonable value of the use and occupation of the property by Mrs. Myers from December 20, 1905, was \$2,200, and that she had committed waste on the property to the extent of \$500. In an answer to this counterclaim, Mrs. Myers denied many of the allegations made by Gilchrist, and alleged affirmatively that there was then due her upon her mortgage the sum of \$2,681. The cause was tried in October, 1907, and taken under advisement by the court, which thereafter, in June, 1908, made its findings of fact and conclusions of law and ordered a decree, which was entered. The court accepted the statement in the decree of December 20, 1905, as amended, for the amount then due Mrs. Myers, but erroneously stated the amount to be \$2,351.76 instead of \$2,357.76, computed interest thereon at the rate of eight per centum per annum to the date of the decree, gave Mrs. Myers credit for taxes paid, in all amounting to \$2,890.29, and then charged her with the reasonable value of the use and occupation of the property from January 9, 1906, to the date of the decree, at the rate of \$65 per month, amounting to \$1,917.50, and also charged her with \$100 for waste committed on the property, leaving the net amount due her upon her mortgage, \$976.98, and provided in the decree for a redemption of the property by Gilchrist upon his paying to Mrs. Myers that amount. From this judgment and an order denying her a new trial Mrs. Myers appealed.

We have encountered great difficulty in attempting to determine just what matters are urged upon us for determination. Many questions are propounded in the brief of counsel for appellant, but some of these at least are not raised by

the specifications of error, and some of the specifications assigned are not ³⁶³ argued, or, if argued at all, are considered with others in such manner as to destroy their identity. We have endeavored to consider all questions which appear to us to be properly before us.

1. Some of the questions suggested by counsel have been set at rest by the former proceeding. For instance, the ownership of this property is not open to further inquiry. That question was determined in *Hore v. Whitney*. It was there decided that Hore owned the property and that Mrs. Whitney (now Mrs. Myers) had only a mortgage upon it, and that judgment is conclusive upon the question of ownership.

2. While there are some cases holding that in a bill to redeem it is necessary to allege a tender, this is not the general rule. It is generally held sufficient that the bill discloses a readiness and intention to pay the amount found due. This is the effect of the decision in *Mack v. Hill*, 28 Mont. 99, 72 Pac. 307, and is the rule announced in 17 *Encyclopedia of Pleading and Practice*, 965, and 8 *Current Law*, 1042. The function of a suit to redeem is to adjust the equities of the parties (8 *Current Law*, 1041); and, where a deed absolute on its face is decreed to be a mortgage, some kind of an accounting is usually necessary, and, because of this fact, it is generally impossible for the party seeking to redeem to make a tender, since the amount due is unliquidated and uncertain. This is true of the suit before us. If Gilchrist had assumed to make a tender, he would have been altogether uncertain as to the amount to be tendered. The rule is well stated in 27 *Cyc.* 1855, as follows: "Where the bill for redemption is framed on the theory that the mortgage debt or some portion of it is still due, it must confine a tender or offer to pay the sum so admitted. If the amount due is unliquidated or disputed, it is sufficient to offer to pay such sum as the court shall find or determine to be justly due, or whatever sum may be found to be due upon taking and stating the account between the parties; and no such offer is necessary where plaintiff alleges that defendant has been already overpaid out of the proceeds of the property."

³⁶⁴ 3. It is contended that the court was in error in charging Mrs. Myers with waste; but we think the court's holding correct. It is a general rule that "a mortgagee is chargeable for waste committed by him on the premises while in his possession, including the permanent depreciation in the property caused by the failure to make necessary or proper repairs, or resulting from the reckless or improvident management of the property by himself or his tenants": 27 *Cyc.* 1838.

4. Complaint is made in the brief that there was not any allowance made to Mrs. Myers for repairs, improvements, insurance, or for her services in caring for the property. But

our attention is not directed to any evidence upon these matters which was excluded, or any offer of proof which was refused. Of course, if the court excluded the evidence, it could not find upon these questions. But there are not any specifications of error directed to the refusal of the court to hear testimony upon any of those questions. If any errors were committed with respect to any or all of these matters, it was the duty of counsel to point out such errors to this court: for it is not the duty of this court to search the record for errors. We commence our investigation of every appeal with the presumption that the trial court did not err.

5. Section 6763, Revised Codes, provides: "Upon a trial of a question of fact by the court, its decision or findings must be given in writing and filed with the clerk within twenty days after the case is submitted for decision." This cause was submitted to the court in October, 1907, but the decision of the court was not rendered until June following. It is earnestly contended that the equitable counterclaim of defendant Gilchrist should have been dismissed because of the failure of the trial court to observe the provisions of the section quoted above; but this would be a manifest injustice. The litigant is not responsible for the failure of the court to perform its duty. If Mrs. Myers had desired action upon the matter at an earlier date, this court was open to her to apply for a writ of mandate to compel the district court to decide the case. California and Utah each has a statute similar to our section 6763 above, and ³⁶⁵ in each state it has been held that the statute is directory, and the failure of the court to render its decision within the time limited does not deprive the court of jurisdiction to decide it at a later date (*McLennan v. Bank of California*, 87 Cal. 569, 25 Pac. 760; *Lynch v. Coviglio*, 17 Utah, 106, 53 Pac. 983), and we think this conclusion is correct.

6. It is suggested in the brief of counsel for appellant that the court did not compute interest upon Mrs. Myers' debt at the correct rate; but, when the judgment of December 20, 1905, was rendered, her debt was merged in the judgment, and the judgment draws interest at the rate of eight per cent per annum (section 5214, Revised Codes), and this appears to have been the rate considered by the court.

7. It is a rule of well-nigh universal recognition that, "on redemption from a mortgage under which the mortgagee has acquired and retained possession, he must account and give credit for the rents and profits of the premises during the period of his occupation, and it is immaterial whether he holds under a formal mortgage or under a deed absolute in form but intended as a security": 27 Cyc. 1878. But the extent to which this rule is to be carried is involved in some obscurity. However, after a somewhat extended review of

the authorities, we think the doctrine most harmonious with reason and equity is that: "If the mortgagee personally retains possession of the mortgaged premises, he will be chargeable on his accounting with the reasonable value of the use and occupation thereof, amounting to the fair rental value of the premises for the period": 27 Cyc. 1841. This same rule applies if a mortgagee, though himself not actually in possession, does not keep an accurate account of the rents received and is guilty of such misconduct as to make a resort to this rule equitable, or if such mortgagee has not exercised reasonable care in selecting an agent to look after the property, or if, having exercised due care in selecting an agent, the agent does not exercise reasonable care to keep the property rented. But, on the other hand, if the mortgagee by reason of his absence or other excuse is not personally in possession of the property, but depends upon the interposition of an agent, and ³⁶⁶ if in selecting such agent the mortgagee exercises due care, and if then such agent further exercises reasonable care to keep the property rented at a fair rental, then the mortgagee will be chargeable with rents actually received, and not with the value of the use and occupation of the property. These rules seem to have the support of the authorities: 2 Jones on Mortgages, 6th ed., sec. 1122; 27 Cyc. 1841; Moshier v. Norton, 100 Ill. 63; Gerrish v. Black, 104 Mass. 400; Montague v. Boston etc. R. Co., 124 Mass. 242.

This record discloses that Mrs. Myers lives in California, and also employed an agent in Butte to look after this property. The evidence does not disclose that her occupancy of the property was wrongful, so as to bring her within the operation of the rule announced in section 6069, Revised Codes. However, in computing the amount of rent with which Mrs. Myers was chargeable, the trial court adopted the rule of the value of the use and occupation of the property, and that, too, without regard to the care exercised by Mrs. Myers in having the property managed. In this we think the court erred.

A new trial of all of the issues does not seem to be necessary, and the motion for a new trial will be denied. The cause is remanded to the district court, with direction to determine the amount of rent with which Mrs. Myers is properly chargeable, according to the views herein expressed, to compute the interest upon \$2,357.76, instead of \$2,251.76, and to further modify the decree by limiting the time within which the respondent Gilchrist shall effect a redemption, and the time ought not to exceed ninety days from the time the decree is finally entered as modified. When the court has finally determined the amount of rent with which Mrs. Myers is properly chargeable, it will then modify the judgment ac-

according to the suggestions here made. Remanded for further proceedings.

Remanded.

Mr. Chief Justice Brantly and Mr. Justice Smith concur.

A Mortgagee in Possession is One who has possession of the mortgaged premises under such circumstances as to make the satisfaction of the lien a prerequisite to his being dispossessed: *Stouffer v. Harlan*, 68 Kan. 135, 104 Am. St. Rep. 396. As a general rule a mortgagee in possession is bound to exercise the same care and supervision over the property that a prudent man would exercise over his own. He must not permit nor commit waste: See the note to *Caldwell v. Hall*, 4 Am. St. Rep. 69. As to the measure of his liability for the use of the property, or for rents and profits, see the note to *Caldwell v. Hall*, 4 Am. St. Rep. 70; subsequent authorities on this question are *Witherington & Co. v. Mason*, 86 Ala. 345, 11 Am. St. Rep. 41; *Stout v. Philippi Mfg. etc. Co.*, 41 W. Va. 339, 56 Am. St. Rep. 843; *Long v. Richards*, 170 Mass. 120, 64 Am. St. Rep. 281; *Felino v. Newcomb Lumber Co.*, 64 Neb. 335, 97 Am. St. Rep. 646; *New England Mortgage etc. Co. v. Fry*, 143 Ala. 637, 111 Am. St. Rep. 62. A mortgagee in possession is said to be not liable for more than the rents actually received, unless he is guilty of fraud or negligence: *Turner v. Johnson*, 95 Mo. 431, 6 Am. St. Rep. 62; but if there has been bad faith on his part, he is liable for such rental as might have been earned by prudent management; *Long v. Richards*, 170 Mass. 120, 64 Am. St. Rep. 281. As to his right to compensation or reimbursement for repairs or improvements which he makes on the premises, see *Lynch v. Ryan*, 137 Wis. 13, 129 Am. St. Rep. 1040.

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[39 Mont. 374, 102 Pac. 981.]

APPEAL.—The Law Favors the Right of appeal. (p. 583.)

APPEAL.—A Substantial Compliance With the Statutes and Rules of court in taking an appeal is all that is required; and the dismissal of an appeal on purely technical grounds will not be ordered. (p. 583.)

ADVERSE USER OF WATER RIGHT—Evidence and Burden of Proof.—One who asserts a water right by virtue of adverse user has the burden of proving satisfactorily and unequivocally, the elements constituting adverse user. (p. 583.)

ADVERSE USER OF WATER—Necessary Elements.—To Acquire Ownership of a water right by adverse user, the use must be open, notorious, continuous, adverse and exclusive under a claim of right for the statutory period; the words "open" and "notorious," as thus used, are practically synonymous. (p. 584.)

ADVERSE USER OF WATER—What Constitutes.—The Mere User of Water for the statutory time is not sufficient to confer prescriptive title; but it is necessary that during the entire period an action could have been maintained against the person claiming by adverse user by the person against whom the claim is made. (p. 584.)

ADVERSE USER OF WATER—Depriving Others of Water.—

The User of Water is not adverse to the right of others unless it deprives them of water when they have need of it; and the requirements of this rule are not met by evidence that one used all the water in a creek each year at low-water season, if it appears that those against whom he asserts prescriptive title used water each year in amounts sufficient for their needs. (pp. 584, 586.)

C. B. Nolan, for the appellants.

T. J. Walsh, W. T. Pigott, Walsh & Newman and Geo. F. Cowan, for the respondents.

377 CALLAWAY, J. An extended statement of the case will not be useful. Suffice it to say that, while the district court of Broadwater county was trying the cause which seems to have involved all the waters of Crow creek, the appellants seasonably requested the court to find them to be the owners of the right to use the waters claimed by them by adverse user, rather than by appropriation. The court refused to make any finding on the subject of adverse user. It gave appellants a water right based upon appropriation solely, which made them subsequent to many other appropriators on the stream. A decree having been entered, appellants moved for a new trial, which was denied. They then appealed to this court from the order denying the motion, and from the judgment.

The respondents moved to dismiss the appeals, assigning several grounds of a technical kind. These we brush aside, because the grounds are purely technical, and because the law favors the right of appeal. A substantial compliance with the **378** statutes and the rules of this court is all that is required: *Payne v. Davis*, 2 Mont. 381; *Morin v. Wells*, 30 Mont. 76, 75 Pac. 688; *Butte Mining & Milling Co. v. Kenyon*, 30 Mont. 314, 76 Pac. 696, 77 Pac. 319.

Appellants rely upon this point alone: They say the court erred in failing to act upon their request for a finding that they were entitled to the water claimed by them by adverse use; that, upon the evidence, it should have made such a finding in their favor. We have concluded that the court did not so err.

The appellants having thus alleged themselves to be the owners of the right to use the waters claimed by them, the burden is on them to prove it: Rev. Codes, secs. 7886, 7972; Long on Irrigation, sec. 92; *Talbott v. Butte City Water Co.*, 29 Mont. 17, 73 Pac. 1111. Because of the nature of the right, the elements constituting it must be proven satisfactorily and unequivocally; and no doubtful inference will suffice. The right by adverse user, or prescription, is acquired, in some measure, by an invasion of the rights of others—it bears

a sort of kinship, by refined descent, to the "possession by bow and spear" of an earlier time; it is based upon a positive assertion of right in and by the water user in derogation of the rights of everyone else. In order to constitute an ownership by adverse user, say the authorities, the use must have been open, notorious, continuous, adverse and exclusive under a claim of right, for the statutory period, which in this state is now ten years: See *Talbott v. Butte City Water Co.*, 29 Mont. 17, 73 Pac. 1111, and authorities cited. While the authorities use both the words "open" and "notorious," the use of either would seem to be sufficient, as they are practically synonymous when used in this connection, as inspection of the dictionaries will show. We advert to this because of the contention of counsel respecting the pleadings. Because of the conclusion to which we have come, we do not make further mention of the pleadings.

It is essential that the use be shown to have been adverse. Proof of the mere use of the water during the statutory period 379 is not sufficient. It is necessary that during the entire period an action could have been maintained against the party claiming the water by adverse user by the party against whom the claim is made: *Talbott v. Butte City Water Co.*, 29 Mont. 17, 73 Pac. 1111; *Chessman v. Hale*, 31 Mont. 577, 79 Pac. 254, 68 L. R. A. 410, 3 Ann. Cas. 1038; *Norman v. Corbley*, 32 Mont. 195, 79 Pac. 1059; *Watts v. Spencer*, 51 Or. 262, 94 Pac. 39. In the case last cited, *Watts v. Spencer*, the supreme court of Oregon said: "The acts by which it is sought to establish the prescriptive right must be such as to operate as an invasion of the right of the person against whom the prescriptive right is asserted, and will give cause of action in his favor: Long on Irrigation, sec. 90. No adverse user can be initiated until the owners of the superior right are deprived of the benefit of its use in such a substantial manner as to notify them that their rights are being invaded: *Wimer v. Simmons*, 27 Or. 1, 50 Am. St. Rep. 685, 39 Pac. 6; *North Powder Co. v. Coughanour*, 34 Or. 9, 54 Pac. 223; *Bowman v. Bowman*, 35 Or. 279, 57 Pac. 546; *Boyce v. Cupper*, 37 Or. 256, 61 Pac. 642." See, also, *Bullerdict v. Hersmeyer*, 32 Mont. 541, 81 Pac. 334.

In *Talbott v. Butte City Water Co.*, 29 Mont. 17, 73 Pac. 1111, this court said: "No use of water by a subsequent appropriator can be said to be adverse to the right of a prior appropriator unless such use deprives the prior appropriator of it when he has actual need of it. To take the water when the appropriator has no use for it invades no right of his, and cannot even initiate a claim adverse to him." And in *Norman v. Corbley*, 32 Mont. 195, 79 Pac. 1059, it is said: "There is no evidence in this record that plaintiff did not have all the

water required for his use from the date of its appropriation to the time this dispute arose, and the claim of a prescriptive right cannot be maintained.”

Upon the record before us it cannot be said that appellants have proved that the use of the water has been adverse. They do not claim that there is any direct proof in the record that respondents were deprived of any water to which their appropriations entitled them, at any time when the respondents required it. They say the requisite proof is furnished by testimony ³⁸⁰ showing that at low-water season each year they took all the waters of Crow creek, thus depriving others of it, and by a statement, which is found in the record, to the following effect: The fact was established without contradiction that there was need for the water of Crow creek taken through their ditch by appellants, and that, during the irrigation season each year, each of the parties to the action had need for the water awarded them by the decree herein.

It appears that Crow creek runs a large volume of water in flood time, reaching its maximum in the month of June. Then there is abundance for all. The creek begins to recede about July 1st, and decreases until the latter part of August, when the quantity is seven hundred or eight hundred inches, perhaps less. As the stream emerges from the mountains, it is tapped by several mining ditches which convey water to an auriferous bench, which lies westerly from Radersburg. This bench is seamed by a number of gulches leading into Crow creek, three of these being named Keating, Uncle Johnny, and Charity. Placer mining has been done on this bench and in these gulches, beginning with 1867 and continuing to the present time. After the water was used for this purpose it flowed into Crow creek, whence it was taken for agricultural purposes. Appellants sought to prove that, after allowing two agricultural rights to be supplied, which they concede to be superior to their own, they took from the stream all the water at low-water season. They say that when the high water receded, as early as July 15th each year, they diverted the water by means of their mining ditches, used it for mining, and then conducted it to Keating gulch, in which they and their predecessors in interest have maintained a dam since and before the year 1884; from Keating gulch they conducted the water to their agricultural lands, and respondents never again became possessed of it. However, appellants' witnesses also testified that parties owning a ditch called the "Swede" ditch diverted large quantities of water from Crow creek for mining purposes. This water returned to Crow creek by way of Charity gulch and Swamp creek, a tributary of Crow, and thus became available to respondents. ³⁸¹ In addition to this, above the point in Charity gulch where the

water of the "Swede" ditch was used, a dam was constructed for the purpose of catching up appellants' water to convey it to Keating gulch; mining in this gulch deposited quantities of tailings, and these were "sluiced out," thus allowing the water so used to run into Swamp creek. There was no dam in Uncle Johnny's gulch, and, when mining was carried on, the waters used there ran into Crow creek. The record is not clear as to when the mining ceases each year, but there is testimony to the effect that it sometimes continued into the first week of August.

Were it to be conceded that appellants have proved their contention that after a certain date in each year they have taken all the waters from Crow creek, still the proof falls far short of completing their case. In addition to the statement in the record above quoted, that during the irrigation season of each year each of the parties to the action had need for the water awarded them by the decree, there is found in the record finding No. 40: "That each and all of the parties who made appropriations of water within these findings set forth, except those designated as for mining purposes, have used the same each year since the date of their respective appropriations, for the irrigation of their lands, and the respective amounts of water are necessary for the proper irrigation and cultivation of said lands." This finding stands unattacked and uncomplained of.

There was testimony introduced by respondents tending to show that water sufficient to mature their crops had always been available. There was no testimony to show that any of the respondents' crops had ever suffered from the want of water. The evidence indicates that the respondents, or some of them, at least, did not irrigate their hay lands after July 15th, which is the date which appellants fix as the time when they deprive the others of the water, and whether the respondents had any other crops which required water after that date is purely a matter of conjecture, upon the record.

³⁸² As appellants have failed to show in the first instance that their use of the water has been adverse, they are not in a position to avail themselves of the rule stated in *Gardner v. Wright*, 49 Or. 609, 91 Pac. 286, and *Gurnsey v. Antelope Creek etc. W. Co.*, 6 Cal. App. 387, 92 Pac. 326, upon which they rely; and as they did not, upon all the evidence in the case, prove one of the most essential elements in their alleged right, it may be said the most essential element, if any distinction is permissible, the court did not err in failing to find upon the question of adverse user submitted. The court cannot be in error in refusing to do a useless act.

The motion to dismiss the appeals is overruled, and the judgment and order are affirmed.

Mr. Chief Justice Brantly and Mr. Justice Holloway concur.

Mr. Justice Smith, being disqualified, did not hear the argument, and takes no part in the foregoing decision.

Prescriptive Title to Waters is the subject of a note to Oregon etc. Co. v. Allen Ditch Co., 93 Am. St. Rep. 711. The exclusive enjoyment of water by a riparian owner in a particular way for the length of time which is the period of the statute of limitations, enjoyed without interruption, is sufficient to raise a presumption of title as against a right in any other person which might have been, but was not, asserted: Alabama Consolidated Coal etc. Co. v. Turner, 145 Ala. 639, 117 Am. St. Rep. 61. If one person and his predecessors have used the water of a stream for forty years adversely to the alleged rights of another and his grantor, the former gains an indefeasible title to such use: Pew v. Johnson, 35 Mont. 173, 119 Am. St. Rep. 852. For other recent authorities on prescriptive rights to water, see Watkins Land Co. v. Clements, 98 Tex. 578, 107 Am. St. Rep. 653; Crawford Co. v. Hathaway, 67 Neb. 325, 108 Am. St. Rep. 647; Meng v. Coffee, 67 Neb. 500, 108 Am. St. Rep. 697; Lawrie v. Silsby, 76 Vt. 240, 104 Am. St. Rep. 927.

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[39 Mont. 382, 102 Pac. 984.]

WATERS—Mining and Agricultural Uses.—An Appropriation of Water for mining is not available for agriculture by the locator's successors, as against intervening appropriators. (pp. 589, 590.)

WATERS—Appropriation.—The Intention of a Claimant is an important factor in determining the validity of his appropriation of water; and his intention is determined by his acts, the circumstances surrounding his possession of the water, its actual or contemplated use, and the purposes thereof. (p. 590.)

WATERS—Extent of Appropriation.—The Rule is not Universal that an appropriator is entitled to all the water which will flow into his ditch at the time of the subsequent appropriation by another. The time when the first appropriator dug his ditch, his diligence in applying the water to a beneficial use, the extent of the use made by him, his needs, and the circumstances surrounding all these acts, are to be considered in determining the amount which he is entitled to in preference to the subsequent appropriator. (p. 591.)

WATERS — Appropriation — Beneficial Use. — One is not Permitted to obtain the exclusive control of an entire stream by appropriation, unless his appropriation is made for some beneficial purpose, presently existing or contemplated. (p. 591.)

WATERS—Appropriation.—The Subsurface Supply of a Stream, whether it comes from tributary swamps or runs in the sand and gravel constituting the bed of the stream, is as much a part of the stream as is the surface flow and is governed by the same rules. (p. 592.)

WATERS—Appropriation of Developed Supply.—Persons Who by their own exertions have developed a supply of water theretofore not a part of the waters of a creek and not before available to the

users of the stream, have the first right to take and use such increase. (p. 592.)

WATERS—Development Without Interference With Supply of Others.—One who asserts that he is entitled to the exclusive use of water by reason of its development by him must make satisfactory proof that he is not intercepting the supply to which others are rightly entitled. (p. 592.)

WATERS—Development of Supply, What is not.—The Rule That One is entitled to waters which he develops in a stream does not apply to cases of mere removal of obstructions or hastening of flow, so that the actual amount of water which passes along the stream is not increased, but only to cases in which a supply of water is added to the stream which otherwise would not have flowed there. (p. 594.)

C. B. Nolan, for the appellants.

George F. Cowan, for the respondents.

385 **CALLAWAY, J.** This controversy, like the last preceding one decided by the court, grows out of the Crow creek water suit. While there were many parties to that suit, the only ones who appear to be affected by this appeal are the Hossfeld Agricultural and Stockraising Company, the Smith heirs, and Ed. Hossfeld, appellants, and Blondell, Massa, and Rothfus, respondents. We shall refer to these respective parties hereafter as the appellants and respondents. The district court awarded appellants the right to use **386** five hundred and twelve inches of water diverted from Crow creek as of date May 1, 1885, through a ditch owned by them jointly. The respondents were awarded the right to use four hundred inches of the waters of the Willow Swamp as of date May 1, 1872, and the exclusive right to use one hundred and sixty inches of the waters of the swamp "by reason of water developed" by them. Respondents' waters are diverted through their "Willow Swamp canal." Appellants' ditch taps Crow creek below the mouths of all its tributaries and below the heads of the ditches of all others to the suit. The record indicates that the Willow Swamp discharges its visible waters through Marsh creek naturally; possibly some through Swamp creek. Both are important tributaries of Crow creek. Any diversion which takes the water of either of these streams lessens the quantity flowing in Crow creek; and any diversion which takes away from the swamp water which would flow naturally in either Marsh creek or Swamp creek accomplishes the same result. At the trial counsel for appellants requested the court to find respondents' rights to be later in point of time than these to be awarded the appellants, and that there was no development of water on account of work done in the Willow Swamp by the owners of the Willow Swamp canal. The court refused to so find, but found as above stated. The appellants then moved for a new trial, which was denied, where-

upon they appealed to this court from the order denying their motion and from the judgment. The respondents have moved to dismiss the appeals upon grounds similar to those lodged against the appeals of Kitto and Williams, and their motion is overruled for like reasons: *Smith v. Duff*, 39 Mont. 374, ante, p. 582, 102 Pac. 981.

1. Taking up the first right given respondents as of date May 1, 1872: It seems that four persons commenced to dig the Willow Swamp canal in the spring of 1872. They intended to convey water to a point near the Missouri river for the purpose of placer mining. The canal was completed in 1874, or 1875, probably. It was used for mining only one year, as the gold was so fine it could not be mined profitably. When the canal was constructed it absorbed a ditch belonging to the witness Ross, which had been dug in 1871. According to his statement the ³⁸⁷ diggers of the canal used the water it diverted in subordination to the right he claimed. He had been irrigating about fifteen acres by means of his ditch. It seems from his testimony—and he is the only witness who gave any direct testimony on the subject—that these men intended to use water only in the spring and fall when it was not needed by others for irrigation. They did not claim, nor did they intend to use, any water for irrigation; nor did either of them ever use any for that purpose, with the exception of MacFarlane, who possessed a small ranch and cultivated a garden. He may have irrigated ten or twelve acres. Ross diverted what water he needed from the canal at pleasure. He seems to have been recognized as an owner in it. After its completion the greatest amount of land he farmed in any year was eighty acres, but in what year this was done it is not possible to say from the record. He further testified that after the completion of the canal the only water from it which was used for irrigation was what was used by himself and MacFarlane. How comprehensive this last statement was intended to be we do not know. The witness Macomber's recollection is that the water was used first on the lands owned by respondents as early as 1880, but he would not testify positively to that. He did not give any information as to the amount of land irrigated, nor as to the quantity of water used. It is fairly deducible from the record that no greater quantity of water than that testified to by Ross as having been used by himself and MacFarlane was used by respondents or their predecessors in interest prior to 1895, which was long after the appropriation of appellants.

It is apparent from this testimony that the only rights which should be awarded respondents superior to appellants are those based upon the appropriations of Ross and MacFarlane. Not by any construction may respondents succeed to

the so-called appropriation for mining, and use it for agriculture under the conditions above set forth.

The intention of the claimant is an important factor in determining the validity of an appropriation of water. "When that is ascertained, limitation of the quantity of water necessary ³⁸⁸ to effectuate his intent can be applied according to the acts, diligence, and needs of the appropriator": *Power v. Switzer*, 21 Mont. 523, 55 Pac. 32. "As every appropriation must be made for a beneficial or useful purpose, it becomes the duty of the courts to try the question of the claimant's intent by his acts and the circumstances surrounding his possession of the water, its actual or contemplated use and the purposes thereof": *Toohey v. Campbell*, 24 Mont. 13, 60 Pac. 396; *Miles v. Butte Electric & Power Co.*, 32 Mont. 56, 79 Pac. 549.

It seems that prior to 1893, when the respondent Massa bought the MacFarlane holdings, not to exceed twelve acres had been irrigated by his predecessors in interest. Taking the most favorable view of that right, then, it should be allowed water sufficient to irrigate that amount of land; but we are unable to say from the evidence the quantity which should be fixed as determining the right without resorting to conjecture. We are not informed as to the character of the land through which the ditch runs after leaving Marsh creek, nor its length from that point to the place of use. We do not desire to guess as to the quantity of water lost by seepage and evaporation as it passes through the ditch, nor as to the quantity required to irrigate those twelve acres of land.

As above noted, the record does not show when Ross irrigated his maximum amount of land; whether it was before or after appellants' appropriation. What were his intentions when he made his appropriation? How large was his ditch? How much land did he possess, and how much did he contemplate using the water upon? How soon did he carry out his contemplated use, and to what extent? What diligence did he employ? These questions, too, we are compelled to leave unanswered.

It is said in *McDonald v. Lannen*, 19 Mont. 78, 47 Pac. 648: "The test of the extent of an appropriation with reference to a subsequent right to the waters of a stream is dependent upon the capacity of the first ditch before such subsequent appropriation is made. When an owner or possessor of land makes an appropriation of water in excess of the needs of the particular portion of the land upon which he conveys the water, and other ³⁸⁹ portions of his land also require irrigation, his water right is not limited by the requirements of the particular fraction. He may still, despite the fact that another's water right has attached, construct other ditches through his remaining land, provided that the

total amount of water conveyed by all the ditches on his place does not exceed the original capacity of the first ditch. As between his appropriation and the subsequent water right, the capacity of the ditch by means of which he first made his appropriation is the test of the extent of it." In using the language above quoted, we think the court did not mean to imply, as a rule of universal application, that an appropriator is entitled to all the water which will flow in his ditch at the time a subsequent appropriation is made by another. The prior appropriator will not be permitted to claim more than his ditch will carry; he may be, and usually is, limited to less. The time when the first appropriator dug his ditch, his diligence in applying the water to a beneficial use, the extent of the use made by him, his needs, and the circumstances surrounding all these acts, are to be considered in determining the amount which he is entitled to in preference to the subsequent appropriator. As illustrative of this: If MacFarlane had been the sole owner of the canal, which had a carrying capacity of four hundred inches, when appellants made their appropriation, and yet for twenty years prior to appellants' appropriation he had never irrigated in excess of twelve acres of land, his prior right would be confined to enough water to irrigate that land. The court would say that was all he ever intended to use, deducing his intentions from his acts during that long period of time. One is not permitted to obtain the exclusive control of an entire stream by appropriation "unless his appropriation is made for some beneficial purpose, presently existing or contemplated": *Toohy v. Campbell*, 24 Mont. 13, 60 Pac. 396. A subsequent appropriator is entitled to have the water flow in the same manner as when he located, and "he may insist that prior appropriators shall be confined to what was actually appropriated or necessary for the purposes for which they intended to use the water": *Spokane Ranch & ³⁹⁰ Water Co. v. Beatty*, 37 Mont. 342, 96 Pac. 727, 97 Pac. 838, and authorities cited.

A final conclusion of this case by the court would be based, not only upon conjecture to a considerable extent, but also upon the assumption that there is no evidence obtainable upon which to adjudge rightly the Ross and MacFarlane rights. The paucity of facts to sustain their rights is attributable to respondents, and probably they could not be heard to complain if we should pass a final judgment upon the record as it stands. However, we think the interests of justice will be subserved best by giving them and their adversaries, the appellants, an opportunity to dissipate the mist which permeates this record now, and have concluded to remand the case for further proceedings.

2. As to the developed water: The court found the respondents to be entitled to the use of one hundred and sixty inches

of the waters of the Willow Swamp "as against every other party to this suit by reason of water developed by said defendants by the draining of said Willow Swamp by the Willow Swamp canal."

From the map in evidence it seems that Willow Swamp covers an area of approximately a square mile. Further than this the record furnishes us with little information as to its character. It is referred to simply as a swamp. The so-called original channel of Swamp creek passes through a portion of it. Marsh creek is "the child of the swamp." Whatever water it has produced in the course of nature undoubtedly is tributary to Crow creek. Whether the water which saturates the swamp comes from subterranean springs, or through percolation from higher adjacent lands, or whether it is in part supplied by a subsurface flow in the bed of the original channel of Swamp creek or in the lands adjacent thereto, we are not advised. Neither are we informed as to its surface flow during different periods of the year, except in the instances hereinafter referred to. It must not be forgotten that the subsurface supply of a stream, whether it comes from tributary swamps or runs in the sand and gravel constituting the bed of the stream, is as much a part of the stream as is the surface flow and is governed by the same rules: *Buckers I. M. & I. Co. v. Farmers' Independent Ditch Co.*, 31 ³⁹¹ Colo. 62, 72 Pac. 49; *Howeroft v. Union & Jordan I. Co.*, 25 Utah, 311, 71 Pac. 487. These inquiries are pertinent, for if the respondents have not added to the waters natural to Crow creek, they may not take any of them to the deprivation of prior appropriators. If by their own exertions they have developed a supply of water theretofore not a part of the waters of Crow creek and not before available to the users of the stream, they have the first right to take and use such increase: *Beaverhead Canal Co. v. Dillon Electric L. & P. Co.*, 34 Mont. 135, 85 Pac. 880. "It is only the actual increase resulting from the addition of water to a natural stream which would not otherwise pass down either its surface or subterranean channel to the benefit of other prior appropriators which the law recognizes as an increase of that character which can be diverted as against those entitled to its natural flow": *Buckers I. M. & I. Co. v. Farmers' Independent Ditch Co.*, 31 Colo. 62, 72 Pac. 49.

Whoso asserts that he is entitled to the exclusive use of water by reason of its development by him must assure the court by satisfactory proof that he is not intercepting the supply to which his neighbor is rightly entitled. Thus the burden was on the respondents to prove that they developed the one hundred and sixty inches of water awarded them by the court in addition to the natural supply of Crow creek (*Howeroft v. Union & Jordan I. Co.*, 25 Utah, 311, 71 Pac. 487; *La Jara*

Creamery & L. S. A. v. Hansen, 35 Colo. 105, 83 Pac. 644); this proof necessarily would have given assurance that in taking the alleged new supply they did not diminish the quantity of the principal stream. We recognize the difficulty of making proof in cases like this, and have searched the record carefully to see if respondents produced evidence to substantiate the court's findings, but we have searched in vain.

The Willow Swamp canal commences near the head of the swamp, runs through it, occupies the bed of Marsh creek for a short distance, and then proceeds to the ranches of respondents. In October, 1895, the respondents began to run lateral ditches from the canal toward the head of the swamp, and the work was completed September 30, 1896. How much work was done ³⁹² the record does not show. One of them, Massa, says it increased the flow in the canal about one-half. Whether this was a permanent increase is left to conjecture. The proof is not of such a character as to permit the indulgence of the presumption that a thing once proved to exist continues as long as is usual with things of that nature": Rev. Codes, sec. 7962, subd. 32. The witness Macomber made measurements of the water running in the canal both before and after the work. In September, 1895, he found three hundred and twenty-four inches, and on October 30, 1896, five hundred and thirteen inches flowing therein. He says there was "quite a good rain" before the measurement of 1895, and "a couple of pretty good rains" before that of 1896, and that rain affects the swamp; "the water raises to the top of the ground as quick as there is rain." He said he could not tell whether the difference in the two measurements was due to work done or to rain, and that he did not know the supplying agencies of the swamp, but that irrigation on the land above has a tendency to increase its waters. Where the lateral ditch ran into his field it was "one spade deep" and probably two feet wide. No other dimensions of laterals are given. The witness Ross testified that lateral ditches were run in the swamp "to increase the water" as early as 1879 or 1880, but whether this work effected any permanent increase is also conjectural.

In August, 1906, one hundred and sixty-eight inches of water flowed in the canal above, and one hundred and eighty-two inches below, its junction with Marsh creek. The last point mentioned seems to be the point where Macomber made his measurements. This indicates that the water produced by the swamp has decreased very materially since 1896, or that it produces more water in the fall than it does in the summer. If the latter supposition be true, it is consistent with the testimony of Macomber, who is of the opinion that the swamp is largely supplied by water from the irrigation of lands above.

It is a matter of common knowledge that the flow from irrigated lands is heaviest in the fall.

It is questionable whether the running of the laterals did more than to facilitate the outlet of the surface waters with which the swamp was saturated. Removing obstructions and making easy ³⁹³ the flow of water would increase the output for a time undoubtedly, but this does not even imply that such work has tended to develop the water. "The rule does not apply to mere removal of obstructions or hastening of flow, so that the actual amount of water which passes along the stream is not increased, but only to cases in which a supply of water is added to the stream which would not otherwise have flowed there": *Beaverhead Canal Co. v. Dillon Electric L. & P. Co.*, 34 Mont. 135, 85 Pac. 880. It is readily appreciated that where waters are impounded, as for instance in a swamp, with no natural means of escape, and one, by work done, releases them and provides a permanent supply of water for use which had theretofore not been available, he may be said to have developed the water. This is quite a different matter from draining a swamp. Draining a swamp exhausts it and causes it to dry up, and this the use of the word "drain" necessarily implies.

The record is absolutely barren of testimony indicating that the respondents through their exertions have added a single drop to the waters of Crow creek. It is possible, upon a further hearing of this phase of the case, that respondents will be able to establish as a fact that they have developed water in the Willow Swamp. Before proceeding further, however, they should ask permission of the lower court to amend their answers to warrant the reception of evidence upon that feature of the case.

The judgment is reversed and the cause is remanded. The district court of Broadwater county is directed to make findings respecting the rights of appellants and respondents in accordance with the views expressed in this opinion, upon the evidence already in the record, and such other evidence as the parties may be able to furnish the court upon the points at issue.

Reversed and remanded.

Mr. Chief Justice Brantly and Mr. Justice Holloway concur.

Mr. Justice Smith, being disqualified, did not hear the argument, and takes no part in the foregoing decision.

What Constitutes an Appropriation of Water is the subject of a note to *Nevada Ditch Co. v. Bennett*, 60 Am. St. Rep. 799. Appropriation of water consists of its diversion by some adequate means, and its application to a beneficial use: *Farm Investment Co. v. Carpenter*, 9 Wyo. 110, 87 Am. St. Rep. 918. To a valid appropriation three

elements must exist: 1. Intent to appropriate it to some beneficial use existing at the time or contemplated in the future; 2. A diversion from the natural channel by means of a ditch, canal, or other structure; 3. The application of it within a reasonable time to some useful industry: *Nevada Ditch Co. v. Bennett*, 30 Or. 59, 60 Am. St. Rep. 777.

The Extent of an Appropriation of Water is Determined by the reasonable necessity for its use, the intention of the appropriator followed by reasonable diligence in executing such intent, and the purpose of the appropriation: *Elliot v. Whitmore*, 23 Utah, 342, 90 Am. St. Rep. 700. See, also, *Hague v. Nephi Irrigation Co.*, 16 Utah, 421, 67 Am. St. Rep. 634; *Wimer v. Simmons*, 27 Or. 1, 50 Am. St. Rep. 685; *Kleinschmidt v. Greiser*, 14 Mont. 484, 43 Am. St. Rep. 652; *Combs v. Agricultural Ditch Co.*, 17 Colo. 146, 31 Am. St. Rep. 257. As sometimes said, the amount of an appropriation of water is in every instance limited to the uses for which it was made, and restricted to the quantity needed for the purpose: *Nevada Ditch Co. v. Bennett*, 30 Or. 59, 60 Am. St. Rep. 778.

Water must be Applied to a Beneficial Use Within a Reasonable Time after its diversion, in order to constitute a legal appropriation; and the amount of water appropriated must be restricted to the quantity needed for such purpose: *Simmons v. Winters*, 21 Or. 35, 28 Am. St. Rep. 727; *Cache La Poudre Reservoir Co. v. Water Supply etc. Co.*, 25 Colo. 161, 71 Am. St. Rep. 131; *Moyer v. Preston*, 6 Wyo. 308, 71 Am. St. Rep. 914.

COPPER MOUNTAIN MINING AND SMELTING COMPANY v. BUTTE & CORBIN CONSOLIDATED COPPER AND SILVER MINING COMPANY.

[39 Mont. 487, 104 Pac. 540.]

MINING—Work on One Claim for Benefit of Group.—The annual expenditure required by the federal statute to preserve the title to mining claims may be made in work or improvements within the boundaries of the claims themselves, or upon one of a group of contiguous claims, or upon adjacent patented land, or even upon adjacent public land, provided only it is made for the purpose of developing the claims and to facilitate the extraction of ore therefrom. (p. 598.)

MINING—Work on One Claim for Benefit of Group.—If representation work is not a part of a general plan having in view the development of a group or a consolidated claim, so that the ore may be more readily extracted, and has no reasonable adaptation to that end, then no matter what the amount of work is, it cannot be said to have been done in the development of the group. In such cases it is usually a question of fact for the court or jury, as the case may be, to say upon the evidence whether the requirements of the law have been met. (p. 599.)

MINING—Enforcement of Forfeitures—Pleading and Proof.—Courts are reluctant to enforce a forfeiture of a mining claim for failure to perform the work or improvements required by law, and one who claims such a penalty to defeat the title of his adversary must plead it specially and establish it by clear and convincing proof. (p. 599.)

MINING—Work on One Claim for Benefit of Group—Burden of Proof.—If the defendant claims a forfeiture for default in repre-

sensation work, but the plaintiff contends that work done on one of the group of claims was for the benefit of all, the burden shifts to the plaintiff to show that such work was adapted and intended for that purpose. (p. 599.)

MINING—Work on One Claim for Benefit of Group.—It is **Primarily** a question for the trial court to determine whether the proof that representation work done upon one claim will inure to the benefit of others in the group; and in equity cases, though the supreme court may examine the evidence and determine the question of fact for itself, it will not overturn the findings of the trial court unless there is a decided preponderance of evidence against them. (pp. 599, 600.)

MINING—Work on One Claim for Benefit of Group.—The purpose for which representation work on a claim is alleged to have been done, when it is sought to be availed of for the benefit of adjacent claims, must always be manifested by the relation which it bears to the claim itself; if the plan pursued can have no reasonable adaptation to its alleged purpose, the mere assertion that it was pursued for that purpose does not suffice, even though good faith in its pursuit be conceded. (p. 600.)

Lewis P. Forestell, for the appellant.

Walsh & Nolan, for the respondent.

489 **BRANTLY, C. J.** The defendant, claiming to be the owner of certain mining ground in Jefferson county under quartz locations designated as the Mammoth, Rarus, Tucker, Anaconda, and Big Butt quartz mining claims, applied to the United States for patents therefor. The plaintiff, claiming a prior right to a portion of the ground under quartz locations designated as the Florence, Jack Taylor, Elaine, Tyrant, Sailor Boy, Stella, Forest, Black Horse, and Twin Boy, filed its adverse claims in the United States land office, and brought this action to determine the right to the possession of the portion in controversy in pursuance of the requirements of the federal statute: Comp. Stats. U. S. 1901, sec. 2326, p. 1430. The pleadings are in the form usually pursued in such actions. One of the defendant's claims—the Tucker—was located on February 14, 1907; the others on March 12, 1907. Of the plaintiff's claims, the Stella was located on April 1, 1902, the Florence, Jack Taylor, Elaine, Tyrant, Sailor Boy and Black Horse were located on October 10, 1903, and the Forest and Twin Boy on October 8 and 23, 1903, respectively.

While some question was made at the trial as to the sufficiency of the declaratory statements filed by the respective parties, by objection to their admission in evidence, notice of these features **490** of the case is not necessary, since they are not seriously urged upon our attention, the only serious contention arising upon the sufficiency of the evidence to sustain the findings of the trial court upon the defendant's plea of forfeiture by the plaintiff for failure to do the representation work upon its claims during the year 1906. The findings were in favor of the defendant. The cause is before us on

plaintiff's appeals from the judgment entered upon the findings, and from an order denying its motion for a new trial.

In addition to the claims enumerated above to which plaintiff alleges title, it owns others which are not in controversy in this cause. The record contains no map or plat of the claims of either of the parties, and it is somewhat difficult to understand and show clearly their relative situation. As near as we have been able to gather a knowledge of it from the statements of witnesses and the briefs of counsel, the situation may be described as follows: The claims of plaintiff here involved are situated on the side of Valparaiso Mountain toward the southwest. On that side is a deep gulch, extending along the base of the mountain from the southeast toward the northwest. Beyond this, toward the southwest, is a low hill or spur, extending back into the mountains toward the west and northwest. Upon this is situated the M. L. claim, several hundred feet distant from the claims in controversy. Other claims of the plaintiff, intervening between this and the claims in controversy, lie in the gulch or extend into it from both sides in such a manner as to constitute them all in a contiguous group. The defendant's claims also lie upon the side of Valparaiso Mountain, toward the southwest, and hence the conflict with plaintiff's claims. Prior to the year 1905 the annual representation work necessary to preserve title to plaintiff's claims had been done by sinking a shaft near the bottom of the gulch. So far as the evidence in the record shows, this shaft was so situated that it could have been used as a means of developing all the claims in the group and for the extraction of ores found in any of them. During that year the plaintiff, having concluded that the continuance⁴⁹¹ of the work at this point would be attended with a greater outlay than the circumstances would justify, determined to transfer its operations to a tunnel which had been started by its predecessors on the M. L. claim on a level about forty-two feet above the mouth of the shaft and the bottom of the gulch, and extending toward the southwest. For that and the following year the representation work was done by extending this tunnel; and so it was continued thereafter, the purpose being, as stated by an officer of the company, to intercept a vein appearing in a shaft which had theretofore been sunk on the M. L. claim from the top of the hill. During the year 1906, the tunnel was extended one hundred and forty-six feet in the same general direction. Up to this depth it is parallel with the apparent strike of the vein exposed in the shaft on the M. L. claim. Continued in this direction it would miss the vein entirely and pass through the hill. Subsequent to the bringing of this action its direction was changed, first to the south and then to the east, with the result that the vein in the M. L. was finally intercepted at a distance of more than

five hundred feet from its mouth. If driven in its final direction, it would reach the surface of the hill to the east or northeast on a level forty-two feet or more above the bottom of the gulch. This was the situation of affairs at the time of the trial.

Defendant's evidence, besides showing that the work of development and incidentally that of representation for the year 1906, had all been done in the tunnel as heretofore stated, and that this was the only work that had been done upon any of the group of claims, tended strongly to show that the tunnel could not, within the range of reasonable possibility, be availed of to develop any of the claims on Valparaiso Mountain. The contention of the plaintiff was, and it undertook to show by its witnesses, that by sinking upon the vein at the point of its interception by the tunnel it could drive a cross-cut or drift under the gulch and thus develop and mine the claims beyond, and that the tunnel had been driven with this end in view. There is no controversy but that the expenditure made in the ⁴⁹² tunnel in 1906 was sufficient in amount to represent all the claims in the group. The evidence is silent as to whether the vein intercepted in the tunnel is the discovery vein of the M. L.; and, while there is some evidence tending to show that its strike is in the general direction of some of plaintiff's claims across the gulch, there is none furnishing a substantial basis for the inference that it crosses the gulch in their direction or that tends to identify it with any vein found in any of them. Many witnesses, practical miners and mining engineers, were examined, who expressed opinions in support of the claims of the respective parties, giving their reasons therefor. The statements of these witnesses cannot be reconciled.

It is now well settled that the annual expenditure required by the federal statute to preserve the title to mining claims may be made in work or improvements within the boundaries of the claims themselves, or upon one of a group of contiguous claims, or upon adjacent patented land, or even upon adjacent public land, provided only it is made for the purpose of developing the claims and to facilitate the extraction of ore therefrom: *Strasburger v. Beecher*, 29 Mont. 143, 49 Pac. 740; *Power v. Sta.*, 24 Mont. 243, 61 Pac. 468; *Had v. Kearny*, 18 Cal. 505, 33 Pac. 373; *St. Louis Smelting & R. Co. v. Kearny*, 164 U. S. 636, 26 L. ed. 875; *Jackson v. Roby*, 109 U. S. 449, 3 Sup. Ct. Rep. 391, 27 L. ed. 199; 2 *Lindley on Min.*, § 27, 100 U. S. 629, 631. In *St. Louis Smelting & R. Co. v. Kearny*, 164 U. S. 636, 26 L. ed. 875, it is said: "Labor and improvements within the meaning of the statute are deemed to have been made upon a mining claim, whether it consists of one lode or several, when the labor is performed or the improvements are made for its development—

that is, to facilitate the extraction of the metals it may contain—though, in fact, such labor and improvements may be on ground which originally constituted only one of the locations, as in sinking a shaft, or be at a distance from the claim itself, as where the labor is performed for the turning of a stream, or the introduction of water, or where the improvement consists in the construction of a flume to carry off the debris or waste material. It would be ⁴⁹³ absurd to require a shaft to be sunk on each location in a consolidated claim when one shaft would suffice for all the locations.” The language used by the court evidently means that, if the work done on one of the claims has no reference to the other claims in a group or does not tend to develop all of them in conformity with a general plan adopted with that purpose in view, it cannot be considered as work done upon them as a group or consolidated claim. This view is borne out by the decision in *Jackson v. Roby*, 109 U. S. 440, 3 Sup. Ct. Rep. 301, 27 L. ed. 990, where the above passage is quoted in support of a statement made in defining the meaning of the statute: “In such case the work or expenditure must be for the purpose of developing all the claims. It does not mean that all the expenditure upon one claim, which has no reference to the development of the others, will answer.” If the work is not a part of a general plan having in view the development of the group or consolidated claim, so that the ore may be more readily extracted, and the work has no reasonable adaptation to that end, then no matter what the amount of it is, it cannot be said to have been done in the development of the group. In such cases it is usually a question of fact for the court or jury, as the case may be, to say upon the evidence whether the requirements of the law have been met.

The courts are reluctant to enforce forfeitures. He who claims such a penalty to defeat the title of his adversary must plead it specially, and, besides, must establish it by clear and convincing proof: *Strasburger v. Beecher*, 20 Mont. 143, 49 Pac. 740. Nevertheless, when it appears, as in this case, that the representation work done was not done upon all the claims, but upon one only of the group for the alleged benefit of all, then the burden shifts, and the requirement that the work must be adapted to the development of all the claims and was intended for that purpose must be met. This rule is recognized by all the authorities, so far as they have been called to our attention: *Hall v. Kearney*, 18 Colo. 505, 33 Pac. 373; *Copper Glance Lode*, 29 Land Dec. 542; 2 *Lindley on Mines*, 2d ed., sec. 631. It is primarily a question within the province of the trial court to determine whether ⁴⁹⁴ the proof is sufficiently clear and convincing to satisfy the requirement; and in equity cases, such as this, though this court may examine the evidence and determine the question of fact for itself

(Rev. Codes. sec. 6253), yet it may not overturn the findings of the trial court unless there is a decided preponderance of the evidence against them: *Bordeaux v. Bordeaux*, 32 Mont. 159, 80 Pac. 6; *Finlen v. Heinze*, 32 Mont. 354, 80 Pac. 918; *Watkins v. Watkins*, 39 Mont. 367, 102 Pac. 860.

Taking into consideration the position of the M. L. claim, with reference to the others in the group, the fact that the tunnel is across the gulch from the others; that it is on a level above the bottom of the gulch; that it extends away from all of the claims in controversy; that it was intended primarily to intercept the vein in the M. L. claim; that it does not appear that this vein traverses any of the other claims or even crosses the gulch in their direction; that, in order to render the tunnel available to develop any of them, it will be necessary to sink a shaft or winze to a depth below the level of the gulch and drift to the eastward many hundreds of feet; that to carry out this plan it will be necessary to install heavy and expensive machinery at the collar of the proposed shaft or winze, to raise the ores, and waste and water encountered, to the level of the tunnel in order to convey them to the surface, whereas this could all have been accomplished with less expense and much more convenience by the use of the shaft in the gulch—taking into consideration the whole of the environment, we think the trial court was justified in its conclusion that the forfeiture alleged by the defendant was clearly and satisfactorily established. The conclusion seems unavoidable that the purpose in extending the tunnel was primarily to encounter pay ore in the M. L. claim, and that it could not reasonably have been intended as a part of any general plan to develop the claims across the gulch or any of them.

Counsel for plaintiff contends that it appears that the work was done by the plaintiff on the M. L. in good faith for the purpose of developing the group of claims, and that the court ⁴⁹⁵ should not be permitted to substitute its own judgment as to the wisdom or expediency of the method employed by the owner in adopting the plan pursued. As an abstract proposition we think counsel states the correct rule: *Mann v. Budlong*, 129 Cal. 577, 62 Pac. 120; *Gear v. Ford*, 4 Cal. App. 556, 88 Pac. 600. Nevertheless, the purpose for which the work is alleged to have been done must always be manifested by the relation which it bears to the claim itself. If the plan pursued can have no reasonable adaptation to its alleged purpose, the mere assertion that it was pursued for that purpose does not suffice, even though good faith in its pursuit be conceded.

The judgment and order are affirmed.

Affirmed.

Mr. Justice Smith and Mr. Justice Holloway concur.

Work on One Mining Claim for the Benefit of All the Claims constituting a group is discussed in the note to McKay v. McDougall, 87 Am. St. Rep. 411, and in the recent case of Hawgood v. Emery, 22 S. Dak. 573, post, p. 941.

A Forfeiture of a Mining Claim takes place by operation of law, without regard to the intention of the locator, whenever he neglects to make the required annual expenditure on the claim within the time allowed: McKay v. McDougall, 25 Mont. 258, 87 Am. Rep. 411. But a forfeiture cannot be established except by clear and convincing evidence, and the burden of proof rests upon him who claims that a forfeiture has occurred: Buffalo Zinc etc. Co. v. Crump, 70 Ark. 525, 91 Am. St. Rep. 87.

CASES
IN THE
SUPREME COURT
OF
NEBRASKA.

CURRIER v. TESKE.

[84 Neb. 60, 120 N. W. 1015.]

HUSBAND AND WIFE.—A Deed of Conveyance Direct from Husband to Wife without the intervention of a trustee, made in good faith, and not in fraud of creditors, is valid both in law and equity, and operates to pass the full title and estate which it purports to convey. In so far as Aultman, Taylor & Co. v. Obermeyer, 6 Neb. 260, and Johnson v. Vandervort, 16 Neb. 144, hold to the contrary, such cases are overruled. (p. 605.)

MORTGAGE FORECLOSURE.—Purchase by Mortgagee and Assignment of Bid.—A mortgagee purchased at the foreclosure sale through an agent, and the sale was confirmed to him. Prior to the sale the agent had been negotiating with one Schmideke for the sale of the land. After confirmation the agent completed the sale to Schmideke, and caused the sheriff to execute a deed direct to him, reciting that Schmideke was the purchaser at the sale. The agent delivered the deed to Schmideke, and received the amount of the bid therefor. Held, after the lapse of more than twenty years, the mortgagee having made no claim that the deed was void, and by his agent having received the purchase money, that an assignment of the bid and purchase will be presumed, and the sheriff's deed will be held sufficient to pass all the rights of the original purchaser to the grantee. (p. 606.)

MORTGAGE FORECLOSURE.—Title Acquired by Purchaser.—The purchaser at a foreclosure suit buys all the interests of the parties to the suit. (p. 606.)

MORTGAGE FORECLOSURE.—The Owner of an Estate by the Curtesy in certain land was made defendant to an action to foreclose a mortgage given by the wife in her lifetime. His son, who had inherited the estate subject to his life estate, was not brought in. Held, that the sale on foreclosure could only convey the life estate of the defendant, even though the purchaser may have believed he acquired the whole title. (pp. 606, 607.)

EJECTMENT.—Time for Action Against One Claiming Under Life Tenant.—An action of ejectment is prematurely brought against one claiming under a life tenant, if begun before the death of such tenant. Such action, however, is no bar to a subsequent action seasonably instituted. (p. 607.)

(Syllabi by the court.)

Ejectment, the plaintiff claiming as heir of his mother, Mary J. Currier. The plaintiff's father, Eugene R. Currier, being then the owner of the property, in 1873, conveyed by deed of warranty to his wife, the mother of the plaintiff, for the nominal consideration of one dollar. She and her husband mortgaged the land to John Campbell. She soon afterward died intestate, leaving surviving her husband and the plaintiff, then a minor four years of age. In 1881, proceedings were commenced for the foreclosure of this mortgage, to which the father was made a party, and the son was not. A decree resulted, and a sale thereunder to the mortgagee, Campbell. This sale having been confirmed, the court ordered a deed to be executed to the purchaser. Instead of so making the deed, the sheriff executed one to one Schmideke pursuant to an arrangement between him and Campbell. The grantee in this deed went into possession and so continued, claiming thereunder, until his death in 1891, and the defendants in this action claimed under Schmideke. The trial court gave judgment for the defendants. The plaintiff appealed. The supreme court, on this appeal, affirmed the judgment, but afterward granted a rehearing.

Willis E. Reed and Wm. V. Allen, for the appellant.

M. D. Tyler and J. J. Sullivan, for the appellees.

61 LETTON, J. The facts in this case are fully stated in the former opinion, 82 Neb. 315, 117 N. W. 712. In that opinion it was held that the defendants were mortgagees in possession, and that, since the plaintiff had not tendered or offered to pay the amount of the mortgage debt, he could not maintain ejectment. A motion for rehearing was filed, accompanied by a request that, if the court still held upon a rehearing that the defendants were mortgagees in possession, the plaintiff might be permitted to amend his petition so as to offer to pay the amount properly due under the mortgage. A rehearing was allowed, the case argued and submitted to the court, as augmented by the adoption of the constitutional amendment, and is now before us for decision. In the view the court takes, it becomes necessary to consider several points argued, but not decided, at the former hearing.

1. The nature of the estate, if any, conveyed by the deed made directly from Eugene Currier to his wife, Mary J. Currier, must be determined. As to the legal effect of a deed direct from husband to wife, the former opinions of the court are difficult to reconcile. In *Aultman, Taylor & Co. v. Obermeyer* (1877), 6 Neb. 260, opinion by Maxwell, J., it was held that by the common law neither husband nor wife could convey lands to each other, that our law still regards them in relation to each other as one person, notwithstanding the stat-

utes enlarging the rights of the wife, and it was further held that a deed of conveyance direct from husband to wife is "absolutely void." In *Berkley v. Lamb* (1879), 8 Neb. 392, 1 N. W. 320, while not essential to the disposition of the case, it was said: "At law such a deed is void, but equity will sustain it when made upon a sufficient consideration." In *Smith v. Dean* (1884), 15 Neb. 432, 19 N. W. 642, action to quiet title, opinion by Maxwell, J.: "At common law no title passed by a deed from a husband to his wife, for the reason that the right of the wife to make contracts was suspended during coverture. ⁶² The doctrine evidently originated at a time when a wife was regarded as but little better than a slave, and has but little application to our state of society, and will not be extended beyond the strict requirements of the law. In equity a wife has ever been regarded as a distinct person, capable of contracting, and whenever equitable grounds for relief have existed her rights have been enforced and protected. So the deed of a husband to his wife, though void at common law, will be sustained whenever equitable grounds exist for sustaining the same, such as a valid consideration." In *Johnson v. Vandervort* (1884), 16 Neb. 144, 19 N. W. 461, 20 N. W. 122, Cobb, C. J.: Action to quiet title and for partition. Plaintiff claimed through a deed direct from husband to wife. The court held that the wife acquired no legal title by the deed, but that the "deed was evidence of a provision made for her support by her husband, which upon timely application by her for that purpose would have been aided by a court of equity. But she made no such application." It was held that there was no title in the plaintiff, and he could not maintain the action. In *Furrow v. Athey* (1887), 21 Neb. 671, 59 Am. Rep. 867, 33 N. W. 208, opinion by Reese, J., the opinion does not show the nature of the action: "The first question presented in this case is, whether a husband can convey his real estate to his wife without the intervention of a third party as a trustee, in a case where no fraud is shown, and the rights of creditors or other third parties do not intervene. . . . If it had been made to a third party as a trustee, and by him conveyed to defendant, it perhaps would never have been questioned. It is just as good without such intervention." In *Ward v. Parlin* (1890), 30 Neb. 376, 46 N. W. 529, opinion by Norval, J., the action was to set aside a certain deed from Ward to his wife as being in fraud of creditors. It was held that a husband may legally give his wife a deed or mortgage to secure a pre-existing bona fide deed, and such conveyance is not fraudulent as to his other creditors if taken in good faith and without any fraudulent purpose. This was a creditor's bill, and the legal effect of direct conveyance ⁶³ was not decided nor discussed. *Wanser v. Lucas* (1895), 44 Neb. 759, 62 N. W. 1108, was an action by heirs to recover real estate conveyed by deed direct from

husband to wife. The opinion does not state the nature of the suit, but apparently it was ejectment. The deed was upheld, Post, J., quoting and adopting the language of Judge Reese in *Furrow v. Athey*, 21 Neb. 671, 59 Am. Rep. 867, 33 N. W. 208. In *Dayton Spice-Mills Co. v. Sloan* (1896), 49 Neb. 622, 68 N. W. 1040, certain creditors attached real estate mortgaged direct from husband to wife. On error to this court from an order dissolving the attachment, the opinion by Harrison, J., cites the prior cases in this state without distinguishing them, reverses the district court, and holds that the mortgages were valid. In *Veeder v. McKinley-Lanning Loan & Trust Co.* (1901), 61 Neb. 892, 86 N. W. 982, it was held that, where real estate is conveyed by a husband to his wife without pecuniary consideration, the presumption is that it was a gift or advancement, and that the parties intended that the full and absolute title both real and equitable should pass by the conveyance.

From this résumé of the former holdings of this court it appears that, while the doctrine of *Aultman, Taylor & Co. v. Obermeyer*, 6 Neb. 260, and *Johnson v. Vandervort*, 16 Neb. 144, 19 N. W. 461, 20 N. W. 122, that a deed direct from husband to wife is void in law, has never been directly repudiated or the cases overruled, the fact is that in every case for the last twenty-five years in which the validity of such conveyance has been attacked it has been held that such a deed, in the absence of fraud, was valid in all respects, and conveys the entire estate, both legal and equitable. The writers of the opinions have clung to the verbal husks of the old rule, while in fact it was ignored in the action taken and the decision made. The rule of *Furrow v. Athey*, 21 Neb. 671, 59 Am. Rep. 867, 33 N. W. 208, announced in 1887, that the deed "is just as good" without the intervention of a trustee, has been followed ever since that opinion was written, and is the law of this state. This is common sense, and is in accordance with the modern tendency to disregard the fictions and technical niceties and distinctions of the common law. While the language of the ⁶⁴ married woman's act does not apply to such a transaction, yet the liberalizing tendency and spirit of this legislation has permeated the body of the law relating to husband and wife, and the tendency of modern courts is toward enlarged freedom of contract between them. From the writer's own knowledge it has been generally accepted among the legal profession in this state since *Furrow v. Athey*, that a direct conveyance is good, and, in so far as *Aultman, Taylor & Co. v. Obermeyer* and *Johnson v. Vandervort* hold that a deed direct from husband to wife made bona fide, and not in fraud of creditors, does not operate to pass both the legal and equitable estate, such cases are overruled. We conclude, therefore, that the deed from Currier to his wife conveyed to her the full legal and equitable title to the

land, and that upon her death the estate vested in her son, the plaintiff, subject to the life estate of the curtesy of her husband. The foreclosure action was prosecuted without making the plaintiff, who was then the owner of the remainder and equity of redemption, a party, and consequently was without effect upon his rights.

2. Plaintiff contends that the sheriff's deed to Schmideke under which defendants claim title is absolutely void, and conveyed neither a legal nor an equitable estate to him because he was not the purchaser at the sale. At the foreclosure sale the bidder was John Campbell, the owner of the mortgage debt and the plaintiff in that action, and the sale was confirmed "to the purchaser, John Campbell." The evidence indicates that one Frank Barnes of Madison had been acting as Mr. Campbell's agent in the matter of the mortgage, and that prior to the sale he had also been negotiating with Mr. Schmideke for the sale of the land to him. Mrs. Teske says he was to buy the land for her then husband Schmideke, and that Barnes procured the sheriff's deed to Schmideke and delivered it to him. The sheriff's deed recites that Schmideke was the purchaser at the sale. Under these circumstances, after the lapse of so many ⁶⁵ years, and considering that Campbell never made any claim that the deed was void, and through his agent accepted and retained the purchase money and caused the deed to be made to Schmideke, it will be considered that he became by equitable assignment the owner of Campbell's interest in the bid, that the deed was made pursuant to such assignment, and that he thereby became vested with all interests that Campbell then had. The purchaser at a foreclosure sale buys all the interests of all the parties to the suit: Code, sec. 853; *Young v. Brand*, 15 Neb. 601, 19 N. W. 494; *Dodge v. Omaha & S. W. R. Co.*, 20 Neb. 276, 29 N. W. 936; *Buchanan v. Griggs*, 18 Neb. 121, 24 N. W. 452. That which was sold, therefore, was the life estate of Eugene Currier and Campbell's unforeclosed mortgage on the plaintiff's equity of redemption. At the sale the interest of the defendant was sold for five hundred dollars, while the amount of the decree was three hundred and sixty-seven dollars and eighty-seven cents. The proceeds of the defendant's interest, therefore, paid the mortgage debt and extinguished the lien on plaintiff's equity of redemption. So that, when Campbell sold to Schmideke, he sold the life estate which he had foreclosed upon and purchased, and that alone. If the mortgage had been upon several tracts, the title to which was in several owners, and the action had been brought against one owner and as to his tract alone, if that tract sold for enough to pay the entire mortgage debt, the mortgage would be discharged as to all. We think that the effect in this case is the same.

The defendants assert that it was "the land itself" that was sold, and not the life estate, but this cannot be true. The

interests alone of the parties to the suit were sold. To hold otherwise would be to deprive one of property without due process of law. The purchaser at a foreclosure sale must advise himself of the title he buys, and when the real owner of the fee is not made a party he cannot deprive him of any of his rights by the purchase. Schmideke took possession under the sheriff's deed, as he was entitled to do. Eugene Currier died October 17, 1901. ⁶⁶ The defendants' estate and right of possession were contemporaneous with Currier's life, and died with him. This action in ejectment was begun nearly ten months before the death of Eugene Currier, and while the defendants were fully entitled to possession of the land. Proper service was had upon all the defendants except Walter Schmideke. As to him, the first service was quashed, and a new summons was served in 1906, after the termination of the life estate. The insanity of Carl Teske was suggested by amendment to the petition in 1905, and the cause revived in the name of Gustave Teske as his guardian. Since the action was begun as to all the defendants except Walter Schmideke during the life estate of Eugene Currier, the action was prematurely brought as to such other defendants. The court did not err in directing a verdict for such defendants. This, however, does not constitute a bar to an action brought within the statute of limitations to recover the possession of the land.

A number of other questions are discussed in the brief, and have been considered by the court, but under the conclusion reached it is unnecessary to notice them.

The judgment of the district court is affirmed as to all of the defendants except Walter Schmideke, without prejudice to a proper action to recover possession. As to Walter Schmideke, the judgment of the district court is reversed and the cause remanded for further proceedings.

Judgment accordingly.

Reece, C. J., and Barnes, J., not sitting.

CONVEYANCE FROM HUSBAND TO WIFE.

I. Retrospect, 607.

II. The Influence of Equitable Doctrines, 609.

III. At Law.

a. The Right Denied, 610.

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c. The Right Absolute, 612.

IV. Summary, 614.

I. Retrospect.

Of all the phenomena which sociology arranges for us and posterity in its universal museum, that of the marital relation with regard to the possession and disposal of property is entitled to the most marked attention, not only as a curiosity, but for the information which a

comparison of that relation under the common law with its evolutionized form under the present statute law affords. In so far as the science is properly described as one that deals "with all that concerns men living together and having certain necessary, agreeable, and desirable relations with one another" (R. T. Ely, *Introduction to Political Economy*, pt. 1, c. 1, p. 13), it appears to be an error to catalogue that branch of the marital relation under it. Rather, its definition should have been "the science that deals, from the property standpoint, with the nonentity of married women," for the common law seems to be, in regard to this question, really only paraphrased in *Paradise Lost*, book 4, where the first husband and wife are described. "He, for God only, she, for God in him." Lest this be thought a permissible, albeit poetical, exaggeration, the reader has only to recall his *Blackstone*, where marriage is dealt with in book 2, page 433, as "a sixth method of acquiring property in goods and chattels." Under the same heading we get the apology, "this depends entirely on the notion of an unity of person between the husband and wife; it being held that they are one person in law," and the learned writer explains that that one person is the husband when he continues: "So that the very being and existence of the woman is suspended during the coverture or entirely merged or incorporated in that of the husband."

As to such real estate as was hers prior to the marriage, the husband took the rents and profits during the coverture and on the birth of a child an estate for life by the curtesy.

The consistency of the common law, which had thus practically obliterated the wife, had to be maintained by decreeing that neither husband nor wife could convey land to each other, chiefly on the ground that, being one person, they could not contract each with the other, and that the incapacity of a feme covert arose not from her want of skill and judgment, as in the case of an infant, but, first, from the husband's right to her society, which would be violated if a creditor could arrest and take her away, and secondly, from his right to her property. In the words of Maxwell, J., in *Smith v. Dean*, 15 Neb. 432, 19 N. W. 642, "the doctrine evidently originated at a time when a wife was regarded as but little better than a slave, and has but little application to our state of society, and will not be extended beyond due strict requirements of the law." So the deed of a husband to his wife, though void at common law, will be sustained whenever equitable grounds exist for sustaining the same, such as a valid consideration: *Currier v. Teske*, 84 Neb. 60, ante, p. 602, 120 N. W. 1015.

To the credit of this country be it known that "the tendency of legislation in the United States is to the utter abrogation of this doctrine, so far as civil rights depend upon it, and to leave property rights existing at the time of the marriage wholly unchanged by that relation. The tendency further is to remove the disability, under which the married woman lay at the common law, to acquire and take property, real and personal, generally for her own use and to control and dispose of the same": *Cooley's Blackstone*, p. 773. "The liberalizing tendency and spirit of this legislation has permeated the body of the law relating to husband and wife, and the tendency of modern courts is toward enlarged freedom of contract between them": *Currier v. Teske*, 84 Neb. 60, ante, p. 602, 120 N. W. 1015.

As to the wife there soon came to be a strong sentiment that she was the victim of an oppressive legal system from which she ought to be relieved and legislation portending the amelioration began about 1850. The first case, practically, that came up for decision settled that the disability of the wife to convey to the husband was not removed by a statute passed to enable her to devise and convey as if she were unmarried. In the opinion, Mr. Justice Denio, with a rare bit of, perhaps, unconscious humor, says: "No doubt there was an intention to confer upon the wife the legal capacity of a feme sole in respect to conveyances of her property, but this does not prove she can convey to her husband, for no such question could possibly arise in respect to a feme sole": *White v. Wager*, 25 N. Y. 328; *Winans v. Peebles*, 32 N. Y. 423. From 1850 onward, there has been, commensurate with the civilization of legislators, and, we may therefore take it, with the reflex of strong public opinion, a gradual growth, the stronger and steadier for the opposition of conservatism, in favor of the extension of the rights of acquisition and alienation by all the adult population of the country irrespective of sex. That its growth was hastened by the old equitable doctrines of the courts of chancery is to be frankly admitted, their readiness to help the wife's equity to a settlement, to support a grant when there was an equitable consideration and, generally, to soften the hard and fast rigor of the common-law courts, being the basic principle of the justly enjoyed right of the American woman of to-day to deal as freely with her goods and her lands as the American man may with his. Her Magna Charta was delayed in England by the tenets of the old feudal laws, which were slow in the release of every single tentacle of their octopodous system. In this country, with no such hindrance, the settlement of the inhabitants to a better form of government rapidly developed the keen critical faculty for the elimination of every species of personal injustice, and, by consequence, the treatment of woman received early attention at the hands of the reformers, who rested not until the old malignant growth was utterly pruned away and the present right to acquire and dispose of property placed upon a newer and a sounder basis.

II. The Influence of Equitable Doctrines.

With the tardy recognition that the wife was entitled to some rights, due as we have shown to the efforts of the courts of chancery, came the method of conveying real estate to the wife through the medium of a trustee, and while we shall avoid a phase of the subject which involves the influence—benign and malign—of the statutes of uses and trusts, founded themselves in the chicanery of the period and destined to attain ends little thought of by their clerical sponsors, we refer to it, in passing, as the chrysalis stage of the movement out of which emerged what we shall demonstrate to be the power of universal and indiscriminate alienation between adults. Here, again, the impetus to the movement was given by the courts of equity, which early in the last century began to hold that notwithstanding the common-law rule, a conveyance direct to the wife—i. e., without the trustee intervention—was not void if founded on a meritorious consideration. A long list of cases might be cited showing how the courts were ready to seize on their equitable jurisdiction

to aid the removal of the anachronism, and from the beginning—about the year 1870—the case law on the subject appears concordant.

In *Hunt v. Johnson*, 44 N. Y. 27, 4 Am. Rep. 631, after an epitome of the then state of the law, the opinion goes on to say: "This is a rule of the common law, which has been adhered to in many cases, when the courts have said that they would have been glad to have got rid of it." In that able opinion, which pointed out that a deed in presenti by husband to wife was inherently and fatally defective, it is also indicated that equity would relieve against it, and cited *Shepard v. Shepard*, 7 Johns. Ch. 57, in support, in which Chancellor Kent laid down what has since been regarded as the sound legal guiding principle—that when the consideration was meritorious, the deed should be aided and enforced by the court. The learned chancellor also directed attention to the fact that none of the earlier English cases were decided upon the ground of the husband's incapacity to convey to his wife, but on some other controlling circumstances. *Shepard v. Shepard*, 7 Johns. Ch. 57, was followed by several other cases now well known: *Powe v. McLeod*, 76 Ala. 418; *Craig v. Chandler*, 6 Colo. 543; *Waterman v. Higgins*, 28 Fla. 660, 10 South. 97; *Majors v. Everton*, 89 Ill. 56, 31 Am. Rep. 65; *Sims v. Ricketts*, 35 Ind. 181, 9 Am. Rep. 679; *Sproul v. Atchison Nat. Bank*, 22 Kan. 336; *Bullard v. Briggs*, 7 Pick. 533, 19 Am. Dec. 202; *Loomis v. Brush*, 36 Mich. 40; *Wells v. Wells*, 35 Miss. 638; *Turner v. Shaw*, 96 Mo. 22, 9 Am. St. Rep. 319, 8 S. W. 897; *Smith v. Dean*, 15 Neb. 432, 19 N. W. 642; *Neufville v. Thomson*, 3 Edw. Ch. 92; *Garlick v. Strong*, 3 Paige, 440; *White v. Wager*, 25 N. Y. 328; *Winans v. Peebles*, 32 N. Y. 423; *Deifendorf v. Deifendorf*, 132 N. Y. 100, 30 N. E. 375; *Crooks v. Crooks*, 34 Ohio St. 610; *Pennsylvania Salt Mfg. Co. v. Neel*, 54 Pa. 9; *Jones v. Obenchain*, 10 Gratt. (Va.) 259; *Humphrey v. Spencer*, 36 W. Va. 11, 14 S. E. 410; *Hamman v. Onley*, 23 Wis. 519; *Rich v. Cockell*, 9 Ves. 369.

Nor did the equity courts stop at merely holding that in certain cases the deed, void in law, should be upheld in equity; they declared that the effect of a conveyance from husband to his wife was to vest in her an equitable estate in the land and to create him trustee of it for her: *Cockrill v. Woodson*, 70 Fed. 752; *Pitts v. Sheriff*, 108 Mo. 110, 18 S. W. 1071; *Swiger v. Swiger*, 58 W. Va. 119, 52 S. E. 23; *Carter v. McNeal*, 86 Ark. 150, 110 S. W. 222.

III. At Law.

a. **The Right Denied.**—Having in subdivision I shown that the husband could not by the common law convey directly to his wife and in II the grafting of the equitable rights doctrine, we proceed to examine the few decisions of note up to about the year 1885, affirming the common-law rule. In *Carrington v. Richardson*, 79 Ala. 101, *Stone, C. J.*, said: "The conveyance by Walker to his wife was, in law, a mere nullity and did not and could not transfer the legal title or divest it out of him." This was followed in *Gaston v. Weir*, 84 Ala. 193, 4 South. 258, without comment. In *Martin v. Martin*, 1 Me. 394, *Mellen, C. J.*, discussed and dismissed the question "Why a deed from a husband to his wife should not be a valid conveyance" with the answer that the law of the land declared such a deed to be a nullity. But the learned chief justice was fain to admit the signs of discontent, for he said: "It can be of no use for the court to disturb, or attempt to disturb, a legal principle which has never

before been agitated in our courts or till very lately even been doubted." In *Voorhees v. Presbyterian Church of Amsterdam*, 17 Barb. 103, the same ruling was given with regard to the right to a pew in church given by the husband to the wife. In *Coates v. Gerlach*, 44 Pa. 43, the same thing is repeated, with this addition: "But while all conveyances from the husband to the wife without the intervention of a trustee are void at law, and some even when the transfer is made to a trustee for her, it is certain that contracts, even directly between them, will be sustained in equity if they are reasonable and not prejudicial to creditors." We here note the two cases, *Aultman Taylor & Co. v. Obermeyer*, 6 Neb. 260, and *Johnson v. Vandervort*, 16 Neb. 144, 19 N. W. 461, 20 N. W. 122, both of which are expressly overruled by *Currier v. Teske*, 84 Neb. 60, ante, p. 602, 120 N. W. 1015. In both cases the same adherence to the common-law rule was expressed.

But even up to that date, 1885, there were already decisions to the contrary. *Brookbank v. Kennard*, 41 Ind. 339, and *Johnson v. Branch*, 9 S. D. 116, 62 Am. St. Rep. 857, 68 N. W. 173, both decided that a conveyance of real estate might be made directly by husband to wife without the intervention of trustees, and that such conveyance would be upheld unless the rights of creditors were injuriously affected thereby. *Walsh v. Chambers*, 13 Mo. App. 301, is to the same effect, but was on the equity side of the court and the deed was upheld on equitable doctrines.

b. The Right Limited.—Since then, however, from the gradual adoption by the various states of almost analogous laws dealing with the property and rights of married women, there has been a continuous stream of cases affirming the husband's right to convey. In some, there is the nominal qualification that such conveyance should not be in fraud of his creditors. We say "nominal" advisedly, because the addition of that qualification is made impliedly to all conveyances. In others again there is a further qualification that the wife shall be competent to acquire realty from persons other than her husband. After all, it must be recognized that the line drawn between the consideration of cases by the court of equity and the law courts is more imaginary than real, and the spectacle of one court deciding that a given deed is void and a nullity and another decreeing its validity is neither edifying nor indicative of the usual hard common sense of the nation. In some of the states, too, the distinction between actions at laws and suits in equity has been abolished and there is only one form of action. As Mr. Justice Downey said in the case of a deed direct from husband to wife (*Thompson v. Mills*, 39 Ind. 528): "As the fact is recognized that the husband may, by deed, made directly to his wife, convey real estate to her, and the conveyance will be upheld, why not apply to such conveyances the same rules which are applied to conveyances between other parties; that is, hold them valid until some legal reason has been shown for setting them aside? . . . Why go into an inquiry, in the first instance, to determine whether the husband intended to defraud his creditors, since they are making no complaint? Why examine into the pecuniary condition of the husband and the wife to ascertain whether he retained a sufficiency of means for his living, or whether this provision was necessary or proper for her support? Are they not competent to decide these questions? As between other parties, the

court would take upon itself no such duties. Without going into an examination, or a re-examination, of the authorities on this subject, we refer to the case of *Sims v. Ricketts*, 35 Ind. 181, 9 Am. Rep. 679, and upon the authority of that case and the cases there cited, hold that, upon the facts shown by the complaint, the deed in this case was valid."

Practically, all those states which have not given the power of unfettered disposal to the husband have given him the right to convey with certain limitations and have also invested the grant with certain specified results.

In Alabama, notwithstanding the code forbids husband and wife to contract with each other for the sale of any property, a direct conveyance from the husband to the wife was upheld by reason of the real consideration being moneys of the wife which the husband had spent: *Copeland v. Kehoe*, 57 Ala. 246. Since February 28, 1887, however, a deed from a husband direct to his wife vests the legal title in her and she can maintain an action of ejectment thereon: *Manning v. Pepper*, 86 Ala. 357, 11 Am. St. Rep. 46, 5 South. 572.

In Indiana an 1896 case treats it as the settled law of that state that a deed conveying real estate from a husband to his wife in good faith for a valuable consideration is valid: *Merchants' & Laborers' Bldg. Assn. v. Scanlan*, 144 Ind. 11, 42 N. E. 1008. Among the citations in the last-named case we consider the opinion in *Thompson v. Mills*, 39 Ind. 528, contains sound argument for the absolute right to convey without distinction of sex and without reference to the side of the court on which the case is to be argued.

In Louisiana the law specially authorizes (Rev. Civ. Code, art. 2446) a sale or transfer of property by the husband to the wife for the replacing of her dotal or other effects alienated or converted by him to his own use or that of the community: *Pons v. Yazoo & M. V. R. Co.*, 122 La. 156, 47 South. 449.

In Michigan it is well settled that such conveyances from husband to wife taken bona fide and for valuable consideration are valid: *Strauss v. Parshall*, 91 Mich. 475, 51 N. W. 1117.

c. The Right Absolute.—In Nebraska the law may be regarded as settled since *Furrow v. Athey*, 21 Neb. 671, 59 Am. Rep. 867, 33 N. W. 208. The appropriate part of the opinion is quoted and adopted in *Currier v. Teske*, 84 Neb. 60, ante, p. 602, 120 N. W. 1015: "The first question presented in this case is whether a husband can convey his real estate to his wife without the intervention of a third party as a trustee, in a case where no fraud is shown, and the rights of creditors or other third parties do not intervene. . . . If it had been made to a third party as a trustee, and by him conveyed to defendant, it perhaps would never have been questioned. It is just as good without such intervention." This was followed in *Ward v. Parlin*, 30 Neb. 376, 46 N. W. 529, *Wanser v. Lucas*, 44 Neb. 759, 62 N. W. 1108, and *Veeder v. McKinney-Lanning Loan & Trust Co.*, 61 Neb. 892, 86 N. W. 982, and finally in *Currier v. Teske*, 84 Neb. 60, ante, p. 602, 120 N. W. 1015, wherein Letton, J., said: "The fact is that in every case for the last twenty-five years in which the validity of such conveyance has been attacked, it has been held that such a deed, in the absence of fraud, was valid in all respects, and conveys the entire estate, both legal and equitable." The learned judge speaking of the rule in *Furrow v. Athey*, 21 Neb. 671, 59 Am. Rep. 867, 33 N. W. 208, said: "This is common sense, and is in accordance with

the modern tendency to disregard the fictions and technical niceties and distinctions of the common law."

In New York the laws of 1877, chapter 537, page 667, provide that "a deed made between husband and wife shall not be invalid because . . . made directly from one to the other without the intervention of a third person," and the laws of 1892, chapter 594, page 1139, enact that "a married woman may contract with her husband . . . to the same extent, with like effect and in the same form as if unmarried." These provisions were called in question on the point whether, where husband and wife were tenants by the entirety, per tout et non per my, the husband could convey his share to the wife direct. It is almost needless to add that the court in view of the provisions above set out unhesitatingly declared the deed good and effectual to vest the whole of the estate in the wife: *Hardwick v. Salzi*, 46 Misc. Rep. 1, 93 N. Y. Supp. 265, followed in *Mardt v. Scharmach*, 65 Misc. Rep. 124, 119 N. Y. Supp. 449.

In North Carolina, constitution, article 10, section 6, provides that a deed by a husband to his wife conveys the legal title to her and Code, sections 1835, 1836, permit them to contract with each other. "This cannot mean that they are one person contracting with himself. They are allowed to contract with each other as distinct persons, capable of contracting with each other and having separate and distinct benefit from such contract. Hence in proper cases they may maintain action against each other": *Walker v. Long*, 109 N. C. 510, 14 S. E. 299, followed in *Fort v. Allen*, 110 N. C. 183, 14 S. E. 685.

In Pennsylvania in *Thompson v. Allen*, 103 Pa. 44, 49 Am. Rep. 116, the court, after tracing the inroads made on the common-law doctrine by the application of equitable principles under modern law, laid it down that a husband may not only convey directly to his wife for a valuable consideration, but that he may also convey to her as a gift when not prejudicial to his creditors. This was followed in *Reagle v. Reagle*, 179 Pa. 89, 36 Am. Rep. 191.

In Texas the right of the husband to convey directly to the wife does not appear to be challenged, so that the conveyance is not in fraud of creditors. When a deed conveyed land in this mode and was silent as to its purpose, its effect has been held to place the title to the property in the wife's separate right: *Watts v. Bruce*, 31 Tex. Civ. App. 347, 72 S. W. 258.

In Wisconsin the right to convey direct to the wife dates back to the Revised Statutes, chapter 95, "of the rights of married women," under which the ordinary disabilities of coverture are entirely swept away. In *Beard v. Dedolph*, 29 Wis. 136, the court said that with respect to her separate property the statute had placed her upon the same footing as all the world, her husband included, as if she were a single female and in a negotiation by her with her husband he was to be regarded as a stranger, and consequently she may take title to property directly from him as if she were in all respects sui juris or as if the relation of husband and wife did not exist. On account, however, of the great facilities which the marriage relation afforded for the commission of fraud, these transactions between husband and wife should be closely examined and scrutinized, to see that they are fair and honest and not mere contrivances resorted to for the purpose of placing the husband's property beyond the reach of his creditors. This was followed in *Hoxie v. Price*, 31 Wis. 82.

IV. Summary.

The conclusion to be drawn from these decisions is that the old common-law doctrine has been whittled away so that only its name exists, and that throughout the states the husband's right to convey to the wife directly is now recognized. In some it has attached with some qualification, some limitation, but we feel safe in saying that the only solid exception is that which compels the good faith of the transaction. Conveyances from man to man, to be upheld, must be able to bear the fiercest scrutiny; conveyances from man to wife capable of the same keen inspection are entitled to the same consideration—no more, no less. The relation has changed its common-law marital phase into one of a common sense contractual character.

EXCHANGE BANK OF WILCOX v. NEBRASKA UNDERWRITERS' INSURANCE COMPANY.

[84 Neb. 110, 120 N. W. 110.]

AGENCY—Notice to Agent as Notice to Principal.—Where an agent's duty to his principal is opposed to, or even remotely conflicts with, his own interest or the interest of another for whom he acts, the law will not hold his acts or his knowledge gained in such transaction obligatory upon his principal. (By the editor.) (p. 617.)

FIRE INSURANCE—Change in Title—Notice to Agent.—In a suit on fire insurance policies covering certain personal property, and conditioned that a change in the title of the property should avoid the policy, notice to the company of a bill of sale made by the insured to a bank was attempted to be shown from the knowledge of such bill of sale possessed by the agent of the company, who at the time was also assistant cashier of the bank. Held, that while notice to an agent will generally be imputed to his principal, the rule does not apply where the agent's duty to his principal is opposed to his own interest or conflicts with the interest of another party for whom he acts in the transaction where knowledge is obtained. (pp. 617, 618.)

(Syllabi by the court except when stated to be by the editor.)

Halleck F. Rose. Wilmer B. Comstock and Hague & Anderbery, for the appellant.

J. L. McPheely, contra.

¹¹¹ **DUFFIE, C.** Action by the plaintiff on three policies of insurance issued by the defendant. Judgment for the plaintiff, and defendant appeals.

The facts are practically undisputed. One Frank Langloss was the owner of a restaurant in the town of Wilcox, and procured two of the policies in question upon his stock and fixtures. He sold his business to Long & Jackson, and assigned to them the two policies. Long & Jackson took out a third policy upon the stock and fixtures, and afterward sold the business to Hall & Hartley, to whom the three policies

were transferred. One Charles W. Lamborn, residing at Wilcox, was a recording agent for the defendant company, and issued these three policies and approved the several transfers made. When Hall & Hartley purchased the restaurant, they borrowed six hundred and sixty-seven dollars and ninety-five cents from the plaintiff bank and executed a bill of sale upon all the property covered by the insurance as security therefor. This was about the middle of May, 1906. The insured property was destroyed by fire July 13, 1906. It is alleged in the plaintiff's petition that the three policies of insurance were verbally assigned to the bank as additional security for the loan made at the date of said loan. Lamborn, the agent of defendant company, was also assistant cashier of the plaintiff bank, and it quite clearly appears that the policies were left either in his possession or in the possession of the bank from the time of their issue. About the 20th of July one Lynde, an adjuster for the defendant, visited Wilcox for the purpose of securing information concerning the loss, and called upon Lamborn, who, as ¹¹² before stated, was assistant cashier of the bank. Lamborn produced the policies for Lynde's inspection, and among them Lynde discovered the bill of sale. Each of the policies contained conditions making it void "if the interest of the insured be other than unconditional and sole ownership, or if the subject of insurance be personal property, and be or become encumbered by a chattel mortgage, or if any change other than by the death of the insured takes place in the interest, title or possession of the subject of insurance, whether by legal process of judgment, or by voluntary act of insured, or otherwise, or if the property above mentioned (meaning the property insured) be or shall be thereafter mortgaged or otherwise encumbered."

On discovering that Hall & Hartley had executed a bill of sale covering the insured property to the bank by way of security, Lynde informed Lamborn and the insured that its effect was to void the policies, and he took no further steps in the matter until he had prepared a writing and secured the signature of Hall & Hartley to the effect that any steps which he might then take should be regarded as an effort to ascertain the amount of the loss and report the same to his company, and that his action was without reference to any other question or matter of difference within the terms and conditions of the several policies. On the 2d of August, 1906, Lynde returned to Wilcox, and proof of loss was made in the name of Hall & Hartley, and verified before Lamborn as notary public. The proof of loss does not disclose any interest claimed by the bank in the policies. Lynde at all times, as he claims, denied any liability on the part of the company, but offered to pay Hall & Hartley two hundred dollars in settlement of their claim, telling them that he

would prefer to give them this amount rather than undergo the expense of a suit, which he estimated would cost them about the same sum. Not being able to effect a settlement during the day, Lynde went to the hotel and retired about 8 P. M., as he wished to take an early train in the morning, and about 9 o'clock Hall & Hartley called upon ¹¹³ him and proposed to settle for two hundred and fifty dollars, which proposition was accepted and the amount paid by a draft drawn by Lynde upon his company. This amount was paid by Lynde without any knowledge, as he asserts, that the bank claimed any interest in the policies, although the evidence is somewhat conflicting upon that point. He knew that the policies were in possession of the bank, but Hartley testified that they were there for the purpose of settlement, and Lynde says he understood that they were left at the bank for that purpose. Lamborn does not in terms deny this, but on his direct examination says: "Well, he (Lynde) asked me as agent what I knew about the loss, and I told him I had the policies there, and Hall & Hartley owed the bank money, and we had a bill of sale which had never been recorded; that it was a personal matter, and stated the case as fully and completely as I knew." On his cross-examination he said: "I told Mr. Lynde that Hall & Hartley had left the policies there with me for settlement. Q. You didn't tell him at any time that the policies were assigned after the fire? A. Yes; no written assignment; just a verbal agreement between Hall & Hartley. Q. I understood you to say on direct examination that the policies were left there for adjustment by you? Now, which will you have it? A. Well, I don't remember of saying adjustment any more than settlement. Settlement is what they were left there for. Q. Now, that is what you told Mr. Lynde, is it? A. Yes, sir. Q. And this conversation occurred after the fire? A. Yes, sir."

It is conceded that the defendant company had no actual notice of the bill of sale made by Hall & Hartley to the bank until after the fire, and the principal dispute arises upon the effect that should be given to the knowledge of Lamborn, the agent of the defendant company, and who, at the same time, was the assistant cashier of the bank. The plaintiff asserts that knowledge of the agent, who, it is conceded, was present when the bill of ¹¹⁴ sale was made, and had knowledge of all the facts, is notice to the defendant company; while the defendant asserts with equal vigor that knowledge of Lamborn cannot be imputed to the company, as his interest as an employé and officer of the bank was adverse to the interest of the defendant company.

As a general rule the knowledge of an agent is imputed to his principal. In *Kennedy v. Green*, 3 Mylne & K. (Eng.) *699. Lord Brougham gave as a reason for the rule "that policy, and the safety of the public, forbids a person to deny

knowledge while he is so dealing as to keep himself ignorant, . . . and yet all the while let his agent know, and himself, perhaps, profit by that knowledge." The same reason, framed in different language, is given by Church, C. J., in *National Life Ins. Co. v. Minch*, 53 N. Y. 144: "The rule which charges the principal with what the agent knows is for the protection of innocent third persons." Like most other legal rules, this one has its exceptions, and one of the exceptions is that a corporation is not chargeable with the knowledge nor bound by the acts of one of its officers in a matter in which he acts in behalf of his own interest, and deals with the corporation as a private individual, and in no way representing it in the transaction: *Koehler v. Dodge*, 31 Neb. 328, 28 Am. St. Rep. 518, 47 N. W. 913; *Buffalo County Nat. Bank v. Sharpe*, 40 Neb. 123, 58 N. W. 734. Another exception to the rule is recognized in *Houghton v. Todd*, 53 Neb. 360, 78 N. W. 634, where it is said: "The rule whereby an agent's knowledge is imputed to his principal is subject to an exception in the case of an agent who is engaged in an independent fraudulent scheme without the scope of the agency." We think it may be regarded as well established that where an agent's duty to his principal is opposed to or even remotely conflicts with his own interest, or the interest of another party for whom he acts, the law will not permit him to act, nor will it hold his acts or his knowledge gained in such transaction obligatory upon his principal. That the execution of the bill of sale rendered void ¹¹⁵ policies conditioned as are those in question was held in *Farmers' and Merchants' Ins. Co. v. Jensen*, 56 Neb. 284, 76 N. W. 577, 44 L. R. A. 861, and in *Home Fire Ins. Co. v. Collins*, 61 Neb. 198, 85 N. W. 54. To the same effect are *Johansen v. Home Fire Ins. Co.*, 54 Neb. 548, 74 N. W. 866, and *Seal v. Farmers' & Merchants' Ins. Co.*, 59 Neb. 253, 80 N. W. 807.

In this condition of the case it is evident that unless the knowledge of Lamborn may be imputed to the company, and a waiver of the conditions of the policies implied from such knowledge, then the plaintiff's action must fail. The bank must be charged with knowledge of the conditions of the policies prohibiting the transfer of title of the property insured. It knew that in accepting the bill of sale the policies were made void, unless the company was notified and consented thereto. It was the duty of the bank to inform the company that it was about to take this security and to obtain its assent. To keep secret the proceeding and to attempt to collect the policies would be a fraud upon the company. A like duty was cast upon Lamborn, the agent of the company, but it appears that the adverse interest cast upon him as an officer of the bank kept him silent, and that same adverse interest creates an exception in the application of the general rule of law imputing knowledge and notice of the agent to

his principal. We do not wish to be understood as charging either the bank or Lamborn with a scheme to defraud the insurance company. At the time of taking this bill of sale it is probable that no thought of the consequences arose in the minds of the officers acting for the bank, and yet it was a moral fraud upon the company to take security upon property insured, without the consent of the defendant company first obtained. The result is that, under the circumstances, the knowledge of Lamborn cannot, under all the authorities, be imputed to the defendant company, as his position as an officer of the bank rendered his interest in the transaction adverse to the insurance company.

We recommend a reversal of the judgment and remanding ¹¹⁶ the cause for further proceedings not inconsistent with this opinion.

Epperson, Good and Calkins, CC., concur.

By the COURT. For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

Where an Insurance Agent has Knowledge of the condition of title to the property about to be insured, this, according to the better rule, is notice to the insurance company: See Arkansas Ins. Co. v. Cox, 21 Okl. 873, 129 Am. St. Rep. 808, and cases cited in the cross-reference note thereto. But the fact that an agent of the insurance company knows of a change in the title to the property insured which affects the policy, and makes no objection thereto, does not affect the right of the company to declare a forfeiture: Moller v. Niagara Fire Ins. Co., 54 Wash. 439, 132 Am. St. Rep. 1115.

WILKINS v. WILKINS.

[84 Neb. 206, 120 N. W. 907.]

DIVORCE—Res Judicata.—Where a Wife Brings a Suit for Divorce on the ground of cruelty, and such suit is finally determined against her on the merits, she cannot afterward, in a suit for divorce brought by her husband charging her with desertion, plead the facts upon which she depended to establish the charge of cruelty as an excuse for such desertion.

DIVORCE—Alimony in Case of Decree Against Wife.—While alimony may be awarded to a wife against whom a divorce is decreed, this is upon the theory that she directly or indirectly assisted in the accumulation of the property acquired during marriage, and that when the family tie is severed she should receive a just proportion of what she has helped to create; but the mere legal liability of the

husband to support her should not be enforced after her desertion of him. (By the editor.) (p. 620.)

DIVORCE—Res Judicata.—Where a wife was the recipient of an income sufficient for her support, and much larger than could be derived from the property of the husband, and the husband shortly before their separation accounted and paid to her the entire amount of the income derived from her property during the existence of the marriage relation, a judgment of the district court granting a divorce to the husband for the wife's desertion will not be reversed nor modified because such court refuses to allow the wife alimony. (pp. 620, 621.)

DIVORCE—Custody of Child may be Subject to Further Order. An award of the custody of an infant child made upon granting a divorce, where neither parent is shown to be disqualified, should be made subject to the further order of the court. (p. 621.)

DIVORCE—Amount of Suit Money Allowable.—The amount of money to be allowed a wife to pay the expenses of defending a suit for divorce is largely within the discretion of the district court, and its action will not be reviewed where it does not appear that the wife has been hampered in making her defense, or is financially unable to pay expenses necessarily incurred. (p. 622.)

DIVORCE—Provision for Father to Visit Child.—Where neither parent is unfit to have the custody of a child, but the decree of divorce awards the child to the mother, a provision in the decree that the father may visit the child at any reasonable time and have the child visit with him "in the village of Cook, not exceeding one hour," is a totally inadequate recognition of his rights. (By the editor.) (p. 621.)

DIVORCE—Amount Awarded for Support of Child.—An order to the father to pay seventy-five dollars annually for the support of a girl of eight years awarded on divorce to the mother, while perhaps adequate for the time being, will be modified by the court so as to require him to pay a larger amount for increasing expenses which he voluntarily fails to meet. (By the editor.) (pp. 621, 622.)

(Syllabi by the court except when stated to be by the editor. We find no language in the opinion corresponding to the first syllabus.)

S. P. Davidson, for the appellant.

George W. Berge, contra.

207 CALKINS, C. This was a suit for divorce on the ground of desertion brought by the husband against the wife. The wife defended, denying the desertion and demanding alimony and the custody of the one minor child, a girl about four years old at the time of the trial. There was a decree granting the divorce and giving to the defendant the custody of the child until she should arrive at the age of eight years, or until the further order of the court, with an allowance of seventy-five dollars per annum to be paid by the father until the child reached the age of eight years. Alimony was denied, and the defendant appeals.

1. The defendant contends that the charge of desertion is not sustained by sufficient evidence. She left the plaintiff's home more than two years before the commencement of this action, beginning an action for divorce on the ground of his misconduct prior to that time. This suit was determined ad-

versely to her claim, and the judgment has become final. She has never offered to return to plaintiff's home, and the only excuse for leaving is the misconduct which she alleged and failed to establish in the suit brought by her. On the trial of this action, being asked by the court whether she wanted him to have the divorce, she replied that she could not live with him and that she did not know that she cared; while, in answer to a question propounded by her own attorney, she answered that she was satisfied they ²⁰⁸ could never live together as husband and wife. Her unexcused absence for more than two years from the home of her husband, together with her statement that she could not live with him, were sufficient to justify the district court in finding that she was guilty of desertion.

2. Complaint is made of the refusal of the district court to allow the defendant alimony. It appears that the plaintiff is the owner of a farm of one hundred and fifty acres, which is valued at about one hundred dollars an acre; that he is possessed of a small amount of personal property: that the defendant is the owner of a life estate in three hundred and thirty acres of farm land, the income from which is about one thousand dollars per annum; that, during the time the parties lived together as husband and wife, the husband collected the rents from the said three hundred and thirty acres and used that in common with his own income; that a few days before defendant left plaintiff she demanded an accounting for these moneys and a payment of the amount thereof from her husband, and that he at that time gave her his note for six thousand dollars, which was equal to the amount of the proceeds of these lands received by him, and which note has since been paid. It therefore appears that the wife has property from which she derives a fair income, in addition to the six thousand dollars which she was thus enabled to accumulate during her married life. While under the statute alimony may be awarded to a wife against whom divorce is decreed (*Dickerson v. Dickerson*, 26 Neb. 318, 42 N. W. 9), this is done upon the theory that the wife directly or indirectly assists in the accumulation of the property acquired during the existence of the marriage relation, and that, when the tie that binds the family is severed by the interposition of law, she should receive a just proportion of what she has helped to earn. The mere naked legal liability of a husband to support his wife should not, however, be enforced after her desertion of him. In this case the wife is well provided for in her own right, and, though the income of her husband aside from that produced by his own labor was much less than her own, she was allowed to accumulate the entire amount thereof, while her husband ²⁰⁹ bore the burden of the family expenses during their married life. Under these circumstances, her equities in the accumulations of her husband

during this period do not appear, nor do her necessities demand an allowance out of his property.

3. As we have seen, the award of the custody of the child was made until she should arrive at the age of eight years, and this limitation is the subject of defendant's most serious complaint. It is argued that the effect of this decree must be to keep the mother in continual suspense and uncertainty, and in anticipation of the danger that the child may be taken away from her at the end of the period named. We think this criticism is not unfounded. While a decree awarding custody of the children is always subject to modification on account of changed conditions and circumstances, there is no reason apparent to us why the award of the custody of this child should be limited to a period ending with her eighth year, thereby inviting a new controversy whether the surrounding conditions should remain the same or not. It is not contended that either of the parents is unfitted morally or temperamentally to have the custody of the child, and it was, we think, eminently proper, considering her sex and tender years, to award her general custody to her mother until the further order of the court.

4. Provision was made in the decree that the father should have the right at any reasonable time, upon his good behavior, to visit said child and have said child visit with him in the village of Cook, not exceeding one hour. While the plaintiff is not here complaining, we deem it proper to say that this seems to us a totally inadequate recognition of the father's rights. He should have an opportunity to become acquainted with his child and to secure her attachment to him, and a child should not be deprived of the acquaintance of her father, nor of his love and affection. This can only be secured by association. The father should have the right, if he so desires, to visit ²¹⁰ the child at reasonable times and with reasonable frequency, and should also have the right to have the child visit him. Such visits, however, should not be protracted for such a length of time as to, in effect, remove the child from the custody of the mother. It is very difficult to lay down specific rules upon such a subject which will be just and adequate under the varying circumstances which must arise in the future. It should be sufficient to say that the rights and privileges accorded to each parent should be exercised with good judgment and discretion, with mutual forbearance, and with proper regard to the rights of each other and to the welfare of the child.

5. Complaint is also made of the amount awarded the mother toward the support of the child. The largest item in the maintenance of a child of tender years is the personal care which it requires, the actual amount of expenditures for sustenance and clothing being relatively small. As the child

becomes older these proportions change. We think it right that the mother should furnish this personal care, and the amount awarded may be a fair contribution from the father at the present time. If he should fail to voluntarily meet this increasing expense, the decree should be modified to require him to pay a larger amount to the mother.

6. The defendant contends that the amount allowed by the district court for her expenses in defending the action was insufficient. This question is committed to the discretion of the district court: *Brasch v. Brasch*, 50 Neb. 73, 69 N. W. 392; *Willits v. Willits*, 76 Neb. 228, 107 N. W. 379, 5 L. R. A., N. S., 767, 14 Ann. Cas. 883. We should not interfere in a case where it does not appear that the wife has been hampered in making her defense, or is financially unable to pay expenses necessarily incurred.

7. In the brief and oral argument the defendant asks for an allowance to pay the expenses of prosecuting this appeal. Considering the financial circumstances of the parties to this suit, we think it advisable to refuse to make such allowance.

We therefore recommend that the judgment of the district ²¹¹ court be modified by striking out the provisions (1) limiting the mother's custody of the child until it arrives at the age of eight years; (2) limiting the right of the father to visit the child and have the child visit him; (3) limiting the payment of the sum of seventy-five dollars per annum until the child shall reach the age of eight years. We also recommend that the decree be further modified so as to allow the father the right at any reasonable time, upon his good behavior, to visit the child and have the child visit him, and, as thus modified, that the judgment of the district court be affirmed.

By the COURT. For the reasons stated in the foregoing opinion, the judgment of the district court is modified by striking out the provisions limiting the mother's custody of the child until it arrives at the age of eight years, limiting the right of the father to visit the child and have the child visit with him, and limiting the payment of the sum of seventy-five dollars per annum until the child shall reach the age of eight years. The decree is further modified to allow the father the right at any reasonable time, upon his good behavior, to visit the child, and have the child at reasonable intervals visit him; otherwise it is affirmed.

Affirmed as modified.

A Judgment Adverse to a Wife in Her Action for Divorce on the grounds of cruel and inhuman treatment and failure to support bars a counterclaim interposed by her on the same grounds in a subsequent action by the husband for a divorce because of desertion. But a judgment adverse to a wife, in her action for a divorce on the grounds

of cruel and inhuman treatment and failure to support, does not establish that she, in living apart from her husband, has been guilty of desertion so as to entitle him to a divorce on that ground in a subsequent action by him: *Patrick v. Patrick*, 139 Wis. 463, 131 Am. St. Rep. 1067.

BOTHELL v. SCHWEITZER.

[84 Neb. 271, 120 N. W. 1129.]

BILLS AND NOTES—Alteration by Detaching Paster.—A written agreement modifying the terms of an accepted bill of exchange and securely glued thereto is a part thereof, and cannot be lawfully detached therefrom without the maker's consent. (pp. 623, 624.)

BILLS AND NOTES—Alteration by Detaching Paster.—If such contract be unlawfully detached from the note, an innocent holder of the bill in due course may, under section 9322, Annotated Statutes, 1907, recover according to the import of the entire contract, but no further. (p. 625.)

(Syllabi by the court.)

Burkett, Wilson & Brown and E. F. Snavely, for the appellant.

Morning & Ledwith, contra.

272 *ROOT, J.* Action by an indorsee of an accepted bill of exchange. Defense that said instrument had been altered after its delivery by detaching therefrom certain material conditions. There was judgment for twenty dollars, the amount due according to the entire contract between the drawer and acceptor, and plaintiff appeals.

1. The evidence discloses that Converse, the payee of the bill, who was also the drawer, sold defendants, who are country merchants, a bill of cheap watches, and secured the instrument in suit payable five months from its date. At the same time Converse executed and delivered to defendants a written agreement that, if sufficient of the watches were not sold within five months to pay the entire bill, they might return the unsold goods and receive credit at the invoice price. One of the defendants testified that they refused to sign the bill of exchange until a copy of Converse's agreement was glued thereto, and that their reason for this requirement was that they did not want the bill to get into the hands of an innocent purchaser who might cause them trouble. Converse admits making the agreement with defendants, but denies that it was ever attached to the bill of exchange; but the evidence is sufficient to sustain the jury's finding in favor of defendants on this point. Plaintiff's deposition was taken, and, although he denied notice or knowledge of any equities in favor of defend-

ants, he did not state that the bill of exchange when purchased by him did not have attached thereto the agreement, nor deny detaching it himself. It may be questioned whether plaintiff's testimony was sufficiently specific to negative guilty knowledge on his part. Conceding, however, that plaintiff did not participate in nor have knowledge or notice of the separation of the agreement from the note, we are satisfied that the judgment should be affirmed. The note and the agreement were parts of the same transaction, and together measured the rights of the ²⁷³ parties. The entire contract thus made did not absolutely bind defendants to pay the amount of the bill of goods, but only to pay in cash, at the end of five months, to the extent of the money received by them for the goods sold in the meantime, with the privilege of satisfying the remainder of the bill by the return in good condition of the watches then in their possession.

In *Palmer v. Largent*, 5 Neb. 223, 25 Am. Rep. 479, although the case did not turn on that point, it was held that a memorandum written under a negotiable instrument, and qualifying it, is considered part of the contract, and, if fraudulently removed, will vitiate the note in the hands of a bona fide holder. In *Davis v. Henry*, 13 Neb. 497, 14 N. W. 523, it was decided that, if a contract referring to and qualifying a negotiable instrument is written on the same piece of paper with the note, and the former is detached without the maker's consent, the note will be void, even in the hands of an innocent purchaser. Professor Bigelow in his work on Bills, Notes and Checks, second edition, page 221, says that marginal terms, conditions and stipulations, which are intended to be part of the written contract, are treated by the better authorities as inseparable from the main writing to which the signature is given, and that no distinction is made by the better authorities between the alteration of the body of the note and detaching therefrom such marginal agreements. In either case the note is rendered void: See, also, *Gerrish v. Glines*, 56 N. H. 9; *Stephens v. Davis*, 85 Tenn. 271, more fully reported in 2 S. W. 382; *Scotfield v. Ford*, 56 Iowa, 370, 9 N. W. 309; *Wait v. Pomeroy*, 20 Mich. 425, 4 Am. Rep. 395.

Plaintiff relies on *Yocum v. Smith*, 63 Ill. 321, 14 Am. Rep. 120, which was cited with approval by Mr. Commissioner Oldham in *Humphrey Hardware Co. v. Herrick*, 72 Neb. 878, 101 N. W. 1016, 102 N. W. 1010. Plaintiff also argues that *Humphrey Hardware Co. v. Herrick* is controlling in the instant case. In the last-cited case a negotiable instrument was signed and delivered to the payee with appropriate blank spaces. ²⁷⁴ wherein, after such delivery, the rate and date of interest and place of payment were inserted. In the opinion of the court on the application for a rehearing the decision was properly based on the apparent authority given by the

maker to the payee to fill in those blanks. But no such apparent authority was given Converse or anyone else to detach the agreement from the bill of exchange. We do not think that this is a case where the rule applies that, if a person's negligence influences and induces an act whereby an innocent man is injured, the culpable party must sustain the loss.

In the case of Scholfield v. Londesborough, 45 Week. Rep. (Eng.) 124, it was held that the fact that some space intervened between the character £ and the figures 500 in an accepted bill of exchange did not render the acceptor liable for £3,500, the figure 3 having been fraudulently inserted between said character and the figure 5. It is held therein that men engaged in business transactions are not to anticipate that some one will commit a felony. In Stephens v. Davis, 85 Tenn. 271, 2 S. W. 382, a note had been executed, and conditions qualifying it were written upon a stub to which the note was attached. It was held that, although a perforated line separated the stub from the note, the maker was not bound to anticipate a forgery by the separation of the writings, and his conduct did not estop him from maintaining a defense of alteration when sued by an innocent holder of the detached note. There are authorities to the contrary, but we are satisfied with Davis v. Henry, 13 Neb. 497, 14 N. W. 523. If the agreement, as testified to by defendants, was glued to the note, it could not have been detached except by deliberate, skillful and painstaking efforts, and for the purpose of defrauding the acceptors.

Under the provisions of section 123 of the negotiable instrument law (Laws 1905, c. 83; Ann. Stats. 1907, sec. 9322), plaintiff was permitted to recover upon the note according to its original terms. Defendants are willing ²⁷⁵ to deliver to plaintiff the unsold watches, and he does not have just cause for complaint.

2. Plaintiff argues that defendants should have returned the watches to Chicago on or before January 1, 1907, and, not having done so, are not entitled to the benefit of the agreement. Converse, however, in December, 1906, requested defendants to retain the goods until the succeeding March, and wrote them that he would then make satisfactory arrangements concerning the unsold watches. He thereby waived delivery according to the terms of the instrument. Plaintiff has refused to accept the watches, and will not be heard to say that they should have been tendered to Converse.

The judgment of the district court is right, and is affirmed.

Marginal Figures in a Note may be referred to for the purpose of supplying the amount for which the note was given, when such amount has been wholly omitted in the body of the note: Kimball v. Costa, 76 Vt. 289, 104 Am. St. Rep. 937. But it is said that if the

marginal figures do not correspond with the amount written in the body, the latter will control: *Prim & Kimbell v. Hammel*, 134 Ala. 652, 92 Am. St. Rep. 52; and if the amount is expressed in the body of the note, an alteration in the marginal figures is material: *Prim & Kimbell v. Hammel*, 134 Ala. 652, 92 Am. St. Rep. 52; *Merritt v. Boyden & Son*, 191 Ill. 136, 85 Am. St. Rep. 246. The unauthorized alteration of a written instrument is the subject of a note to *Burgess v. Blake*, 86 Am. St. Rep. 80. An application for insurance on a single sheet of paper, containing at the end a note intended to secure assessments, is a single contract, and the removal of the note, the signing of which is secured under false representations, is a material alteration of the instrument, rendering it void even in the hands of a bona fide holder, even if such note is written and signed below a perforated line, if the general appearance of the paper is such that it shows that the signer was not guilty of negligence in signing it: *Rochford v. McGee*, 16 S. D. 606, 102 Am. St. Rep. 719.

ANDERSON v. CHICAGO, BURLINGTON AND QUINCY RAILWAY COMPANY.

[84 Neb. 311, 120 N. W. 1114.]

TRIAL—Submission of Case to Jury When There is No Evidence.—It is error to submit a cause of action to the jury when there is no evidence to sustain it. (p. 627.)

EVIDENCE—Value of Crops and Livestock.—A Farmer who is engaged in raising farm crops and livestock is competent to testify to the value of such crops and livestock. (p. 627.)

EVIDENCE—Value of Land and Crops.—A Farmer who has resided upon his farm for many years, and is actively engaged in agriculture, is competent to testify as to the value of his land and the crops raised thereon by him. (p. 628.)

EVIDENCE—Value of Tract of Land.—A Farmer actively engaged in agriculture, and who is acquainted with a particular tract of land, and has a knowledge of the value of lands in its vicinity, is competent to give an opinion as to the value of the particular tract. (p. 628.)

(Syllabi by the court.)

James E. Kelby, Byron Clark and Frank E. Bishop, for the appellant.

H. W. Short, contra.

312 **GOOD, C.** Plaintiff brought this suit to recover on four separate causes of action. For his first cause of action he alleged that defendant negligently threw out sparks and coals of fire from a passing engine, and thereby started a fire which burned and destroyed certain crops and killed a part of a field of growing alfalfa. For his second cause of action he alleged the negligent starting of a fire in a similar manner which burned and destroyed a quantity of hay and a rake. For a third cause of action he alleged that the defendant

negligently permitted its fence along its right of way to become out of repair and insufficient to turn stock, and in consequence plaintiff's hog went upon defendant's railroad track and was killed by a passing train. For a fourth cause of action he alleged that defendant negligently failed to keep open and unobstructed a certain ditch and culvert along its right of way and under its track, whereby the surface waters were collected, dammed up and thrown back upon plaintiff's land, which caused the destruction of certain crops and killed and destroyed several acres of growing alfalfa. The defendant admitted its corporate capacity, and denied all the other allegations of the petition. Verdict and judgment were for plaintiff, and defendant has appealed.

Defendant insists that there is not sufficient evidence to sustain the first and second causes of action, and that it was error for the court to submit those causes to the jury. We have carefully examined the evidence, and with reference to the first cause of action there is nothing in the evidence from which it can be ascertained what quantity of hay or crops were destroyed or what amount of alfalfa was killed. With reference to the second cause of action, the evidence shows that there was a fire upon plaintiff's ³¹³ premises which burned and destroyed certain hay and a rake. A witness testified that he observed the fire and that the hay was burning, but he did not know how the fire started or what caused it. He further stated "there was another fire on up the track just a little ways," and that a train had passed about that time. This is all the evidence relating to the origin of the fire which caused the damage sued for in the second cause of action. It is not shown whether the train passed before or after the fire started. It is not shown that the fire burned from the railroad track toward the hay, nor from what direction the wind was blowing, nor how far the hay was located from the railroad track. Under these circumstances, the evidence is wholly insufficient to warrant the finding that the fire was started by sparks or coals from defendant's engine. The evidence was insufficient to justify the submission of the first and second causes of action to the jury.

Defendant complains of the admission of certain evidence given by the plaintiff, wherein he testified to the value of the crops destroyed by fire and water, and also with reference to the value of the land before and after the alfalfa was killed by fire and water. Defendant insists that the witness was not competent to testify as to value. The record shows that the plaintiff was a farmer, had owned and resided upon the land for many years and was engaged in the raising of crops of the character of those destroyed. The owner of land who has resided upon and cultivated the same and is familiar with its value is a competent witness on the question of its value:

Chicago, R. I. & P. R. Co. v. Buel, 56 Neb. 205, 76 N. W. 571; Chicago, B. & Q. R. Co. v. Shafer, 49 Neb. 25, 68 N. W. 342; 17 Cyc. 115. The owner of chattels is qualified by reason of that relationship to give his estimate of their value: 17 Cyc. 113, 114; see, also, Western Home Ins. Co. v. Richardson, 40 Neb. 1, 58 N. W. 597. Defendant also complains of the admission of certain other testimony as to the value of certain crops destroyed, and the value of land before and after the destruction of the alfalfa by fire and water, on the ground that the witness ³¹⁴ was incompetent. The record discloses that the witness was a farmer engaged in the business of agriculture and raising crops of a similar character, and had some knowledge of the value of lands in the vicinity of plaintiff's land, and was acquainted with that land. The general rule is that a farmer who is engaged in raising crops and livestock may, without other qualifications being shown, testify to the value of farm or domestic animals and farm crops. If a witness is shown to be acquainted with the value of land generally in that vicinity, he may testify as to the value of such land: 17 Cyc. 116, 117. The record brings the witness within the rule, and the evidence was properly admitted. Complaint is made of other rulings on the admission of evidence, all of which we have examined and find no prejudicial error in any of them.

On motion of the defendant, the court submitted to the jury the four several causes of action for special findings as to each. The return of the jury allowed plaintiff on the first cause of action fifty-five dollars and ten cents; on the second cause of action fifty-eight dollars and fifty-two cents; on the third cause of action six dollars, and on the fourth cause of action, two hundred and seventy-four dollars and seventy-nine cents, and returned a general verdict for three hundred and ninety-four dollars and forty-one cents. It appearing that the evidence is not sufficient to sustain the first and second causes of action, the judgment as to the amount covered by those two findings should be reversed. We therefore recommend that the judgment of the district court be reversed and the cause remanded, with directions to the district court to enter judgment as of date October 16, 1907, in favor of the plaintiff, for the amount found by the jury upon his third and fourth causes of action, in the sum of two hundred and eighty dollars and seventy-nine cents, and to grant defendant a new trial as to plaintiff's first and second causes of action.

Duffie, Epperson and Calkins, CC., concur.

By the COURT. For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded, with directions to the district court ³¹⁵ to enter judgment as of date October 16, 1907, in favor

of plaintiff, for the amount found by the jury upon his third and fourth causes of action, in the sum of two hundred and eighty dollars and seventy-nine cents, and to grant defendant a new trial as to plaintiff's first and second causes of action. It is further ordered that each party pay one-half of the costs in this court.

Judgment accordingly.

The Admissibility of the Opinion of Witnesses as to the Value of property is discussed in *Atlantic etc. R. R. Co. v. Campbell*, 4 Ohio St. 583, 64 Am. Dec. 607; *Hangen v. Hachemeister*, 114 N. Y. 566, 11 Am. St. Rep. 691; *Griswold v. Gebbie*, 126 Pa. 353, 12 Am. St. Rep. 878; *Gallagher v. Kemmerer*, 144 Pa. 509, 27 Am. St. Rep. 673; *Enos v. St. Paul F. & M. Ins. Co.*, 4 S. D. 639, 46 Am. St. Rep. 796; *Elvins v. Delaware etc. Tel. Co.*, 63 N. J. L. 243, 76 Am. St. Rep. 217; *Long v. Pruyn*, 128 Mich. 57, 92 Am. St. Rep. 443. Persons engaged in buying, selling, and handling racehorses, who had seen certain racehorses injured while in the hands of a common carrier, frequently upon the racetrack and in races before their injury, and knew their speed and quality, are competent to testify to the value of such horses immediately before and subsequent to such injury: *Chicago etc. Ry. Co. v. Calumet etc. Farm*, 194 Ill. 9, 88 Am. St. Rep. 68.

HAIR v. CHICAGO, BURLINGTON AND QUINCY RAILWAY COMPANY.

[84 Neb. 398, 121 N. W. 439.]

RAILROAD—Duty to Licensee in Yards Near Station.—A railway company that maintains its station in a public highway in the center of its switchyards, and for years has permitted the public to use said yards as a footway, is bound to exercise reasonable care to avoid injuries to persons who are known or reasonably may be expected to be within those yards in the vicinity of said station. (pp. 631, 632.)

NEGLIGENCE—When a Question for Jury.—Questions of negligence and contributory negligence, where the facts are such that from them different minds may reasonably draw diverse conclusions, are for the jury, and not the court, to determine. (p. 632.)

INSTRUCTIONS—Error in not Ground for Reversal.—If the trial court fairly instructs the jury concerning the law of a case its judgment will not be reversed because of some slight ambiguity in the instructions, nor because they might lawfully have been stated more favorably to defendant. (p. 632.)

(Syllabi by the court.)

James E. Kelby, Arthur R. Wells and Frank E. Bishop, for the appellant.

Wilmer B. Comstock and John R. Berry, contra.

398 ROOT, J. Plaintiff recovered judgment for personal injuries, and defendant appeals.

There is but little conflict in the evidence. It may fairly be said that three lines of defendant's railway converge at Ashland, a city of about fifteen hundred inhabitants, where defendant maintains a switchyard about four hundred feet wide and fifteen hundred feet in length. The greater part of Ashland lies west of and some distance from said switchyard. Main street is one hundred feet in width, and crosses said yards obliquely at a point about midway between the ends ³⁹⁹ thereof, and defendant's station, with the exception of the northwest corner of the building, is located in said street east of the main track and most of the sidetracks, which run north and south. About a half mile north of the station the railway crosses Salt creek, and a half mile farther the Platte river. None of the streets north of Main street are opened or traveled across defendant's railway, and people having occasion to cross the railway in said city, if they travel the highway, must come to Main street, and practically all of the individuals transacting business with defendant at Ashland are compelled to pass over the main track and sidetracks to reach its agent or station. It also appears that for many years next preceding the date plaintiff was injured the public generally, with at least the tacit consent of defendant, has used the yard aforesaid as a footway in traveling north from said station to Salt creek and the Platte river.

1. Plaintiff in January, 1907, had been working in the neighborhood of Ashland, and on the 1st of February, in company with a friend, about 4 o'clock in the afternoon, went to defendant's station, and there ascertained that the north and east bound train would arrive about 7 o'clock. Plaintiff left his suit-case with defendant's agent, went back up town for supper, and returned with said friend a few minutes too late for the Omaha passenger. He then inquired of said agent concerning the west-bound passenger train, and was told that it was due about midnight. Plaintiff testified that he had intended to travel on said train to Lincoln, where his parents resided, and that he remained in the waiting-room of defendant's station for that purpose, but it does not appear that he informed any employé of the company of his intentions, nor did he purchase or have a ticket or any other evidence of a right to transportation over defendant's railway. About 9:30 o'clock a trainman came into the station, and in speaking to another person stated that a freight train would soon depart for Omaha. Plaintiff's friend went out of the station and north into the yards ⁴⁰⁰ to ascertain if he could secure transportation on said freight, and plaintiff stepped outside of the station to bid his friend farewell and breathe the more invigorating air. The night was dark and cold, and snow was falling. While plaintiff was standing west of the station and upon its platform, his hat was blown from his head and north-

ward through the yard. He looked each way and listened, and, not receiving warning of the approach of any car or locomotive, ran from sixty to one hundred feet after his hat, and recovered it. The evidence does not inform us with much certainty whether plaintiff went outside of Main street or not, but the inference is that he did. In the meantime one of defendant's locomotives was backing a string of freight cars, at the rate of ten miles an hour, south from the north part of the yard. The car nearest to plaintiff was a flat car. No warning by way of sound, light or person was given of the approach of the cars. As soon as plaintiff became aware of the movement of the cars, he attempted to get out of their way, but his foot was caught and crushed by the wheels of said flat car. The evidence shows without dispute that it was the custom of defendant when backing cars through said yard to station a brakeman upon the right-hand side of the rear car and to maintain a light thereon. Section 104, chapter 16 of the Compiled Statutes of 1907, charged defendant with the duty of giving warning, by sounding the locomotive whistle or ringing the bell thereof, of the near approach of said cars to said street crossing.

Defendant insists that plaintiff was a trespasser, to whom it owed no further duty than not to wantonly injure him, and that he is in no more favorable light than was the plaintiff in *Shults v. Chicago, B. & Q. R. Co.*, 83 Neb. 272, 119 N. W. 463. Plaintiff relies upon *Chicago, B. & Q. R. Co. v. Wymore*, 40 Neb. 645, 58 N. W. 1120, and also insists that he was injured in a public highway. Plaintiff also argues that the relation of passenger and carrier existed between the parties hereto at the time of the accident, but we are not willing to concede that fact. Plaintiff, however, was in ⁴⁰¹ the station upon the implied invitation of defendant, and in departing therefrom, whether for temporary purposes or otherwise, would not go in the guise of a trespasser. Defendant's servants were reckless and grossly negligent. At 9 o'clock in the evening, although there would not be much travel across the yards by way of Main street, yet pedestrians and teams were likely to cross at any moment. Individuals desiring to send, or expecting to receive, telegrams might cross the yards to the station, and an occasional footman might be expected to walk north or northwest from the depot through the yards. This brings the instant case within the rule announced in *Chicago, B. & Q. R. Co. v. Wymore*, 40 Neb. 645, 58 N. W. 1120, and distinguishes it from *Shults v. Chicago, B. & Q. R. Co.*, 83 Neb. 272, 119 N. W. 463. In the first case and the instant one defendant was reasonably bound to anticipate that some one might be in the location where plaintiff was injured, and was charged with the duty of exercising at least ordinary care to give notice of the movement of the cars

it was so swiftly propelling toward and across the public highway and across the traveled way to and from its station: *Sullivan v. New York, N. H. & H. R. Co.*, 73 Conn. 203. 47 Atl. 131; *Downing v. Morgan's L. & T. R. & S. Co.*, 104 La. 508, 29 South. 207; *Chesapeake & O. R. Co. v. Keelin's Admr.* (Ky.), 62 S. W. 261; *Johnson v. Lake Superior T. & T. Co.*, 86 Wis. 64, 56 N. W. 161. The jurors were instructed that plaintiff could not recover if guilty of negligence which contributed to his injuries, and that he was charged with the duty of a reasonable use of his senses to determine whether trains or cars were approaching. Reasonable men, we are satisfied, might draw differing conclusions from the testimony, and we do not feel that we should hold, as matter of law, as defendant argues we should, that plaintiff was guilty of contributory negligence: *Johnson v. Lake Superior T. & T. Co.*, 86 Wis. 64, 56 N. W. 161.

2. It is suggested that the tenth instruction given by the court permitted the jurors to return a verdict upon finding that defendant failed to maintain a fence between ⁴⁰² its station and the railway tracks, but we do not so understand the charge of the court. Plaintiff in his petition, as matter of inducement, alleged that such a fence was not maintained, but did not charge that defendant was negligent in that omission. The acts of negligence are later specifically stated in a separate paragraph of the petition, and the opening statement in the instruction, "In the event that you find from the evidence and under these instructions that defendant was negligent in some of the respects alleged as set out in the first paragraph of these instructions," etc., by reference to said paragraph, which is a summary of the petition, plainly restricts the grounds for recovery to the various specific alleged acts of negligence, and not to any part of the matter of inducement.

3. It would extend this opinion to an unprofitable length to refer to each instruction given and refused. We have examined all of them, and find that the charge of the court is a reasonable statement of the law of this case. The rulings of the court in admitting and rejecting evidence do not present any serious question for our consideration. The defendant did not produce as witnesses any of the train crew responsible for plaintiff's injury, nor any witness other than Mr. Bignell, its division superintendent. The facts testified to by plaintiff's witness are practically undisputed.

Defendant has had a fair trial, and the judgment of the district court is affirmed.

Where a Railroad Company has Permitted its roadbed to obstruct the natural drainage of water from a street so that it has overflowed and washed away the sidewalk and thus compelled pedestrians to use the railroad track instead of the sidewalk as a footpath, and this use of

the track has been so general and long continued that the company must have known thereof and acquiesced therein, a person so using it after alighting from a train will be deemed a licensee rather than a mere trespasser: *Moody v. St. Louis etc. Ry. Co.*, 89 Ark. 103, 131 Am. St. Rep. 75.

A Passenger Leaving a Railroad Depot by a Pathway on its premises which he and passengers generally have been invited to use is not a trespasser or a mere licensee: *Alabama Great Southern Ry. Co. v. Godfrey*, 156 Ala. 202, 130 Am. St. Rep. 76.

MARRIOTT v. WESTERN UNION TELEGRAPH COMPANY.

[84 Neb. 443, 121 N. W. 241.]

TELEGRAPH—Failure to Deliver, Evidence of Effect.—Where the plaintiff had decided to consign a shipment of cattle to Chicago upon the receipt of a telegram regarding that market, which telegram the defendant negligently failed to deliver, he may, in an action against the defendant for such negligence, be permitted to testify that the effect upon his mind of the failure to receive the telegram was to cause him to divert a part of such shipment to another market. (pp. 634, 635.)

TELEGRAPH—Failure to Deliver—Notice of Probable Result. Knowledge of the probable result of a failure to deliver a telegraph message may be imparted to the telegraph company as well by circumstances as by formal or explicit notice or by the language of the message itself. (p. 635.)

TELEGRAPH—Damages for Failure to Deliver Message Relating to Shipment of Stock.—Where the failure of the defendant to deliver a message caused the plaintiff to divert a shipment of stock to an unfavorable market, the measure of damages in an action against the defendant for such failure is the difference between the net sum the plaintiff received in such unfavorable market and what he would have realized in the market to which he would have shipped the stock except for defendant's said failure. (p. 636.)

(Syllabi by the court.)

George F. Fearons and Francis A. Brogan, for the appellant.

T. W. Blackburn, contra.

444 **CALKINS, C.** The plaintiff was a stockman having a ranch about one hundred miles distant from Evarts, a station on the Chicago, Milwaukee and St. Paul Railroad in South Dakota. He had about four hundred and fifty head of cattle, enough to load twenty-one cars, which he desired to ship to Chicago or Sioux City, the two markets which were most readily accessible from Evarts. After starting the cattle from his ranch on the drive to Evarts. he on Saturday, September 3, 1904, delivered to the defendant at Evarts a message to the

Globe Commission Company of Chicago, of which one Horn was the representative, as follows: "Evarts, So. Dak. 9-3-1904. To Globe Com. Co. Yards: Will load Monday. Wire before noon Monday prospects for Wednesday. (Signed) A. D. Marriott." This was duly delivered, and on Monday, in response to the request therein contained, Mr. Horn delivered to the defendant at Chicago the following message: "Chicago, Ill., Sept. 5, 1904. A. D. Marriott, Evarts, So. Dak. 2500 westerns 10 to 20 higher; show ⁴⁴⁵ Humphrey. (Signed) J. S. Horn." This message the defendant negligently failed to deliver. Prior to 6 o'clock P. M. of that day the plaintiff had billed or directed the billing of all his cattle to Chicago; but not receiving the telegram sent by Mr. Horn, though called for by him at the defendant's office, he, for the reason, as he claims, that he supposed the market at Chicago had not improved, changed the billing of his cattle so as to consign six cars, containing one hundred and twenty-five head, to Sioux City. The result was that he realized four hundred and seventy-three dollars and twenty-three cents less for the cattle than he would have obtained had the same been shipped to Chicago. There was a trial to a jury, who found for the plaintiff in the above amount, and from a judgment upon this verdict the defendant appeals.

1. The defendant argues that, before the damages claimed can be regarded as arising naturally from defendant's breach of the contract, we must ascertain what effect the receipt of this telegram would have had upon the plaintiff's mind, and that this fact is not susceptible of proof and cannot be the subject of investigation in a legal proceeding. It does not follow that, because a fact cannot be established by direct proof, the same cannot be the subject of a legal investigation; but that point it is unnecessary to discuss, as the question presented here is one of the application of the law of evidence. It is said that, while Mr. Marriott may now testify what he would have done, he cannot possibly know what the effect would have been. We think the question must be determined by the test whether the witness is testifying to a state of mind which actually existed, or what would have been the state of his mind under certain conditions. If the former, it is admissible; if the latter, it is the expression of an opinion, and irrelevant under a familiar rule of the law of evidence. Upon consideration we are convinced that the evidence relates to a state of mind which actually existed. The plaintiff had determined to ship the cattle to Chicago if he received advices showing favorable conditions existing in that market. The failure ⁴⁴⁶ to receive any telegram caused him to divert six cars to Sioux City, which was the nearest market for such cattle. In testifying to this he was not giving an opinion as to what effect the receipt of the telegram would have pro-

duced, but what effect the failure to receive the telegram did actually produce, and we therefore conclude that the real question necessary to be determined is the effect actually produced by defendant's breach, which is capable of proof and may be the subject of legal investigation.

2. It is claimed that the diversion of part of plaintiff's shipment to Sioux City was not a result which might reasonably be supposed to have been contemplated by the parties as one of the consequences of defendant's breach of its contract to deliver the message; in other words, that, supposing the defendant actually took thought of the consequences of its neglect, it could not reasonably be expected to consider a diversion of the shipment as one of the natural results. This assumes an ignorance on the part of the defendant of the ordinary method of conducting the plaintiff's business, and the purpose for which business men make use of telegraph facilities, which is inconceivable. The defendant had forwarded the message on Saturday addressed to a commission company at the Chicago stock-yards, asking them to wire before Monday noon the prospects for Wednesday. The defendant received and transmitted this message and took from the party to whom it was addressed a reply thereto, the contents of which plainly indicated that it was intended to convey to the plaintiff information of the condition of the cattle market. We think these facts unexplained were sufficient to submit to the jury, which was the judge of the questions of fact, whether the defendant should or should not have anticipated this result as a consequence of its negligence: *Smith v. Western Union Tel. Co.*, 80 Neb. 395, 114 N. W. 288.

3. The rule for the measure of damages announced in *Hadley v. Baxendale*, 9 Exch. Rep. *341, generally ⁴⁴⁷ adopted in this country, is expressed in the following language: "Where two parties have made a contract, which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either as arising naturally, i. e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it." We have therefore to inquire whether the defendant may reasonably be supposed to have contemplated that the diversion of such shipment might result, as it did, in a financial loss to the plaintiff on account of the less favorable conditions existing in the Sioux City market. As is pointed out in the brief of the defendant, the different markets have a tendency to approximate each other; but they vary from the normal and from each other at particular times and on account of local conditions that affect one market and

do not obtain in another. The problem presented to the shipper when he is determining to which of several markets he will consign his stock is to select a market where the most favorable conditions will probably exist for the seller at the time of the arrival of his stock. This can never be done absolutely, but it is one of the conditions which the shipper undertakes to forecast from a knowledge of present conditions, and to ascertain those present conditions he uses the facilities offered by the telegraph. If the defendant company fails to transmit, according to its contract, information concerning the existing conditions, and the shipper, for want of such information, makes the mistake of shipping his stock to the market where the less favorable conditions prevail, the loss which he thus sustains arises naturally from his selection of the unfavorable market, and is one which would have been in the contemplation of any person who had considered what the consequences of selecting the unfavorable market would be. The loss that ⁴⁴⁸ he so suffered was the identical one which he was seeking to avoid in selecting his point of shipment, and, if the defendant considered what damage the plaintiff would suffer if he was led to select the wrong market by its failure to fulfill its contract, the difference between the prices in the favorable and the unfavorable market would have been the first and only consequence of importance which would have naturally suggested itself to the defendant. We therefore conclude that the case falls within the rule laid down in *Hadley v. Baxendale*, 9 Exch. Rep. 341, and that the court did not err in submitting the case to the jury.

We recommend that the judgment of the district court be affirmed.

Duffie, Epperson and Good, CC., concur.

By the COURT. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed.

The Damages Recoverable Against a Telegraph Company for the failure to transmit or deliver messages are discussed in the note to *Kagy v. Western Union Tel. Co.*, 117 Am. St. Rep. 286. Where the terms of a telegraphic message and the circumstances known to the company when the message was presented for transmission were reasonably sufficient for the defendant to contemplate therefrom that the losses sustained by the plaintiff would probably result from a negligent transmission, it will be liable in damages to the amount of loss directly sustained by plaintiff from its negligence. And it is not essential that the particular loss sustained was contemplated, it being sufficient if the loss sustained should have been contemplated as a probable and proximate result of the negligence: *Western Union Tel. Co. v. Milton*, 53 Fla. 484, 125 Am. St. Rep. 1077; *Western Union Tel. Co. v. Merritt*, 55 Fla. 462, 127 Am. St. Rep. 169.

CLAGUE v. TRI-STATE LAND COMPANY.

[84 Neb. 499, 121 N. W. 570.]

CORPORATION—Contract Ultra Vires—Admission in Answer.

A statement in an answer that, if a contract was executed by a corporation, it is void because ultra vires, is an admission that the contract was made, notwithstanding a general denial in another paragraph of said pleading. (p. 641.)

IRRIGATION—Contract to Furnish Water, Validity and Enforcement.—A contract for the use of water, made for a valuable consideration with a corporation organized for the purpose of supplying water for irrigating land, that did not when made contravene the laws or policy of the state, may, as between the parties or their successors in interest, be enforced, subject to all reasonable regulations, provided that the rights of other users are not thereby unlawfully curtailed. (pp. 639, 640.)

IRRIGATION—Contract to Furnish Water, Liability for Breach.

If a corporation engaged in the business of supplying individuals with water for the irrigation of arid or semi-arid lands unlawfully and arbitrarily prevents the holder of one of its water contracts from using water for the irrigation of a field of growing potatoes, it is liable to the individual in damages. (p. 640.)

IRRIGATION—Contract to Furnish Water, Damages for Breach.

In such a case the measure of damages is the value to plaintiff of the use of said right during the time he is deprived thereof, and it is not error to instruct the jury that the measure of plaintiffs' recovery "is the value of the crop at the time the water was shut out of said canal, with the right to irrigate it from that time on to the end of the season, less the value of the crop without the right to irrigate it from that time until the end of the season." (p. 640.)

INSTRUCTIONS — Harmless Error in Giving.—If the court gives another instruction less favorable to plaintiffs on the same subject, it is error without prejudice to defendant, especially if it has requested practically the same instruction. (p. 640.)

IRRIGATION—Breach of Contract to Furnish Water—Proof of Damages.—In proving damages in such a case, considerable latitude should be given in the introduction of evidence, and a judgment will not be reversed because the court refused to strike out an answer not entirely responsive to an interrogatory, and to that extent not competent, where there is an abundance of other competent evidence in the record to support the verdict, and the only reasonable ground for contention upon the entire record is the amount of the recovery. (p. 641.)

(Syllabi by the court.)

Wright & Wright and Wilcox & Halligan, for the appellant.

Morrow & Morrow, contra.

500 ROOT, J. Action for damages because of the alleged unlawful interference with plaintiffs' use of water for irrigating their farm. Judgment for plaintiffs, and defendant appeals.

The facts in this case are incident to the reorganization of the Farmers' Canal Company, the sale of its assets under a decree of foreclosure, and the conduct of the grantee of the

purchaser at said sale. Many of the facts relating to the evolution of said enterprise are detailed in *Farmers' Canal Co. v. Frank*, 72 Neb. 136, 100 N. W. 286, and reference is hereby made to said opinion.

The original corporation was conducted as a mutual concern. The stockholders contributed small sums of money and a good deal of labor to construct the canal. In the fall of 1890 individuals, not owners of, nor subscribers to, the stock of the corporation, desired to acquire control thereof for speculative purposes. The corporate stock and other obligations were then represented principally by receipts issued to those who had paid money or contributed materials or labor for the construction of the canal. The main canal had been completed a distance of about ten miles from the headgate and about one-fourth the width originally contemplated, and the stockholders were receiving and using water from the main canal to irrigate their lands. The promoters of the reorganization and all of the stockholders of the old corporation evolved a scheme whereby the latter were to be protected in their investments and the control of the corporation given to the former without the payment of money. In ⁵⁰¹ pursuance of this plan, the old company executed contracts conveying in severalty to said stockholders perpetual, preferred and non-assessable water rights, which, if valid in all particulars, gave the grantees in said instrument each an absolute right in perpetuity to the use of a number of cubic inches a second of water for irrigating any land that might be served from said canal at any point along its path within forty miles of the headgate thereof, without the right of the corporation to prorate the use of water in said canal among said grantees on the one part and the subsequent purchasers of water from the corporation on the other, and without liability on the part of the original stockholders to pay for maintenance of the canal in the future. There is some evidence tending to prove that the promoters agreed that those contracts should be issued by the reorganized, and not the original, corporation, but all parties interested knew that the original corporation had assumed to issue the contracts and acquiesced therein. By virtue of said arrangement Joel Jackson received one of said contracts granting him the right to thus use one hundred and twenty square inches of such water flowing under a five-inch pressure, but not describing any land upon which it was to be used. The contract was recorded, and thereafter Jackson used water from said canal to irrigate land owned by him. Subsequently he sold said land and water right, and his grantee, in turn, sold and assigned the water contract separate from the land, and by mesne conveyances plaintiffs became the owners thereof. In the spring of 1906, after said purchase, plaintiffs diverted the water from defendant's canal

at a point about fourteen miles from the headgate thereof, and had prepared to irrigate forty acres of potatoes. In the latter part of July defendant commenced reconstructing its canal so as to irrigate an extensive tract of land not within the limits of the territory served by the ditch as constructed by the reorganized company. Meeting with determined opposition from the water users who had been receiving water out of the upper section of the canal, defendant built a ⁵⁰² dam therein some distance above plaintiff's headgate, and cut the banks of the ditch below said obstruction. Plaintiff's could not secure water from any other source, and claim that their potatoes were seriously injured and that they were damaged thereby.

1. Independent of some questions of practice, defendant argues that the aforesaid contract was void and not within the chartered power of the corporation to make, because it purported to give the holder an unlawful preference in the use of water, and illegally sought to shoulder on other water users the entire cost of maintaining the canal, and, finally, that the use of water for irrigation is inseparably attached to land and cannot be conveyed separate therefrom. There is not a particle of evidence to show that defendant was under the necessity of, or that it attempted to, prorate the use of any water in its canal, nor that it had levied a maintenance tax which plaintiffs had refused to pay. Defendant arbitrarily shut off the water for its own convenience. We therefore do not determine the effect of those clauses in said conveyance.

Concerning the power of the Farmers' Canal Company to convey the water right under consideration without reference to a specific tract of real estate, it may be said that the corporation had theretofore appropriated water and constructed its ditch with reference to the land now owned by plaintiffs, as well as that owned by Jackson when the contract was made with him. The corporation received from Jackson twenty dollars and the use of a team for a year in consideration of said agreement. The corporation was organized, and had appropriated the water prior to the enactment of the law of 1889, and had executed said contract before the passage of the present irrigation law in 1895. At the time Jackson surrendered his claims against, and interest in, the corporation for said contract, the state had not announced its policy to attach the use of water appropriated for irrigation purposes to designated tracts of land, and it is not claiming in the instant ⁵⁰³ case that the use of its water is being misapplied by plaintiffs, nor are any other water users insisting that their rights are in any manner infringed by the use aforesaid. In irrigating said land, plaintiffs were applying the water to the purposes for which the corporation had appropriated it, and as between the parties hereto, upon the facts before us,

we are of opinion that plaintiffs acted within their legal rights: *Strickler v. City of Colorado Springs*, 16 Colo. 61, 25 Am. St. Rep. 245, 26 Pac. 313; *Oppenlander v. Left Hand Ditch Co.*, 18 Colo. 142, 31 Pac. 854; *Cache La Poudre Irr. Co. v. Larimer & Weld Reservoir Co.*, 25 Colo. 144, 71 Am. St. Rep. 123, 53 Pac. 318; *Middle Creek Ditch Co. v. Henry*, 15 Mont. 558, 39 Pac. 1054; *Hall v. Blackman*, 8 Idaho. 272, 68 Pac. 19; *Johnston v. Little Horse Creek Irr. Co.*, 13 Wyo. 208, 110 Am. St. Rep. 986, 70 L. R. A. 341.

2. The court instructed the jury that the measure of plaintiff's damage was "the value of the crop at the time the water was shut out of said canal with the right to irrigate it from that time on to the end of the season, less the value of the crop without the right to irrigate it from that time until the end of the season." Defendant requested an instruction that such measure was "the difference between the value of the crops growing on plaintiffs' land as set out in the petition immediately before and immediately after the injury complained of." The instruction requested would be proper if the injury had been inflicted by one act or at one time so that a comparison of the crop just before and immediately subsequent to the transaction would demonstrate the extent of the injury and the amount of the damage. In the instant case the injury resulted from withholding the water for several consecutive weeks. In the meantime the crops had made some progress. If the comparison were made immediately after all injury had been inflicted, defendant would have the benefit of the increased growth and value of the potatoes which had accrued notwithstanding the handicap imposed by cutting off the water. If the application were made immediately before and immediately subsequent to the damming of the canal, then a just estimate could not ⁵⁰¹ be made without a consideration of the result of the continued deprivation of water during the growing season. Plaintiffs were damaged to the extent of the value to them of the use of the water during the growing season for their crop, and the instruction given fairly presented that principle to the jury.

In the sixth instruction given by the court on its own motion the jurors were informed that the plaintiffs' damages would be "the difference between the fair market value of the growing crop in its condition at or just before it was damaged by reason of defendant's failure and neglect to carry and deliver water and its fair market value immediately after the damage was done." Defendant argues that this instruction is in conflict with the second one given by the court. In so far as it conflicts, it is to defendant's advantage. The first one given more nearly approximates a proper measure of recovery, and receives our approval under the facts in this case. If the jury followed either, defendant ought not to complain.

3. Defendant insists that the court erred in instructing the jury that the execution of the contract was admitted. Evidently counsel have overlooked the allegations in the fourth paragraph of their answer that, "if said Farmers' Canal Company issued the water contracts as set out in plaintiff's amended petition, it acted ultra vires, . . . and said alleged contracts were issued without consideration." Thereby defendant admitted the execution of the contracts: *Dinsmore & Co. v. Stimbert*, 12 Neb. 433, 11 N. W. 872; *Home Fire Ins. Co. v. Johansen*, 59 Neb. 349, 80 N. W. 1047.

4. Complaint is made concerning the admission of evidence as to the extent of plaintiffs' damage. Witnesses were permitted to testify to what in their judgment would have been the yield of potatoes if the land had been irrigated; also, to state the actual yield and the market value of potatoes in the fall; also, to say what the potatoes were worth at the time the water was shut off, but with the right to continue the use of such water during the growing season. The witness Foreman qualified as an expert, ⁵⁰⁵ and was asked concerning the value of the potatoes at the time the water was shut off, and stated: "All the conditions being favorable for the crop from that on, I should say that the crop would bring one hundred dollars an acre." The court refused to strike this answer out. Plaintiffs' counsel then asked the witness to give his judgment based on the hypothesis that the crop could be irrigated, but excluding the further assumption of favorable conditions, whereupon counsel for defendant objected that the witness had answered such a question, and the objection was sustained. The answer was not strictly responsive to the question, and the assumption of continued favorable conditions was not the proper one upon which to predicate an opinion as to the value of the crop on the 1st of August: *Pribbeno v. Chicago B. & Q. R. Co.*, 81 Neb. 657, 116 N. W. 494; *Morse v. Chicago B. & Q. R. Co.*, 81 Neb. 745, 116 N. W. 859. In view of the position assumed by counsel that the answer given to the first question was an answer to the subsequent one, which clearly called for a different and proper answer, and because there was an abundance of other competent evidence to sustain the verdict returned, the error is without prejudice.

On the entire record we find that plaintiffs should prevail; that the only room for legitimate contention was as to the amount of the verdict. The court gave each party a wide latitude in making proof. No serious errors were committed, justice has been done, and the judgment of the district court is affirmed.

A Ditch Company Carrying Water for General Purposes of Irrigation cannot arbitrarily refuse to supply water to an actual and bona fide
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consumer making seasonable application and offering proper compensation: *Combs v. Agricultural Ditch Co.*, 17 Colo. 146, 31 Am. St. Rep. 275. If, under a contract to furnish water for irrigation, the irrigation company may itself determine as to when the water shall be furnished and in what quantities, and it is also stipulated that the company shall not be liable for failure to furnish water, when failure is caused by a deficiency of water at its source of supply, accidents to machinery, injuries to canal, or other failures or accidents over which the company has no control, the control vested in it is accompanied by a corresponding measure of liability, and is exercised at its peril, and an allegation that, having control of the water, such company failed to furnish it on proper demand, and that plaintiff thereby lost his crop, discloses a legal cause of action which, if sustained by proof, justifies a recovery, unless the company can by proof bring itself within one of the exceptions named in the contract exempting it from liability: *Mathieu v. North American Land etc. Co.*, 119 La. 896, 121 Am. St. Rep. 548.

There may be a Sale of a Water Right Separate from the Land, and an application of the water to other land, so long as the rights of third persons are not infringed: *Johnston v. Little Horse Creek Irr. Co.*, 13 Wyo. 208, 110 Am. St. Rep. 986, and cases cited in the cross-reference note thereto.

COCKINS v. BANK OF ALMA.

[84 Neb. 624, 122 N. W. 16.]

GARNISHMENT—Rights of Third Persons.—Service of summons in garnishment upon a debtor of a solvent attachment defendant will not revoke an authority theretofore given by said defendant to his debtor to pay a part of said debt to a person not a party to the attachment suit. (pp. 643, 644.)

GARNISHMENT—Rights of Third Persons.—And in such a case the debtor will be justified in acting upon said instructions, if he retains in his hands twice the amount of the attaching creditor's demand. (p. 644.)

JUDGMENT—Person Employing Counsel, When not a Party.—The mere fact that a person not a party to a pending suit employs counsel to assist in the defense thereof will not make him a party or privy to such proceedings, nor estop him from questioning the issues determined therein. (p. 645.)

PLEADING—Variance.—“There can be No Recovery if there is a material variance between the allegations and the proof. The *allegata et probata* must agree”: *Elliott v. Carter White-Lead Co.*, 53 Neb. 458. (p. 646.)

(Syllabi by the court.)

Gomer Thomas and J. G. Thompson, for the appellants.

John Everson, contra.

625 **ROOT, J.** Action for alleged conversion of plaintiff's money. Plaintiff prevailed, and defendants appeal.

In March, 1905, plaintiff resided in Lawrence, Kansas, and owned a farm near Alma, Nebraska, extending across the

state line into Kansas. About 1903 he authorized defendants Porter & Griffen, who are in the real estate business in Alma, to sell said land. March 22, 1905, Porter & Griffen telegraphed and telephoned plaintiff that they had sold his land subject to his approval for \$40 an acre. Plaintiff wired his acceptance of the sale, and went to Alma, arriving there in the forenoon of the 25th. Plaintiff had also listed his land for sale with Gaumer & Harbaugh, real estate agents, residing in Woodruff, Kansas, ten miles distant from Alma. Before closing the deal through Porter & Griffen, plaintiff talked with Mr. Harbaugh, who claimed that his firm, and not said defendants, had made the sale, and thereafter, after again talking with the Alma men, plaintiff entered into a contract with the purchaser and received \$2,800 cash. Plaintiff then went to the place of business of defendant Bank of Alma and deposited a deed to the purchaser for said land and the contract between himself and the vendee, and instructed said bank to deliver the deed to Willey, the purchaser, whenever the remaining cash payment was made and Willey's notes secured by a mortgage on said farm for \$10,000 were delivered to it for plaintiff. The bank was then to pay \$400 to Porter and pay for an abstract and for recording the mortgage. The instructions were reduced to writing by the president of the bank, but not signed by plaintiff. On the twenty-seventh day of March Gaumer & Harbaugh commenced an action in the county court of Harlan county against plaintiff for \$450 commission for selling said farm, and garnished the bank. At that time the bank did not have any of plaintiff's property in its possession, nor was it indebted to him. Thereafter Willey ⁶²⁶ paid about \$4,000 to the bank for Cockins, and, according to plaintiff's instructions, it paid for the abstract and for recording the mortgage and paid to Porter \$400. It retained \$900 to satisfy whatever judgment might be rendered in the attachment suit, and remitted the remainder of the money, together with the notes and mortgage, to plaintiff. Gaumer & Harbaugh prevailed in the county court, and in the district court of appeal, and the judgment rendered was satisfied by the Bank of Alma. Plaintiff did not modify its instructions to the bank, nor notify it not to pay Porter the \$400, but claims that the service of summons in garnishment was a sufficient revocation of the bank's authority to pay Porter.

1. In the court's second instruction the jurors were informed that plaintiff ought to recover against the defendant bank, unless Porter & Griffen were entitled to a commission from plaintiff. In the third instruction the jurors were told that Porter & Griffen were not entitled to commission, unless they were plaintiff's agents for the sale of said land and sold it in accordance with the terms of their agency. In the

seventh instruction the jurors were informed that the service of summons in garnishment on the bank revoked its authority to pay Porter & Griffen the \$400, and that thereafter the Bank of Alma could only pay out Cockins' money upon the order of the court or the specific directions of plaintiff or his authorized agents. The instructions are erroneous as applied to the bank. Its authority to pay the \$400 was unconditional, and was never vacated or modified by plaintiff preceding the payment to Porter. So far as the bank was concerned, it was immaterial whether Porter & Griffen had earned a commission or not. The direction to the bank was plain, and it ought to be protected, so far as plaintiff may be concerned, if it followed his instructions. It is true, as a general proposition, that chattels in the possession of a garnishee, but owned by a defendant in attachment proceedings, and debts due from the garnishee to such defendant are, subsequent to 627 the service of summons in garnishment, in the custody of the law, but that principle is invoked to protect creditors of the defendant, and cannot be applied to destroy the rights of third persons acquired prior to the levy of the attachment or service of process in garnishment: *Fitzgerald v. Hollingsworth*, 14 Neb. 188, 15 N. W. 345.

We have not been cited to any authority holding that the service of summons on the garnishee in a suit against a solvent defendant will annul and set aside a bona fide assignment theretofore made by him, where the debt of the garnishee exceeds several times the combined amount of said assignment and the claim of the attaching creditor. Plaintiff could have protected himself if he had acted judiciously, and his failure to countermand his instructions to the bank or to interplead the rival claimants for commission will not justify a judgment in his favor against his former debtor or bailee. Plaintiff argues that the instructions given in the district court ought not to be considered, because the assignments of error filed in this court in regard thereto are joint. The motion for a new trial conformed to the rule, and, under the practice established by the laws of 1907, chapter 162, the assignments of error discussed in the printed brief will be considered: *First Nat. Bank v. Adams*, 82 Neb. 801, 118 N. W. 1055.

2. As to Porter & Griffen, plaintiff claims that they are bound by the judgment rendered in the case of Gaumer & Harbaugh v. Cockins, and estopped from denying that said plaintiffs were the efficient cause of the sale to Willey. The judgment in that case was received in evidence over defendants' objections. That record, of course, was proper evidence of its own existence, but ought not to have been received for any other purpose. The instructions do not indicate that the trial judge considered that the judgment concluded the defendants herein, but he did not instruct to the contrary.

Counsel argue that, because at Cockins' request Porter & Griffen employed an attorney to assist in the defense of said cause, they are bound by the judgment. There is nothing in the record to indicate ⁶²⁸ that Porter & Griffen were given the control of the suit, nor that they had any right to appeal from the judgment. They did not instigate the litigation, nor did Cockins represent them therein. One may employ counsel to assist a litigant, or may testify as a witness in his favor or give other active support to his cause in court, without becoming a party to the record or bound by the judgment rendered: *Schribar v. Platt*, 19 Neb. 625, 28 N. W. 289; *Williamson v. White*, 101 Ga. 276, 65 Am. St. Rep. 302, 28 S. E. 846; *Loftis v. Marshall*, 134 Cal. 394, 86 Am. St. Rep. 286, 66 Pac. 571; *State v. Johnson*, 123 Mo. 43, 27 S. W. 399; *Litchfield v. Goodnow's Admr.*, 123 U. S. 549, 8 Sup. Ct. Rep. 203, 31 L. ed. 199.

Plaintiff cites *Missouri P. R. Co. v. Twiss*, 35 Neb. 267, 37 Am. St. Rep. 437, 53 N. W. 76, but we there held that, if a defendant is sued for a wrong committed by a third person, and the party responsible has knowledge of the suit, and appears as a witness therein, he will be liable over to defendant; and that connecting common carriers are agents for one another for the carriage of goods accepted by one carrier to be delivered by them at a point beyond the limits of the initial carrier's railway. In the instant case the attachment suit was not prosecuted in the interest of Porter & Griffen, nor because of their misconduct, but to recover a demand which plaintiffs therein made against Cockins. In *Burns v. Gavin*, 118 Ind. 320, 20 N. E. 799, cited by plaintiff, the purchaser from an assignee of a bankrupt estate had induced the county treasurer to bring a suit against said assignee to compel him to pay from the assets of the estate in his hands certain taxes theretofore levied on the property sold to said vendee, and had employed counsel for the treasurer. The treasurer was defeated, and plaintiff, after paying the taxes himself, brought a suit against the assignee, and it was held that, as he had instigated and actually controlled the suit brought by the treasurer, he was bound by the judgment therein. In *Roby v. Eggers*, 130 Ind. 415, also cited by counsel, the party held to be estopped had instigated and controlled the former litigation. Those cases, and others cited by plaintiff upon this phase of the case, are not in point. It is doubtful ⁶²⁹ whether the record of the judgment was relevant from any standpoint, but, if admitted for any purpose, the jurors should have been cautioned that it did not conclude the defendants herein.

3. There is evidence in the record to the effect that a friend of Gaumer & Harbaugh brought said firm and Willey, the purchaser, together with reference to said sale, and that

Porter & Griffen were not the efficient cause thereof, but that they learned of said negotiations and induced Willey to close the deal through them. Plaintiff, however, nowhere alleges that Porter & Griffen withheld from him any material facts or made any false statements whereby he was induced to close the deal through them, or promise to pay them a commission, or to order the bank to pay the four hundred dollars. Neither does he charge that Gaumer & Harbaugh actually made said sale or were the efficient cause thereof. Defendants assert that, relying on the failure of the plaintiff to state a cause of action in his petition, they did not introduce any evidence. The evidence must support the allegations in the petition, or a judgment in plaintiff's favor cannot be sustained: *Traver v. Shaeffe*, 33 Neb. 531, 50 N. W. 683; *Elliott v. Carter White-Lead Co.*, 53 Neb. 458, 73 N. W. 948. There is not a scintilla of evidence to support the allegation in the petition that plaintiff ever countermanded its instruction to the bank, but, on the contrary, plaintiff testified that no such notice was given, unless as a matter of law the service of summons in garnishment had that effect. There is no allegation in the petition that Porter & Griffen, or either of them, deceived plaintiff or fraudulently induced him to order the bank to pay their commission. The evidence affirmatively discloses that plaintiff never had a cause of action against the bank, and does not support the case stated, if any is made, against the defendants, Porter & Griffen.

The judgment of the district court therefore is reversed, with directions to dismiss the petition as to the defendant Bank of Alma, and for further proceedings as to the other defendants.

Reversed.

The Service of Trustee Process is Sufficient Notice to the trustee that the ownership of funds in his hands is in question, and he should await the judgment of the court before paying the funds to anyone. Not to do so is to act at his peril: *Dow v. Taylor*, 71 Vt. 337, 76 Am. St. Rep. 775. See, also, *Ferry v. Home Savings Bank*, 114 Mich. 321, 68 Am. St. Rep. 487; *Bessemer Savings Bank v. Anderson*, 134 Ala. 343, 92 Am. St. Rep. 38.

A Debtor Having Notice of the Assignment of a Debt made by his creditor cannot, by paying moneys to an officer subsequently garnishing the debt, under a writ against the creditor, relieve himself from liability to such assignee: *Merchants' & Miners' Nat. Bank v. Barnes*, 18 Mont. 335, 56 Am. St. Rep. 586.

As Between Plaintiff and Defendant in Trustee Process, equitable considerations must prevail so far as the nature of the process will permit: *Harlow v. Bartlett*, 96 Me. 294, 90 Am. St. Rep. 346.

HOOVER v. JONES.

[84 Neb. 662, 121 N. W. 975.]

EXECUTION—Receiving in Evidence Without Proof of Judgment.—As a general rule, an execution cannot be received in evidence without proof of the judgment on which it was issued. (By the editor.) (p. 648.)

OFFICER—Justification Under Execution.—In levying on property under an execution regular on its face and issued by a court of competent jurisdiction, a sheriff is not obliged to ascertain at his peril that the judgment on which the writ issued is valid and unpaid; and when called on to account as a tort-feasor for such action, he may produce the writ to protect himself from personal liability without proof of the judgment. (By the editor.) (p. 648.)

REPLEVIN—Justification of Officer Under Execution.—Where a sheriff seizes personal property under an execution, and a stranger to the process deprives him of his possession by a writ of replevin, the execution, though produced by the officer at the trial of the suit in replevin, is not competent evidence of the officer's possessory rights without proof of the judgment on which such execution was issued. (p. 649.)

(Syllabi by the court except when stated to be by the editor.)

R. D. Sutherland and Cole & Brown, for the appellant.

H. H. Mauck and Charles H. Sloan, contra.

662 ROSE, J. This was an action by plaintiff to recover from defendant the possession of an undivided three-fifths interest in **663** one hundred and forty acres of corn in the field, valued at four hundred dollars. In his answer defendant pleaded, in substance, that when the corn was taken from him under the writ of replevin, he was lawfully holding possession of it as sheriff of Nuckolls county, having previously seized it by virtue of three executions as the property of S. E. Hoover, the husband of plaintiff herein. The executions were issued out of the district court for Nuckolls county on three separate judgments which had been removed thereto by transcripts from inferior courts. The judgments were pleaded in the answer, and their existence was denied by plaintiff's reply. In the suits in which they were rendered, S. E. Hoover was the only defendant. His wife was not a party to the suits, judgments or executions. The real controversy was between the judgment creditors and plaintiff. She insisted the corn belonged to her. The sheriff, who acted under the executions in the interests of the judgment creditors, contended that her husband was owner and that the property was subject to execution for the payment of his debts. On the issue of fact as to ownership and right of possession, the jury found in favor of plaintiff, and from a judgment on the verdict defendant appeals.

In seeking a reversal defendant argues that the evidence is insufficient to sustain the verdict, and also complains of errors

in the instructions to the jury. Plaintiff suggests that all of the assignments of error presented are immaterial, for the reason there is no evidence in the record to justify a return of the property to the sheriff or to show his right to possession, the judgments not having been proved except by the executions, which, as she argues, are not competent for that purpose. If this point is well taken, the judgment in her favor herein must be affirmed, since seizure by defendant under executions issued on valid, unpaid judgments is the only justification for his possession of the corn.

The executions were offered in evidence without proof of the judgments, and admitted over proper objections by plaintiff. A judgment, when scrutinized as evidence, may ⁶⁶⁴ show on its face that it has been paid; that it is void; that it has been assigned to one not seeking to enforce it; that its enforcement has been enjoined; that it has been canceled; that it has been reversed or superseded, or that for some other reason it is not enforceable by execution. Inherent defects in a judgment do not appear on the face of an execution issued thereon. For these and other reasons, the general rule that an execution cannot be received in evidence without proof of the judgment on which it was issued is everywhere recognized. There is an exception to the rule, however, in favor of a sheriff who is required to serve the processes of the courts. In levying on property of a defendant under an execution regular on its face and issued by a court of competent jurisdiction, a sheriff is not obliged to ascertain at his peril that the judgment on which the writ was issued is valid and unpaid. When called to account as a tort-feasor for such action, he may produce the writ to protect himself from personal liability without proof of the judgment: *Muller v. Plue*, 45 Neb. 701, 64 N. W. 232. This exception to the general rule is necessary to the proper administration of justice. A sheriff must necessarily obey the directions of the courts without waiting to investigate the validity of their decrees. The efficacy of a judgment to satisfy a debt may depend upon the immediate seizure of the property of the defendant; and for his own protection, when sued as a trespasser, the sheriff may be permitted to produce the writ without proving the judgment. The right to do so, however, is a mere personal privilege of the officer. It does not extend to litigants or strangers, and the parties in whose behalf the sheriff acts cannot make use of the privilege to change the rules of evidence in establishing their possessory rights or title to property: *Beach v. Botsford*, 1 Doug. (Mich.) 199, 40 Am. Dec. 145.

It is apparent from an inspection of the record herein that the reasons for the exception to the general rule do not apply to the present controversy. If the verdict is justified in point of fact, the sheriff levied on the property ⁶⁶⁵ of plaintiff, a stranger to the executions. Afterward she took it from him

by replevin. He demanded its return, and pleaded facts showing his right of possession through executions issued on judgments against her husband. He could not deprive plaintiff of her property under the executions, if the judgments for any reason were unenforceable. She denied his allegations as to the judgments, and his only proofs of their existence are the executions. Defendant's liability as a trespasser in seizing the corn was not the issue in the action of replevin. The question at issue was the right of possession when the suit in replevin was instituted. The foundation of the seizure under which the sheriff held the property was the judgments, which, under the rules of evidence, could not be proved by executions issued thereon. When sued as a trespasser, the attitude of a sheriff is personal and defensive. As a defendant in replevin, his position is different. In the present case he asserted the rights of the judgment creditors and demanded affirmative relief, seeking a return of the property, and should have established by competent proof the judgments, which were the basis of his possession. The executions were not admissible for that purpose without proof of the judgments: *Muller v. Plue*, 45 Neb. 701, 64 N. W. 232; *Beach v. Botsford*, 1 Doug. (Mich.) 199, 40 Am. Dec. 145; *Gidday v. Witherspoon*, 35 Mich. 368; *Andrews v. Smith*, 41 Mich. 683, 3 N. W. 181; *Ramsey v. Waters*, 1 Mo. 406; *Wilson v. Conine*, 2 Johns. (N. Y.) *280; *State v. Records*, 5 Har. (Del.) 146; *Campbell v. Strong*, Hemp. 265, Fed. Cas., No. 2367b.

Defendant having failed to show his right of possession by proper evidence, the judgment against him must be affirmed.

Replevin Against an Officer is the subject of a note to *Carpenter v. Innes*, 25 Am. St. Rep. 256. If an officer seizes under attachment property which is in the possession of a stranger to the writ under a claim of ownership, it is incumbent on the officer, when sued in replevin by such person for the recovery of the property, to show not only a writ valid on its face, but the regularity of the attachment proceedings: *Cheeseman v. Fenton*, 13 Wyo. 436, 110 Am. St. Rep. 1010. See, also, *Williams v. Eikenberry*, 25 Mont. 721, 13 Am. St. Rep. 517; *Curtis-Baum Co. v. Lang*, 83 Neb. 728, 131 Am. St. Rep. 660.

Justification of Officers by Their Process is the subject of a note to *Savacool v. Boughton*, 21 Am. Dec. 190.

RASMUSSEN v. BLUST.

[85 Neb. 198, 122 N. W. 862.]

WATERS—Reservoirs and Ditches on Public Lands, Vested Rights.—One who has constructed upon the vacant public lands of the United States a system of reservoirs and ditches for the distribution of water appropriated by him for irrigation purposes, and has secured the approval of his plan and appropriation by the state board of irrigation, and was using his said reservoirs and ditches for the storage and distribution of such waters before said lands are entered, has a vested and accrued right within the meaning of sections 2339, 2340, Revised Statutes of the United States. (pp. 652, 654.)

WATERS—Irrigation System on Public Lands—Subsequent Entries.—If such improvements have been made with the tacit or express consent of the entryman upon lands of the United States that have been entered as a homestead, and the entryman thereafter relinquishes his entry or it is canceled by the United States, and the said improvements are in actual use by the irrigator under the authority and with the approval of the state board of irrigation, a subsequent entryman takes said lands subject to a right of way for said ditches and the use by the irrigator of the land covered by the reservoir. (pp. 652, 654.)

WATERS—Failure of Irrigator to File Map in Land Office.—The failure of the irrigator to file a map in the land office and to secure the approval of the Secretary of the Interior in accordance with the act of Congress approved March 3, 1891, entitled "An act to repeal timber culture laws, and for other purposes," and the acts supplementary thereto, do not destroy the privileges protected by sections 2339, 2340, Revised Statutes of the United States. (pp. 652, 654.)

WATERS—Irrigation System on Public Lands—Subsequent Entries.—A deed executed by an entryman before he is entitled to a receiver's final receipt and purporting to vest the grantee with a right of way over, and the privilege of constructing and maintaining a reservoir upon, the lands of the entryman, will not vest the grantee with any right against a subsequent entry of the land under the acts of Congress, unless such grantee, before the last entry, shall have constructed said improvements and was using them under such circumstances as to entitle him to protection under the laws of this state. (p. 654.)

(Syllabi by the court.)

J. E. Porter, for the appellant.

Allen G. Fisher, for the appellees.

199 ROOT, J. This case is submitted on rehearing. Our former opinion is reported in 83 Neb. 678, 120 N. W. 184. The cause was submitted to the district court upon the pleadings, the affidavits of witnesses, and copies of public records. A bill of exceptions containing the original evidence adduced is before us. It is a difficult undertaking to sift the conflicting statements, and, without the aid of cross-examination, establish the controverted facts. Were it not for the public importance of the questions of law involved, we would affirm the judgment because of the condition of the record. The

land in controversy is in Dawes county and in the water district No. 2: Comp. Stats. 1909, c. 93a, art. 2, sec. 3. Rasmussen, the plaintiff, has resided in said county and has owned real estate therein for many years next preceding the institution of this suit. In 1898 or 1899, he appropriated the waters in the Big Cottonwood creek and in the south branch of the Cottonwood creek for the irrigation of lands in sections 18, 19, 28, 29 and 33, town 33, range 51, in said county, and other lands, and his appropriation was duly approved by the state board of irrigation August 3, 1899. In September, 1899, he made a further appropriation for the benefit of said lands, adding six storage reservoirs to his scheme, and specifically referred to flood waters as a source of supply. This appropriation was approved by the state board of ²⁰⁰ irrigation February 21, 1900. Plaintiff also joined with one Carlson in appropriating water from Sand creek for the benefit of lands not above described, but included in Rasmussen's irrigation system. In the prosecution of the work involved in the construction of said plant, plaintiff has dug and continuously extended necessary ditches and has constructed at least two of said reservoirs. The state board of irrigation has extended the time fixed by it for the completion of said irrigation system, so that upon the institution of this suit, Rasmussen was not in default in complying with the exactions of said board. In 1900, when Rasmussen commenced said work, there was but little, if any, land along the route of the main ditches that had not been entered under the homestead law. The northeast quarter of section 32, town 33, range 51, was vacant at said time. The northeast quarter of section 29, involved in this suit, had been entered as a homestead, and said entry was canceled June 17, 1904. The southeast quarter of said section had been entered under the homestead act by Isabella Ihrig, who thereafter married Cephas Ross. Her homestead entry was canceled April 14, 1904. John F. Howard entered the southwest quarter of said section 28 in 1890, and filed a relinquishment of his claim in January, 1904. In February, 1900, Mrs. Ross, nee Ihrig, and husband conveyed to plaintiff a right of way for his irrigation ditches across, and the right to construct and maintain a reservoir upon, the southeast quarter of said section 29. In July, 1904, defendant, August Blust, entered the east half of said section 29 under the "Kinkaid act" (33 U. S. Stats. at Large, c. 1801, p. 547), and thereafter released the southeast quarter of the southeast quarter thereof. The defendant, Anton Blust, thereafter entered said forty acres in connection with the northeast quarter of section 32, and the southwest quarter of said section 28, under said act of Congress. August Blust for years had owned, and still owns, the northwest quarter of section 28. Plaintiff's right to maintain ditches across all of the aforesaid tracts of land and to construct and maintain

reservoirs thereon is involved ²⁰¹ in this suit. In February, 1901, Rasmussen prepared a map showing his proposed irrigation system, and filed it in the United States land office at Alliance, so that he might secure the benefits of the act of Congress of March 3, 1891 (2 U. S. Comp. Stats., c. 561, p. 1570, sec. 18). The evidence indicates that this application was forwarded to the commissioner of public lands, and by that official was returned for corrections. Plaintiff attempted to make the necessary alterations, and on the ninth day of April, 1902, refiled the application and map. June 13, 1902, the documents were returned to the land office as unsatisfactory and incomplete. Rasmussen testified that he was not notified of this fact, but the officers of the land office seem to have been satisfied that Rasmussen had notice, and, as he did not comply with their requisitions, his application was treated by the land department as abandoned.

1. Upon the facts just related, our former opinion held plaintiff never secured any rights in the premises that could be enforced against the subsequent entryman. Counsel for plaintiff still insists that, under the act of Congress approved March 3, 1891, *supra*, and the facts in the instant case, his client secured, and still retains, an easement in the lands described. We are entirely satisfied with our former opinion upon this point. By the express terms of the statute a right of way can only be acquired over vacant government lands upon the approval of applicant's map by the Secretary of the Interior. The interior department has held that the filing of a map of location for a reservoir site does not reserve the land described therein, but affects only such lands as were vacant at the date of the approval of the map: *Highland Supply Ditch Company*, referred to in *Hamilton v. Pope*, 28 Land Dec. 402; *United States v. Rickey Land & Cattle Co.*, 164 Fed. 496. The map has never been approved, and none of the land is now vacant.

2. When August Blust and Anton Blust made their respective entries, the land, necessarily, was vacant. The preceding entries had been relinquished by the entrymen, or canceled by the government, and that condition had existed ²⁰² for several weeks. The evidence in the record satisfies us that in July, 1904, Rasmussen had completed, and had been for some time operating, his low line ditch across the northeast quarter of section 29, and that he had a right of way across the northwest quarter of section 28.

The legislature has declared that the unappropriated waters in every natural stream within the state are public property, dedicated to the use of the people of the commonwealth, but subject to appropriation according to the terms of the statute: Comp. Stats. 1909, c. 93a, art. 2, sec. 42. The legislature has further provided: "All ditches constructed for the purpose of utilizing the waste, seepage, swamps, or spring waters

of the state shall be governed by the same laws relating to the priority of right as those ditches constructed for the purpose of utilizing the waters of running streams; provided, that the person upon whose lands the waste, seepage, swamp, or spring waters first arise shall have the prior right to the use of such waters for all purposes upon his lands": Comp. Stats. 1909. c. 93a, art. 2, sec. 44. To the state board of irrigation, an administrative body, has been committed the power to determine, in the first instance, between individuals or corporations and the state their respective rights to use the waters aforesaid. Under an unrevoked permit from said board, an applicant, who thereafter by virtue of that permit applies public waters to a beneficial use within the meaning of the irrigation law, obtains a vested right recognized and protected by the laws of Nebraska. Sections 2339 and 2340 of the United States Revised Statutes provide:

"Sec. 2339. Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; ²⁰³ but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

"Sec. 2340. All patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the preceding section."

In *Broder v. Natoma Water & M. Co.*, 101 U. S. 274, 25 L. ed. 790, it was held that the last-cited statute merely acknowledges pre-existing rights, and that the owners of a ditch located on public land and in actual use will be protected against subsequent entrymen. The federal government does not by said act grant any estate, but merely recognizes such vested and accrued rights as "are recognized and acknowledged by the local customs, laws, and the decisions of courts." If the appropriator is first in time with reference to possession and use as compared with the date a homestead entry is made upon the real estate, the rights of the homesteader are junior and inferior: *Brosnan v. Harris*, 39 Or. 148, 87 Am. St. Rep. 649, 65 Pac. 867, 54 L. R. A. 628; *Smith v. Hawkins*, 110 Cal. 122, 42 Pac. 453; *Maffet v. Quine*, 93 Fed. 347, 95 Fed. 199. The irrigator will be protected in his possession and applica-

tion of the water so long as he conforms to the local law regulating his rights, but he has no contract with or grant from the government, federal or state, with respect to his privileges: *Mohl v. Lamar Canal Co.*, 128 Fed. 776.

The act of Congress approved March 3, 1891 (2 U. S. Comp. Stats., p. 1570, sec. 18), extends to those in possession of public lands the benefit of that legislation, but, in our judgment, does not supersede the earlier statute. The act of 1866 recognizes rights created independent of the acts of Congress, whereas the later acts confer rights upon certain named conditions. If the individuals or corporations who have appropriated and are applying public waters for beneficial purposes choose to avail themselves of the benefits ²⁰⁴ of the act of 1891, they may acquire a right of way fifty feet in width across vacant public lands, whereas under the act of 1866 a mere possessory right of way is recognized. Under the later act a record is made of the right of way and reservoir sites. The applicant under the act of March 3, 1891, need only survey the route for his proposed ditches and the sites for his reservoirs and file in the local land office a map of those surveys with certain other data. If the Secretary of the Interior approves the map, a base or determinable fee vests in the applicant in advance of possession and the making of improvements, and without reference to any local laws or customs.

In *Lincoln County Water Supply & Land Co. v. Big Sandy Reservoir Co.*, 32 Land Dec. 463, Mr. Secretary Hitchcock said: "While the clause above quoted from section 20 of the act of March 3, 1891, extends the benefits of that act to all canals, ditches or reservoirs theretofore constructed upon the public domain, among which is the right to file in that behalf with the land department a map of such canals, ditches and reservoirs, and secure the approval of the Secretary of the Interior thereof, yet the rights of claimants under section 2339 of the Revised Statutes are in nowise dependent upon said act or upon an approval of such maps."

Concerning the southeast quarter of section 29, the evidence establishes that Rasmussen relied upon the deed from Mrs. Ross, née Ihrig, to protect his right of way for the high line ditch across, and his reservoir site upon, that tract. At the time August Blust entered that land under the Kinkaid act, plaintiff had not constructed either of said improvements. Rasmussen did not secure any rights by virtue of the Ross deed as against the subsequent entryman, but he must either purchase or condemn if he concludes to extend his ditches across, and locate a reservoir upon, that land.

The evidence in the record concerning the feasibility of the high line ditch is irrelevant. The state board of irrigation has passed upon that feature of the dispute, and ²⁰⁵ the district

court, in the first instance, has no jurisdiction of the subject. In our former opinion we failed to give plaintiff the benefit of sections 2339, 2340, Revised Statutes, *supra*. Upon more mature deliberation we are satisfied that the evidence does not sustain a judgment dismissing the petition. If the case is again tried, the evidence adduced may justify more comprehensive relief for plaintiff than we have indicated in this opinion; on the other hand, defendants may be completely exonerated.

The former opinion and judgment of this court are set aside, the judgment of the district court is reversed and the cause is remanded for further proceedings, and all taxable costs incurred up to the date of filing a mandate in the district court are taxed to plaintiff.

Reversed.

As Between an Appropriator of Water on Public Lands and a patentee from the United States, the title of the latter relates back to the first necessary proceeding on his part to acquire title to his land: Benton v. Johncox, 17 Wash. 277, 61 Am. St. Rep. 912. An appropriator of water for irrigation acquires a prior right thereto as against the riparian owner of land along the stream, who obtained patent for the land after such appropriation had been made, but before the operation of the amendment of July 9, 1870, to act of Congress of July 26, 1866, requiring that patents to public lands, thereafter to be issued, shall be subject to any vested or accrued water rights: Hammond v. Rose, 11 Colo. 524, 7 Am. St. Rep. 258. And the appropriation of the waters of a stream for use as a propelling power to a mill is a valid appropriation, and the purchaser of public lands, after such appropriation has been made, acquires title subject thereto: Isaacs v. Barber, 10 Wash. 124, 45 Am. St. Rep. 772. As to the rights of the appropriator of water in a spring, as against a subsequent grantee of the government, see Brosnan v. Harris, 39 Or. 148, 87 Am. St. Rep. 649.

BECKMAN v. LINCOLN AND NORTHWESTERN RAILROAD COMPANY.

[85 Neb. 228, 122 N. W. 994.]

EMINENT DOMAIN — **Damages** — **Election of Remedies.** — A railroad company which had leased its road to another company instituted proceedings in the county court for the purpose of condemning the real estate of a land owner for right of way purposes. The land owner appeared and contested the jurisdiction of the court upon the ground that the company seeking to exercise the right of eminent domain was not the real party in interest. His objection was overruled, and the report of the appraisers awarding two thousand seven hundred dollars was confirmed. He then appealed to the district court, alleging the same facts, and averred that his damages were seven thousand dollars. He also sought to enjoin the proceedings, alleging the want of jurisdiction. The injunction being denied, he then amended his petition, claiming the increase of damages as demanded

in his first petition. Held, that his proceeding to defeat the condemnation was not such an election of remedies as would prevent him from litigating as to the amount of damages. (p. 657.)

EMINENT DOMAIN—Damages for Land Taken or Injured.—In a proceeding to condemn real estate for the purposes of right of way for a railroad company, "the land owner is entitled to full compensation for the land actually taken, and for such damages to the residue of the land as are equivalent to the diminution in value thereof": *Fremont, E. & M. V. R. Co. v. Meeker*, 28 Neb. 94. (p. 658.)

EMINENT DOMAIN—Damages for Danger from Fire or to Stock.—In an inquiry whether and how much the part of a farm not taken for railroad right of way is depreciated in value by the appropriation of a part, it is proper for the jury to consider the liability of stock being killed, and the danger from fire from passing trains: See *Fremont, E. & M. V. R. Co. v. Bates*, 40 Neb. 381. (p. 659.)

EMINENT DOMAIN—Instruction as to Amount of Damages.—The trial court instructed the jury that, if the amount of damages found by them did not exceed two thousand seven hundred dollars, no interest should be allowed, but, if it exceeded that sum, they should compute interest on the amount. The giving of the instruction was excepted to for the reason that, by inference, it informed the jury of the sum awarded by the appraisers. Defendant offered another one, which directed the jury to find damages and interest separately and unadded, which instruction was refused. Held, that while the instruction refused might, under the circumstances, have been the better, yet the giving of the one submitted would not require a reversal of the judgment. (p. 659.)

TRIAL—Misconduct of Juror, When not Material.—After the rendition of the verdict, affidavits of a number of jurors were filed, showing that during the deliberations of the jury one of their number stated that another railroad company had constructed its road across his land, and that he knew the inconvenience of it, and that his vote was for a larger sum than that returned by the verdict. It being shown that substantially the same statement was made by the juror on his voir dire examination, it is held that defendant cannot be heard to complain, there being no showing that it could not have excluded him. The question of the propriety of receiving such affidavits for the purpose of impeaching the verdict is not decided. (p. 660.)

(Syllabi by the court.)

James E. Kelby, Byron Clark and F. E. Bishop, for the appellant.

Field, Ricketts & Ricketts, contra.

229 REESE, C. J. This is an appeal from the judgment of the district court for Lancaster county in a proceeding by defendant ²³⁰ to condemn a portion of the land of plaintiff for right of way for the railroad track of the defendant. The principal question involved is the amount of damages plaintiff is entitled to receive. The verdict of the jury was for more than that appraised by the commission appointed by the county court. Preliminary to this, however, is the contention by defendant that the district court was without authority or jurisdiction to inquire into the question of damages for the reason that the appeal was not from the judgment of the county court awarding damages, but from the order of that

court in taking any action in the matter. The appeal was filed in the district court in due time. A petition was filed by plaintiff in which he contested the right of the defendant to condemn his land for right of way purposes for the reason that it was not the real party in interest, it having leased its line of road to another railroad company. The petition set out the proposed line, and contained averments of facts showing the injury to the property, with the allegation that the damages sustained would be the sum of seven thousand dollars, which was more than the amount awarded by the appraisers. He also instituted an action in injunction seeking to restrain the defendant from proceeding with the condemnation of a portion of his land. That suit was finally decided against the contention of plaintiff, the case being reported in 79 Neb. 89, 112 N. W. 348. Plaintiff, over the objections of defendant, filed his amended petition, claiming damages in the amount named in his former petition. Defendant filed its answer controverting plaintiff's right to try the question of damages. "because plaintiff has not appealed from the award of damages made by the commission in the condemnation proceedings, but filed objections to the jurisdiction in said condemnation, and in the original petition filed in this proceeding has prayed for the dismissal of said condemnation." The answer also denied that plaintiff had been damaged for the land taken in any greater sum than fourteen hundred dollars. Plaintiff replied by a general denial.

It is claimed by defendant that, plaintiff having elected ²³¹ to appeal on the question of jurisdiction, he is bound by that proceeding, and should not be permitted to shift his appeal to one involving the question of damages. In other words, he is bound by his election. We cannot agree with defendant in this contention. Plaintiff's first petition not only questioned the jurisdiction of the court, but specifically raised the question of damages. But, had he not done so, we would still have to hold that the appeal transferred the whole case to the district court, and the fact that plaintiff questioned its jurisdiction could not have the effect of depriving him of the right to question the amount of damages awarded him, his attack upon the jurisdiction failing. In so far as the subject of damages was concerned, no new pleadings were necessary: *Fremont E. & M. V. R. Co. v. Meeker*, 28 Neb. 94, 44 N. W. 79. The jurisdiction of the court having been sustained, the cause was pending for trial on its merits. The rule that a party cannot shift his contention to the prejudice of another has no application here. There has been no change in plaintiff's attitude as to the question of damages, or on any fact upon which his claim therefor was based.

A number of questions propounded to plaintiff and his witnesses were objected to, the objections overruled, and to

which defendant excepted. To discuss them separately would extend this opinion to an unwarrantable length. The legal propositions presented will be noticed. It was conceded that the land taken comprised seven acres in a strip one hundred and fifty feet wide through plaintiff's quarter section, leaving twelve acres on one side of the track and one hundred and forty-one on the other, twelve acres having been previously taken for right of way for another track. Plaintiff sought to prove the value of the seven acres actually taken and the diminution of the value of the remaining land, the whole being a farm in one compact body. To this defendant objected. Its contention is that the valuation of the seven acres should be based upon the average acreage value of the farm. There was evidence that the seven acres was of the best portion of the land, and hence the most valuable. In addition to proving the value ²³² of the land actually taken, the court permitted evidence tending to show the value of the whole one hundred and forty-eight acres immediately before the condemnation proceedings and after. This ruling was afterward corrected, and the witness then testified as to the value of the one hundred and forty-one acres before taking, excluding the seven acres taken. However, this did not materially change the situation, as the testimony of the witness relating to values was practically the same. He had estimated the value of the whole one hundred and forty-eight acres at seventy-five dollars to eighty dollars an acre before the location of the road, and in his subsequent testimony stated that he thought the one hundred and forty-one acres were worth eighty dollars an acre before the construction of the road. To the mind of the writer the contention of defendant is a little difficult of comprehension. From the adoption of our present constitution in 1875 to the present time the uniform holding of this court has been that, in the exercise of the right of eminent domain by the condemnation of real estate for purposes of right of way, the land owner was entitled to the value of the land actually taken and the diminution in value of the land not taken as his damages: *Fremont, E. & M. V. R. Co. v. Whalen*, 11 Neb. 585, 10 N. W. 491; *Republican V. R. Co. v. Arnold*, 13 Neb. 485, 14 N. W. 478; *Republican V. R. Co. v. Linn*, 15 Neb. 234, 18 N. W. 35; *Blakeley v. Chicago, K. & N. R. Co.*, 25 Neb. 207, 40 N. W. 956; *Chicago, K. & N. R. Co. v. Wiebe*, 25 Neb. 542, 41 N. W. 297; *Fremont, E. & M. V. R. Co. v. Meeker*, 28 Neb. 94, 44 N. W. 79; *Burlington & M. R. Co. v. White*, 28 Neb. 166, 44 N. W. 95. The instructions of the court on the trial followed this rule. Had the court adhered to the rule adopted in the early stages of the trial, there might be ground for complaint, yet, as to this, we are not certain, in the light of former decisions. However, since

the rule contended for by defendant was finally adopted by the court, there is no ground for complaint.

It is next contended that there was error in the instructions given to the jury. The eighth is too long to be here copied. The different elements of damage to the land not taken were stated with exactness, at least in part. "the liability of stock to be killed, the danger of fire ²³³ from passing trains, and all other circumstances caused and produced by the location of defendant's right of way over and across plaintiff's farm in the manner which the evidence shows it to have been located," forming a portion thereof, and to which exception is taken. Were this an open question in this state, we would be strongly inclined to hold with the earlier decisions that the giving of the instruction above quoted, without the limitation to the use of the road without negligence on the part of defendant, was prejudicial error, as the law gives ample remedies when stock is killed or fires started by the negligent use of trains, but not where negligence is absent. However, the principle of the instruction has been approved in *Fremont, E. & M. V. R. Co. v. Bates*, 40 Neb. 381, 58 N. W. 959, *Omaha S. R. Co. v. Todd*, 39 Neb. 818, 58 N. W. 289, *Chicago, B. & Q. R. Co. v. O'Connor*, 42 Neb. 90, 60 N. W. 326, and *Chicago, R. I. & P. R. Co. v. O'Neill*, 58 Neb. 239, 78 N. W. 521, and cannot now be departed from.

The court instructed the jury that, if their finding of damages did not exceed the sum of two thousand seven hundred dollars, no interest should be allowed, but that, if they found above that sum, interest should be computed by them at the legal rate. The criticism of this instruction is that, by inference, it informed the jury of the amount found due by the appraisers, and was, in effect, a suggestion which might induce them to find for more than that sum in order to give plaintiff interest. It is possible that such might have been the effect of the instruction, and yet we cannot see that it was reversible error. In *Bolar v. Williams*, 14 Neb. 386, 15 N. W. 716, an attorney, in trying a case before a jury in the district court, stated that the cause had been tried in justice court, giving the result. No exception was taken, and the question was not presented for review, but the remark was referred to as "a gross breach of propriety," etc. There is no contention in this case but that the rule given was correct, but it is claimed that it should have been given in another way. For the purpose of obviating this difficulty, defendant asked an instruction directing ²³⁴ the jury to find the damages and interest separately and unadded. This instruction was refused. It is probable that the plan suggested by defendant would have been the better method, but it is not thought for that reason the judgment should be reversed. It would be by inference alone that the former finding could be surmised

by the jury. From the instruction given, the jury might seek a reason for it and might arrive at the correct solution, but such is not shown by the record to be the fact. Other instructions were asked, and the refusal to give them is assigned for error, but we find nothing in the action of the court in that behalf to the prejudice of defendant.

After the returning of the verdict, affidavits of jurors were filed, stating, in substance, that one of the jurors who desired to return a larger verdict than that rendered had stated in the jury-room during their deliberations that another railroad company had constructed its road across his land, and that he knew the inconvenience of it, and that his vote was from three thousand five hundred dollars to four thousand two hundred dollars. The verdict was for three thousand six hundred and fifty-nine dollars and thirty-two cents, including interest at seven per cent for the one year and six months, making the damages found about three thousand three hundred dollars. The question is raised as to the propriety of filing and considering such affidavits for the purpose of impeaching the verdict; but, as it is shown that substantially the same statement was made by the juror on his voir dire examination, it is not deemed necessary to notice the matter further, as the defendant could not be heard to complain, there being no showing that it could not have excluded him.

Finding no prejudicial error in the record, the judgment of the district court is affirmed.

The Elements of Damages Allowable in Eminent Domain Proceedings are considered in the note to Board of Trade Tel. Co. v. Darst, 85 Am. St. Rep. 291. That employes will stop to look at passing trains, that mules will run away, that livestock will be killed on the track, and that deleterious grasses will be scattered over the farm, have been held not proper to be considered as elements of damages in proceedings by a railway corporation to acquire lands to be used as a right of way: Yazoo etc. R. R. Co. v. Jennings, 90 Miss. 93, 122 Am. St. Rep. 312.

OLSON v. NEBRASKA TELEPHONE COMPANY.

[85 Neb. 331, 123 N. W. 422.]

EMPLOYER'S LIABILITY—Electric Wires—Compliance With Ordinance.—An employé of a telephone company directed by his master to fasten a cable to an overhead messenger wire thirty feet above a pavement, unless warned to the contrary by his master or by obvious conditions, is justified in relying upon an ordinance of the city forbidding the maintenance of wires carrying an electric current for light or power purposes within five feet of telephone wires, and commanding that all such electric light wires be insulated and defects therein repaired at once. (p. 665.)

EMPLOYER'S LIABILITY—Safe Place—Telephone Poles and Wires.—Notice to an employé that a master does not and will not inspect poles, cross-arms, wires or implements used by a lineman, but that the duty to make such inspection is cast upon the servant, that he must satisfy himself of their safety before climbing upon or about poles or working with such wires, and that it is his duty to report any defect therein, does not relieve the master from the duty he owes said servant to exercise reasonable care to furnish him a reasonably safe place, independent of such poles, cross-arms and wires, to work in, the nature of the work to be performed being considered. (pp. 664, 666.)

(Syllabi by the court.)

The former opinion in this case is reported in 83 Neb. 735, 120 N. W. 421, from which it appears that the action was against the Nebraska Telephone Company and the Omaha Electric Light & Power Company, to recover for personal injuries sustained by the plaintiff while in the employ of the telephone company as "ground man," assisting in stringing cables. The evidence, to quote from the former opinion, "shows that at the time plaintiff received the injuries complained of the defendant telephone company was inclosing its wires along Twenty-fourth street in a lead cable, about one and one-quarter inches in diameter. This lead cable was suspended from a strong woven wire called 'the messenger,' and ran parallel with and about six inches below the messenger wire, being supported at short intervals by wire hooks, somewhat in the form of a figure 8, so that the cable would be permanently suspended from and supported by the messenger wire. It would appear that the linemen who had strung the cable had placed the wire hooks in position, but had not securely fastened them, and at the time of the injury it was plaintiff's work to pass along that wire and with a pair of metal plyers securely fasten the hooks. In order to do this he was seated on an iron saddle with an iron frame extending to the top of the messenger wire and attached to a wheel which ran upon the wire. The saddle was provided with a wooden seat. After fastening a hook he would pull himself along to the next and repeat the operation. The telephone wires ran north and south along the west side, and the electric wires of the light company along the east side, of Twenty-fourth street. At the intersection of Twenty-fourth and Grant streets one or more of the electric light wires crossed Twenty-fourth street, some of the witnesses say diagonally, and passed under the telephone wires. Plaintiff was working northward. When he had reached, or nearly reached, the electric light wires, he turned partially around in his saddle to remedy some defect which he had discovered in the fastening which he had just passed, or was just passing. While in the act of doing this, the witnesses say there was a flash, and plaintiff received an electric shock which caused him to fall from the saddle to the pavement below, a distance

of about thirty feet. He was picked up in an unconscious condition and taken to a hospital."

There were introduced in evidence the following rules which appear in the city ordinances: Rule 28 provides: "Wires must cross each other at right angles as near as possible, and, where it can be done, must cross on arms secured to poles or fixtures. . . . Wires must be drawn taut to avoid swinging contacts, and in such cases the stretches must be short." Rule 30 provides: "Telegraph, telephone, and all other wires of like character must not be attached to the same arm with electric light and power wires, and, when possible, must run on a separate line of poles and fixtures. When running on the same poles wires must be kept at all points five feet apart." Rule 33 provides: "All wires designed to carry an electric light or power current must be covered with a substantial, high-grade insulation not easily worn by friction, and whenever the insulation becomes impaired it must be renewed at once." Rule 46 provides: "That wires used as conductors for electric lighting purposes, and supports for the same, shall be erected or placed along the opposite side of any street or alley that is occupied by the wires of any fire alarm and police telegraph, telegraph or telephone company." Rule 47 provides: "Whenever it is necessary for an electric light conductor to approach or cross the line of any fire alarm and police telegraph, telegraph or telephone line, the same shall not approach or cross at a distance of less than five feet either above or below said fire alarm and police telegraph, telegraph or telephone wire, and shall be securely fastened on supports placed as near as practicable to said fire alarm and police telegraph, telegraph or telephone lines, or shall be carried in troughs or boxes across the route of said fire alarm and police telegraph, telegraph or telephone line, so constructed and placed as to prevent the electric light and police, telegraph or telephone lines coming in contact in case either should break or become detached from fixtures."

There was testimony, and, to quote further from the opinion, "no attempt was made by the defendant light company to disprove the testimony, that its wires at the point where they crossed the wires of the telephone company were only separated therefrom by a distance of some twelve to eighteen inches, instead of five feet, as required by the ordinances of the city; that the insulation at that point was worn off and entirely gone from their wire, in violation of the requirements of the city ordinances, and that their light wire was loose and swinging, instead of being taut, as required by the ordinances of the city. In the light of this uncontradicted testimony it was the duty of the court to charge

the jury as a matter of law that the defendant light company was guilty of negligence in these particulars."

The court formulated its conclusions of law in the following syllabi: 1. A contract by which a master seeks to impose upon his servant duties and obligations which the law imposes upon the master, and to relieve the master from liability for negligence on his part, is against public policy and void.

2. Where the question of negligence is presented by the pleading, and there is no conflict in the evidence, and but one reasonable inference can be drawn from the facts, the question is for the court.

3. Where the ordinances of a city require an electric light company to maintain its electric light wires in a taut condition to avoid swinging contacts, and to keep such wires properly insulated, and, wherever it is necessary for such electric light wires to cross the line of a telegraph or telephone line, to string its said wires at a distance of not less than five feet from the wires of said telegraph or telephone line, a failure on the part of said electric light company to comply with all or any of such requirements is negligence which will render it liable to any person who, without fault on his part, is injured by reason thereof.

4. And in such a case, where the defenses of assumption of risk and contributory negligence are relied upon, it is error to withdraw the case from the jury, unless such defenses are established by evidence so clear that reasonable men would not be warranted in reaching a different conclusion.

E. T. Farnsworth, for the appellant.

Greene, Breckenridge & Matters, contra.

331 ROOT, J. This cause has been submitted upon briefs and oral arguments supporting and resisting defendants' application **332** for a rehearing. We are satisfied that a rehearing ought not to be granted, but our former opinion will be modified.

1. The statement of facts heretofore made is correct, but will be extended somewhat as we proceed with the case. [The facts and syllabus here referred to are set forth ante, pp. 661-663.] Defendants except to the first paragraph of the syllabus and the discussion in regard thereto. They argue that the printed notice given by the telephone company to plaintiff at the time he entered its employ is not a contract exempting the employer from liability for its negligence, but a notice advising plaintiff of the risks he would likely encounter if he entered its employ, and that he must inspect for himself the conditions under which the work would be performed. The writing is as follows: "The Nebraska Telephone Company. To all linemen, trouble inspectors, and all other employes

whose duties require them to work upon or about poles: The duties of a lineman are, among other things, to test and inspect poles; reset old poles; set new poles; rebuild old pole lines; build new pole lines; climb poles; paint poles; gain poles; cross-arm poles; take down old wires; string new wires; pull slack; knock out crosses; trim trees; straighten up cross-arms or poles that have been pulled out of shape; replace defective cross-arms with new ones; string and hang cables; put up guy wires; set and reset guy stubs; and in fact do everything necessary to keep pole lines, cross-arms, wires, exchange cables and subscribers' wires in perfectly safe condition and working order. All linemen and other employés of the company whose duties require them to work upon or about poles are especially charged with the duty of inspecting the implements with which they work, all poles, cross-arms, and wires, and must know that they are safe to work with, or upon, before climbing or going upon such poles and cross-arms. The company does not employ other persons to make such inspection, but relies upon its linemen and such other employés to make such inspection themselves at the time, and to know that the poles, cross-arms and wires are safe for them to work upon. They must be constantly on the ³³³ lookout for trouble, and at once, upon discovery, report to the manager or foreman (in writing) any trouble or defect on lines or poles that they cannot at once repair. As the occupation is a more or less hazardous one, those engaged in that line of work must at all times be on their guard and careful for their own safety as well as the safety of those engaged in working with them and of the general public."

We have again examined the document, and conclude that it is irrelevant and immaterial in the instant case. The first paragraph describes the duties of linemen. The second division informs plaintiff that all employés "whose duties require them to work upon or about poles" are charged with the duty of inspecting all implements with which they work, and all poles, cross-arms and wires, and must know that they are safe to work upon before going upon such poles and cross-arms; that the company does not employ other persons to inspect such implements, wires, poles and cross-arms, and that the employé must be on the lookout for defects on "lines or poles" and report the same. Plaintiff was not injured while working upon or about the poles or cross-arms; neither does he claim damages because of any defects in the telephone company's wires. So much of the statement as informs the employé that "the occupation is a more or less hazardous one" is indefinite, and cannot amount to a defense in this case. The evidence is undisputed that the saddle furnished plaintiff is the ordinary and usual implement provided for the work in which he was engaged at the time he was injured,

and that it was not out of repair. If the telephone company is liable to plaintiff, it is because the master did not exercise ordinary and reasonable care in constructing and maintaining its cable and messenger wire within five feet of the live wires of the electric light company and in negligently directing plaintiff to work in that dangerous locality without using reasonable care to warn him of the situation. The danger was not an incident of the business in which plaintiff was engaged. He ³³⁴ would be justified in believing that his master would obey the ordinance, and that, if the telephone company strung its wires within a few inches of the wires of the electric light company, the last-named conductors would be dead and not charged with an electric current: or that, if his master for any reason was constructing its cable and wire, in violation of the ordinance, in close proximity to the dangerous electric light wires, it would exercise reasonable care to warn him of the danger: *Barto v. Iowa Telephone Co.*, 126 Iowa, 241, 106 Am. St. Rep. 347, 101 N. W. 876. The notice does not refer to any such situation as the facts establish in the instant case, and should not have been received for any purpose. The vice of this error cannot be restricted to the defense of the telephone company, but infects the entire case and calls for a reversal of the judgment as to each defendant. The first paragraph of the syllabus and so much of the opinion as refers thereto are withdrawn.

2. The rule announced in the second paragraph of the syllabus is also assailed as a departure from the law announced in preceding decisions of this court. [The syllabus here referred to is set forth in the statement, ante, p. 663.] A reconsideration of the record convinces us that the evidence is not so conclusive upon the issue of defendants' negligence as to justify a peremptory instruction in plaintiff's favor. It is true that the evidence establishes that the wires of the light company crossed Twenty-fourth street diagonally about fourteen inches beneath the cable of the telephone company, and that the insulation upon the electric light wires immediately below the cable was worn and displaced. It further appears that the light wires were not carried in a trough or box across the telephone wires. It cannot be reasonably inferred from the evidence that plaintiff was misled in calculation or judgment because the wires did not cross the street at right angles, nor that, if they had, the accident would not have occurred. The evidence does not show when the electric light wires were placed in position across Twenty-fourth street, nor when the telephone company strung the wires or cable attached to its cross-arms and poles. It is possible to infer from ³³⁵ the discolored condition of the light wires where insulation was lacking that they had been in position for some time; and, from the fact that the cable and mes-

senger wire had evidently been constructed but a short time before the accident, that the electric light company was first in point of time in occupying Twenty-fourth street. It is highly improbable that the telephone company and light company combined to violate the ordinance, but it is probable that one of the defendants, by prior permission of the municipal authorities and earlier construction, secured a superior right to the zone of five feet on either side of its wires: *Nebraska Teleph. Co. v. York Gas & Electric Light Co.*, 27 Neb. 284, 43 N. W. 126. It would not necessarily follow that the light company would be excused by proof that the telephone company was the junior occupant of Twenty-fourth street. The ordinance is mandatory that the light company cover all its wires designed for carrying light or power currents with "a substantial high grade insulation not easily worn by friction, and whenever the insulation becomes impaired it must be renewed at once." Although the senior occupant of the street, it may have known, or conditions may have been such that it ought to have known, that telephone wires had been strung above its light conductors at the point where plaintiff was injured. In such a case it ought to have known that failure to keep its wires properly insulated might result in an injury to an employé of the telephone company: *Heaven v. Pender*, L. R. 11 Q. B. Div. 503; *Mitchell v. Raleigh Electric Co.*, 129 N. C. 166, 85 Am. St. Rep. 735, 39 S. E. 801, 55 L. R. A. 398. The jury should be permitted to say under proper instructions whether plaintiff's injury was caused by the negligence of one defendant or the combined negligence of both: whether there was but one proximate cause, or several for which the defendants were separately responsible but all contributing to the accident, without which the injury would not have occurred. In the first case only the defendant responsible should be held; in the other event the jury might return a verdict against either ³³⁶ or both of the defendants, provided plaintiff was not guilty of contributory negligence: *Electric R. Co. v. Shelton*, 89 Tenn. 423, 24 Am. St. Rep. 614, 14 S. W. 863; *McKay v. Southern Bell Teleph. Co.*, 111 Ala. 337, 56 Am. St. Rep. 59, 19 South. 695, 31 L. R. A. 589. The second paragraph of the syllabus in our former opinion and the argument upon that point are withdrawn.

We are of opinion that the reference in the fourth paragraph of the court's instructions to extraordinary and unusual conditions ought to be omitted. The evidence is undisputed that plaintiff was employing usual and ordinary methods for securing the cable of the telephone company, and, if the light company had created an unusual condition in constructing or maintaining live wires in violation of the city ordinance, it ought not to receive any special consideration because of such facts.

3. The evidence submitted at the trial of this case is unsatisfactory concerning many material facts; that is to say, the date that telephone lines were first constructed at the point where plaintiff was injured, the time when electric light wires were first strung across Twenty-fourth street at the intersection of Grant, and the facts concerning notice, actual or constructive, to the light company of the condition of its wires with reference to the wires of the telephone company at said point. We find little, if anything, in the record to prove whether plaintiff before he was injured knew of the presence of the electric light wires in question, or, if he had such knowledge, whether or not he believed, or had a right to believe, that the light wires were dead or alive. In short, the record almost justifies an affirmance because of the lack of evidence, notwithstanding the errors committed.

We have given mature consideration to this phase of the case, and conclude upon the entire record that the judgment of reversal should be adhered to, but our former opinion should be modified as herein indicated. It is so ordered, and the motion for a rehearing is overruled.

The Duty and Liability of Electric Corporations to Their Employés are discussed in the note to *Hebert v. Lake Charles Ice etc. Co.*, 100 Am. St. Rep. 537. A telephone corporation must be presumed to have known, what everyone else has observed, that linemen, in going up and down poles, take hold of braces and other projections which do not appear to be dangerous, and the corporation in placing wires and apparatus on those poles must take this custom into consideration in guarding against exposing its employés to unnecessary peril: *Barto v. Iowa Tel. Co.*, 126 Iowa, 241, 106 Am. St. Rep. 347.

Where an Electric Corporation Fails to Comply With an Ordinance regulating the placing, guarding and insulation of its wires, this is prima facie negligence: *Mize v. Rocky Mt. Bell Tel. Co.*, 38 Mont. 521, 129 Am. St. Rep. 659; *Conrad v. Springfield Ry. Co.*, 240 Ill. 12, 130 Am. St. Rep. 251. In an action by a telephone lineman against a railway company for injuries received from a wire coming in contact with unguarded wires of the company at a point where an ordinance requires guard-wires to be maintained, the defendant may show as a defense that a compliance with the ordinance would not have prevented that particular injury, but it cannot make the general defense that the use of guard-wires is a menace rather than a protection and has generally been discontinued in recent years: *Conrad v. Springfield Ry. Co.*, 240 Ill. 12, 130 Am. St. Rep. 251.

O'CONNOR v. TIMMERMAN.

[85 Neb. 422, 123 N. W. 443.]

LANDLORD—Waiver of Forfeiture for Nonpayment of Rent.—

The leniency of a landlord in not insisting upon prompt payment of rent when due does not constitute a waiver of his right to a forfeiture of the lease for nonpayment of rent. (pp. 669, 670.)

(Syllabus by the court.)

Charles W. Haller and James T. Begley, for the appellant.

J. J. O'Connor, I. J. Dunn and A. E. Longdon, contra.

422 LETTON, J. This is an action of forcible detainer to recover possession of two hundred and eighty acres of land. The original written lease was made for five years, ending March 1, 1905. With the exception of the first year, as to which it was agreed the rent should be seven hundred and fifty dollars, the stipulated rent was eight hundred dollars a year, payable four hundred dollars upon March 1st and four hundred dollars upon September 1st, annually. At the expiration of the lease it was agreed that defendant should hold over as under the old lease. There is no dispute but that during the whole seven years the tenant never paid his rent promptly at the time due, and never paid the amount that he actually agreed to pay by the terms of the lease. A large amount was due at the end of the five-year term.

Perhaps the theory of the defense is best stated in the language of counsel: "That the verdict and judgment are against the weight of the evidence and contrary to law, chiefly for the reason that O'Connor, by a long course of dealings with Timmermann, lulled him into a feeling of security and repose, and made him believe that failure to make prompt payment of rentals would not cause a forfeiture of his lease, and said O'Connor could not, without ⁴²³ notice as to the future, maintain a forfeiture." It is further contended that credit should have been allowed by the court for the flooded lands, the new lease being made on that basis, and that, if this were done, there would be nothing due. The real defense seems to be that the plaintiff agreed that, because about one hundred and fifty acres of the land were flooded for a number of years, the rent should be reduced. The evidence fails to show any definite agreement of this nature. Moreover, we think this defense cannot be considered in this case, since, whatever may be the actual amount due under the contract, it is evident that at least five hundred dollars was long past due at the time the notice to quit was served. In a letter dated February 11, 1907, defendant paid forty-five dollars, and promised to pay five hundred dollars more on the rent,

which he never did. The defendant at that time was more than five hundred dollars in arrears by his own admission. If the leniency of a landlord in not insisting upon the strict payment of rent according to the terms of a lease would be a defense to an action to recover possession of the premises, then, indeed, the lot of a tenant might often be a hard one, since for their own protection landlords would insist upon strict compliance with the contract.

Defendant cites the case of *Hukill v. Myers*, 36 W. Va. 639, 15 S. E. 151, as sustaining his position, but we think it is not applicable. That was an action in equity to enjoin subsequent lessees from interfering with a tenant in possession, and for specific performance of the lease by the lessor. The tenant had been paying rent, but not within the time required by the lease. Upon the theory that by reason of nonpayment the lease was forfeited, the landlord, without acquiring possession or declaring a forfeiture, made a second lease under which the defendant lessees sought to take possession. Relief was given, but the power of the court to extend relief to the tenant was placed upon the ground that it was a court of equity, which was founded "to relieve against the hardness of courts of common law, and notably to relieve against ⁴²⁴ forfeiture, even where it clearly exists." The cases are not parallel. The evidence shows O'Connor had been demanding payment, and accepting such sums as the tenant was willing and able to pay. When the accumulation of arrears became too great, he requested the tenant to come in and have a settlement. Upon his failure to do this, he began this action under the provisions of section 1020 of the Code, which provides that the action will lie against tenants holding over their terms, and that "a tenant shall be deemed to be holding over his term whenever he has failed, neglected, or refused to pay the rent or any part thereof when the same became due."

It is further contended that the acceptance of payment of rent after September 1, 1906, constituted a waiver of forfeiture. This cannot be so. The unpaid rent constituted a debt owing from the tenant to the landlord, and the acceptance of money owing upon this debt, in the absence of any agreement or conditions whereby the landlord agreed to waive the forfeiture and reinstate the tenancy, could not affect his right to recover possession. A somewhat similar case is *Cochran v. Philadelphia Mtg. & Trust Co.*, 70 Neb. 100, 96 N. W. 1051, where a tenant long in arrears attempted to compel the landlord to waive the forfeiture by sending a check in payment of present rent, except that in the present case no attempt was made by the tenant to evade the forfeiture.

The question of the right of defendant to a reduction of the amount of the rent on account of floods can be determined if an action is brought to recover upon the unpaid rent. It

is immaterial here, because there is no claim that any portion of the rent for 1906 had ever been paid.

There is no evidence that by the plaintiff's leniency the defendant has been put in any worse position than he would have been in had strict performance on his part been enforced. There is a class of cases holding that one having the right to declare a forfeiture, who does not declare it when he is entitled to do so, waives the right, ⁴²⁵ but this rests upon the ground of estoppel. In such cases the lessee has usually incurred large expenditures or made valuable improvements believing that, by the landlord failing to assert the right of forfeiture after breach of condition, it would not be asserted. This is not such a case.

Under the law, no defense was established and the district court properly directed a verdict for the plaintiff. The judgment of the district court is affirmed.

The Exercise by a Landlord of His Right to Declare the Forfeiture of the lease is discussed in the note to McKay v. Ohio Riv. R. R. Co., 26 Am. St. Rep. 912. A demand for rent on the day it falls due is not necessary in order to cause a forfeiture of the lease; the lessor may declare a forfeiture on some subsequent day: Williams v. Vanderbilt, 145 Ill. 238, 36 Am. St. Rep. 486. See, also, Medinah Temple Co. v. Currey, 162 Ill. 441, 53 Am. St. Rep. 320; Miller v. Prescott, 163 Mass. 12, 47 Am. St. Rep. 434; Moses v. Loomis, 156 Ill. 392, 47 Am. St. Rep. 194. Under a contract of sale in the nature of a lease for a term, stipulating for the payment of rent at fixed periods, its prompt payment is waived, even if time is of the essence of the contract, by accepting it at other times, either before or after the time fixed upon for its payment: Davis v. Robert, 89 Ala. 402, 18 Am. St. Rep. 126.

CHAN v. CITY OF SOUTH OMAHA.

[85 Neb. 434, 123 N. W. 464.]

SPECIAL ASSESSMENTS—Remonstrance by Administrator.—

An executor or an administrator in the possession of and exercising complete control over the real property of his decedent, if his authority to remonstrate is not challenged by the heirs or devisees of said decedent, is an owner of such real estate within the meaning of the statute authorizing the owners of fifty per cent of the foot frontage of real estate subject to special assessments within an improvement district by remonstrating to deprive the city council of power to repave the streets within said district at the expense of the real estate situated therein. (pp. 672, 674.)

WORDS AND PHRASES.—The word "Owner" has no technical meaning, but its definition will contract or expand according to the subject matter to which it is applied. (By the editor.) (p. 673.)

SPECIAL ASSESSMENTS—Remonstrance by Guardian.—A guardian in like control of the real estate of his ward is also an owner within the meaning of said statute. So, also, the surviving

spouse of the owner of a homestead and a tenant in common are owners. (pp. 673, 674.)

SPECIAL ASSESSMENTS—Remonstrance—Signature of Corporation.—The name of a corporate owner of real estate subject to such an assessment may lawfully be affixed by the president thereof to such a remonstrance. (p. 675.)

SPECIAL ASSESSMENTS—Remonstrance—Signing by Initials.—Names signed by initial which identify the remonstrant by reference to the property owned by the signer should also be received, where objection is not made by the council to the fact that the first name is not signed in full. (p. 674.)

(Syllabi by the court except when stated to be by the editor.)

W. C. Lambert and S. L. Winters, for the appellants.

A. H. Murdock and E. T. Farnsworth, contra.

435 ROOT, J. This is an action to cancel special assessments levied upon plaintiffs' real estate in South Omaha for the purpose of defraying three-fifths of the expense incurred in repaving a part of Twenty-fourth street in said city. Plaintiffs prevailed, and defendants appeal.

The tax was assessed in 1905. In 1903 the legislature by chapter 17, Laws of 1903, authorized the city of South Omaha to issue bonds to pay for improving street intersections and such parts of streets and alleys as are not subject to special assessments but are within improvement districts. In 1905 the city charter was so amended that streets might be repaved upon the city's initiative, and provided: "No repavement, as herein provided, shall be ordered or made if a remonstrance against the making of the same is filed with the city clerk during the time the ordinance declaring the necessity therefor is pending, which remonstrance shall be signed by the owners of fifty per cent at least of the foot frontage on the street, or the part thereof to be repaved as the case may be": Laws 1905, c. 20, sec. 110, subd. 16. A remonstrance purporting to represent more than fifty per cent of the foot frontage in said district was filed July 10, 1905, and submitted by the council to the city engineer and the city attorney. The record does not show that the remonstrants were given a hearing on their objections, nor that they **436** were afforded any opportunity to establish their claim of ownership to the tracts and lots of land represented by them. The city attorney and the city engineer, on the third day after the objections were filed, reported to the council that a frontage of only five thousand one hundred and eighty feet was represented by the remonstrance, but in nowise indicated the names rejected. The remonstrance does not seem to have been formally overruled, but from thenceforward was ignored. The statute does not provide that a hearing shall be given the remonstrants if their right to remonstrate or the sufficiency of their number is questioned, so that, whenever

the sufficiency of the remonstrance is questioned in court, the fact should be determined without reference to the action of the city officials. The district court found that the owners of fifty per cent of the foot frontage in said district had remonstrated against the repavement of the street, and that the city council was without jurisdiction to levy the assessments in suit.

1. It appears from the stipulations in the bill of exceptions that the total foot frontage of the district repaved is two thousand one hundred and twenty-one and three-tenths feet, and that the United States government is the owner of one hundred and thirty feet thereof. The one hundred and thirty feet should be deducted from the entire frontage, leaving one thousand nine hundred and ninety-one and three-tenths feet: *Armstrong v. Ogden City*, 12 Utah, 476, 43 Pac. 119; *Herman v. City of Omaha*, 75 Neb. 489, 106 N. W. 593. Defendants admit that all of the signatures to the remonstrance are genuine, and that many of the remonstrants owned the real estate described opposite their names. The issue, therefore, is whether in July, 1905, certain signers of the remonstrance owned lots or parts of lots fronting on Twenty-fourth street in said paving district.

2. It seems that John J. Joslin died prior to 1905, the owner of certain lots aggregating six hundred and thirty feet frontage in said district. By his last will and testament, which has been duly probated in Douglas county, the testator nominated Suviah Joslin and Charles S. Joslin as executrix and executor thereof, and authorized them to sell all of his real estate not specifically devised. He made specific ⁴³⁷ devises of real estate other than the South Omaha property, created various trusts, authorized his executors to complete improvements on his South Omaha property, and devised the residue of his estate in equal shares to said Suviah Joslin, Charles S. Joslin, and one other person. The estate had not been settled in 1905, but all of its assets were in the possession of the executrix and executor, who signed the remonstrance. The remonstrants were owners within the meaning of the statute, *supra*: *Portsmouth Sav. Bank v. City of Omaha*, 67 Neb. 50, 93 N. W. 231. Complaint is made that the executrix signs as to certain lots and the executor for the remaining tracts owned by the estate and included in the district, and it is argued that each representative of the estate should have signed the protest as to all of said lots. While it may be necessary for the representatives to act jointly to convey the real estate, a remonstrance signed by either representative for the purpose of protecting the estate is valid.

The respective administrators of the Akofer, Crowell and Eggers estates and the executrix of the last will and testament of William Schmeling, deceased, signed said remonstrance. In each instance the decedent at the time of his de-

mise owned real estate fronting on Twenty-fourth street within said district. In each case the remonstrator was in possession of and managing the estate of his or her decedent. Mrs. Schmeling owned one-third of the real estate represented by her remonstrance, and Mrs. Eggers, Mrs. Akofer and Mrs. Schmeling, respectively, occupied as a home for herself and children the lots represented by her remonstrance, and had so occupied the property preceding the death of her decedent. Mrs. Eggers was also the guardian for her infant children. No one disputed the right of any one of said remonstrants to represent the property of the estate, and, under the circumstances, the remonstrant was an owner within the meaning of the statute. The word has no technical meaning, but its definition will contract or expand according to the subject matter to which it is applied. A ⁴³⁸ moment's reflection will recall that in the criminal law a mere bailee may be the owner of personal property, that the same rule holds good in replevin and trover, and that in condemnation proceedings all persons having any interest, estate or easement by way of lien, charge or encumbrance in the property to be taken is an owner thereof. Many examples may be found by an examination of 6 Words and Phrases, page 5135 et seq. In *Allen v. City of Portland*, 35 Or. 420, 58 Pac. 509, and *Los Angeles Lighting Co. v. City of Los Angeles*, 106 Cal. 156, 39 Pac. 135, it is held that an executor, a guardian or tenant in common is the owner of land within the meaning of the statute granting owners power identical with that conferred by the Nebraska statute, *supra*: See, also, *Morey v. City of Duluth*, 75 Minn. 221, 77 N. W. 829. It may be that, if the heir, devisee or other person entitled to the fee of the lots had denied the right of the remonstrant to represent the estate, the city council would have been justified in rejecting the signatures. The record affirmatively discloses that the authority of the remonstrants was not questioned by any other owner of the property represented by the signers.

We have not lost sight of the cases holding that an administrator or an executor not vested with title to the real estate of his testator is not an owner thereof within the meaning of the statutes directing city authorities to make improvements and levy special assessments to defray the cost thereof upon abutting lots, whenever a certain percentage of such owners petition the authorities to so act. There is sound reason for relaxing the definition in the former and restricting it in the latter instance. In Nebraska, an executor, unless authorized by his testator's will, an administrator or a guardian, cannot sell, convey or in any manner encumber the estate which he represents, except in conformity with an order of court made in proceedings provided therefor by statute, but it is his duty to exert himself under all circumstances to

protect and conserve the estate within his possession or under his control. A cotenant also has authority to protect ⁴³⁹ the property which he holds for the benefit of all of the persons interested therein. In some instances the executor or administrator merely added his title to his signature, and in other cases representatives signed without descriptive or qualifying words other than a reference to the property they were assuming to represent. It is insisted that the quality of those acts is individual, and not representative. *Allen v. City of Portland*, 35 Or. 420, 58 Pac. 509, is cited in support of the argument. In that case a title was rejected as surplusage and a signature upheld because the remonstrant owned the land in his individual capacity. And we are of opinion that, if a remonstrant is an owner of real estate in any sense of the word, and no other person claiming to own the identical property challenges the remonstrant's authority to represent said real estate, the municipal authorities cannot lawfully reject the signature for the sole reason that technical words of description are not grammatically included in the signature.

3. The signature of S. Ritchie by his attorney in fact, A. S. Ritchie, should be counted. Ritchie's power of attorney was not recorded at the time the remonstrance was signed, but it had been executed, and authorized the attorney to manage the real estate, lease it, collect rents and remove tenants. The principal never repudiated the act of his attorney, and the city council could not usurp the prerogative of the land owner.

4. Objection is made to the signature of K. Tombrink and of H. Tombrink, each for sixty feet frontage in said district. The litigants have stipulated that Herman Tombrink owned lot 6, block 61, and Katie Tombrink lot 4, block 23. The remonstrance is signed K. Tombrink and H. Tombrink. Mrs. Tombrink testified that she told her husband to sign her name to said remonstrance for her, and that he did so in her presence. The fact that he signed for himself by his initial only ought not to defeat his remonstrance. The signatures are genuine. Each signer is identified in the remonstrance as the owner of a definite ⁴⁴⁰ lot or a certain tract of land in the improvement district. No objection seems to have been made that signing by initial did not amount to a legal signature. We think, therefore, that Tombrink's signature should be counted. For the same reasons, the signatures of Peterson, Heafey, Gay, Fisher and McCreary should be counted. Jacob Levy, who signed as J. Levy, was a witness in the case, and testified to signing the remonstrance.

5. Certain property in the district is owned by the Fowler-Cowles Mortgage Company, a corporation, and its name was attached to the remonstrance by its president. All of the corporate stock was then, and still is, owned by the president and his wife. A nominal board of directors was in existence;

but the president had possession and control of the property. The board of directors did not authorize the signature; but the stockholders all assented thereto, and have never repudiated this act of the president. The signature was sufficient to warn the city council that the owner of that property was objecting to the repavement.

We also count the signature of C. A. Birney. The testimony of the witness Wilcox, taken altogether, and uncontradicted as it is, establishes that Birney owned the property he purported to represent in the remonstrance. The signatures of Honey and Chandler, tenants in common, have been counted for but sixty feet, being lot 6, block 78. John Carroll's signature is counted. The deed dated July 6th, conveying his property, was not delivered until August, subsequent to the enactment of the repavement ordinance. We have not counted the signatures of Rowley, Rudersdorf, Huberman, Frank Wallace or Darling & Sons, nor included the frontage they claimed to represent.

A careful examination of the evidence, assisted by the arguments and briefs of counsel for both sides, convinces us that the proof establishes that the owners of fifteen hundred and eighty-five and three-tenths feet of frontage within the improvement district remonstrated against the repavement thereof, and that the ⁴⁴¹ remonstrance has an excess of five hundred and eighty-nine feet over the amount required by statute to divest the council of authority to make that improvement at the expense of said property owners.

The judgment of the district court therefore is right, and is affirmed.

An Administrator is not the Owner of the land of his intestate, in City of Sedalia v. Montgomery, 109 Mo. App. 197, 88 S. W. 1014, so as to be clothed with authority to protest against the improvement of a street, and thereby bind the heirs, who are the real owners of the property. In California, however, the statute expressly designates executors as "owners" for the purposes of the act in protesting against public improvement: Los Angeles Lighting Co. v. Los Angeles, 106 Cal. 156, 39 Pac. 135.

BANK OF ALMA v. HAMILTON.

[85 Neb. 441, 123 N. W. 458.]

EQUITY—Rule That Plaintiff Must Do Equity—Statute of Limitations.—If a litigant asks affirmative equitable relief, he will be required to do justice himself with regard to any equity arising out of the subject matter of the action in favor of his adversary, and the statute of limitations is no bar to the imposition of such conditions. (p. 676.)

EVIDENCE—Documents Executed Contemporaneously With a Transaction in dispute become landmarks by which to correct, adjust and supply the imperfections and uncertainties of memory; they supply convincing evidence of controverted facts and will be construed most strongly against their author. (By the editor.) (pp. 677, 678.)

QUIETING TITLE—Sufficiency of Evidence to Sustain Judgment.—The evidence examined in the opinion, and held to sustain the judgment. (p. 678.)

(Syllabi by the court except when stated to be by the editor.)

John Everson, W. S. Morlan and J. G. Thompson, for the appellants.

G. Norberg and Gomer Thomas, contra.

441 ROOT, J. This is an action to quiet plaintiff's title to a quarter section of land in Harlan county. Defendant Hamilton made a cross-demand for an accounting and prevailed. Plaintiff appeals.

In 1895 Hamilton and a Mr. Gardner traded certain chattels to Mrs. Carpenter for the farm in question, and she, by their direction conveyed it to plaintiff's cashier. The land was subsequently transferred to plaintiff, and by it sold to a Mr. Robinson, but a deed has not been made to the purchaser. Plaintiff alleges that it has had **442** adverse possession of the land for more than ten years next preceding the commencement of this suit. Counsel for plaintiff suggests in his briefs, and argued at the bar, that the bank was a mortgagee in possession; that Hamilton's right to redeem accrued more than ten years before this action was instituted and the statute of limitations bars him from any relief. Plaintiff asks for affirmative equitable relief and it should do equity as a condition precedent to receiving any assistance from the court: *Kerr v. McCreary*, 84 Neb. 315, 120 N. W. 1117. The statute of limitations does not deprive the court of power to impose those conditions: *Hobson v. Huxtable*, 79 Neb. 340, 116 N. W. 278.

Coming, therefore, to the merits of the case, the cashier testifies that he loaned Hamilton and Gardner \$600 upon the latter's representation that it was to be used as boot money to close up the trade with Mrs. Carpenter; that title to the land was taken by the witness as security for the payment of that loan; that subsequently he loaned the parties, for

Hamilton's exclusive benefit, \$100; that the notes have not been paid, but that Gardner, about two years after the execution of the deed, orally renounced all right to redeem the land. Hamilton did not participate in the negotiations which were carried on with plaintiff's cashier by Gardner. Hamilton testifies that no money was paid Mrs. Carpenter in the trade, but that Beddoe, her agent and brother in law, received about \$100 commission; that the witness did not authorize Gardner to borrow money from the bank or pledge Hamilton's interest in the land. It is argued that the bank ought to recover \$700, with interest, because no one explicitly contradicts the cashier's testimony that that amount of money was loaned on the credit of the transfer from Mrs. Carpenter. There is, however, evidence tending strongly to corroborate Hamilton and weaken plaintiff's evidence on this point. In the first place, the \$641 note is signed by Gardner alone, whereas the bill for \$106 bears the signature of Gardner and Hamilton. At the time the Carpenter deed was made there were unreleased chattel ⁴⁴³ mortgages from Gardner to plaintiff and to its cashier, aggregating \$2,000, on file with the county clerk of Harlan county. Gardner and the cashier testified that the former owed little, if anything, to the mortgagees, and they were protecting Gardner's property from seizure by his creditors; but it is probable that Gardner did owe these mortgagees considerable money at the time the deed was made, and that the \$641 note evidenced part of that debt. No entries in the records of the bank or in the private books of its cashier were produced to show that anything was paid to Gardner or Hamilton about the time the larger note was given. True, there is evidence to the effect that mice had mutilated some of these records; but the bank's cash-books for that period were intact, and confessedly did not contain any evidence relevant in this case. Gardner, an intimate friend and one time business associate of the cashier, testified for plaintiff, and states that he has forgotten all of the details of the transaction. Carpenter and Beddoe were not produced, nor their testimony taken, and the evidence fairly preponderates in favor of a finding that the woman was not paid any cash consideration in the trade, nor her agent more than \$100, which is evidenced by the smaller note. Finally, the bond for a deed was signed one day, and acknowledged two days subsequent to the date of the larger note. It was prepared by plaintiff's vice-president, a practicing attorney, and signed by the cashier. The cashier testified that he always examined documents before signing them, and probably read the bond before signing his name thereto, although he does not remember the fact. Documents executed contemporaneous with a transaction in dispute become landmarks by which to correct, adjust and supply the imperfections and uncertainties of memory. They supply convincing evidence

of controverted facts and will be construed most strongly against their author: *Hart v. Ten Eyck*, 2 Johns. Ch. (N. Y.) *62; *Miller v. Cotten*, 5 Ga. 341; *Thomas v. Paul*, 87 Wis. 607, 58 N. W. 1031; 1 Moore on Facts, sec. 11.

444 Considering all of the evidence, the trial court was justified in finding that Hamilton's interest in the land was not pledged for payment of the \$600 note. The amount due him is \$774.61. Counsel for plaintiff assert that upon any theory of the case the judgment is excessive, but fails to furnish dates and amounts from which a computation should be made according to his scheme, and does not make the calculation himself. It is evident from the briefs that some allowance was made the cashier for services rendered, and the record indicates that Hamilton is not given credit for the use of the grass land. It also appears from the evidence, although such an issue was not presented by the pleadings, that each of the notes is tainted by usury. If credit is given plaintiff for \$700 with ten per cent simple interest thereon to the date of the sale of the farm, for taxes paid with ten per cent interest thereon, and \$5 a year for collecting rents, and it is charged with \$1,900, the net consideration of said sale, there is a balance due Hamilton of \$694.45. If Hamilton's share is not to be held for any part of the \$600 note, there is due him \$840.52. He does not ask to have the decree of the district court modified, and plaintiff has no just cause for complaint.

The judgment of the district court is affirmed.

The Maxim That He Who Seeks Equity Must Do Equity may be applied and conditions of relief imposed in favor of the defendant in many cases where he could obtain no independent or affirmative relief, but equity cannot require of a complainant, as a condition of relief to which he is otherwise entitled, the performance of conditions not warranted by settled principles of equity: *Martin v. Martin*, 164 Ill. 640, 56 Am. St. Rep. 219; *Manternach v. Studdt*, 240 Ill. 464, 130 Am. St. Rep. 282; *American Freehold L. & M. Co. v. Jefferson*, 69 Miss. 770, 30 Am. St. Rep. 587.

Courts of Equity, While Sometimes Adopting the Statutory Period of Limitations, by analogy, have never regarded themselves bound, in administering their remedies, by any hard-and-fast rule, but, looking at the parties, their relation to each other, and the surrounding circumstances, have determined the question of diligence, in each case, according to equity, having due regard for those elementary principles upon which their jurisdiction rests: *Deadman v. Yantis*, 230 Ill. 243, 120 Am. St. Rep. 291.

THIELE v. CAREY.

[85 Neb. 454, 123 N. W. 442.]

VENDOR AND VENDEE—Right of Vendee to Recover Payments.—One who has made a payment of purchase money on a contract which has been rescinded under circumstances entitling him to a return of the amount paid may recover the same in an action for money had and received. (By the editor.) (p. 680.)

VENDOR AND VENDEE—Action by Vendee to Recover Payments.—A Petition disclosing by alleged facts that defendant received a payment of purchase money on a land contract which was terminated under circumstances showing that in justice and fairness the money ought to be returned to plaintiff states a cause of action. (pp. 679, 680.)

VENDOR AND VENDEE—Action by Vendee to Recover Payments.—The Statute of Limitations does not begin to run against an action for money had and received, where the suit is brought by a purchaser of land for the sole purpose of recovering a payment thereon under a contract violated by defendant, until the contract has been terminated. (p. 681.)

(Syllabi by the court except when stated to be by the editor.)

T. M. Franse, for the appellant.

Moodie & Burke, contra.

⁴⁵⁴ ROSE, J. This is an action to recover back a payment of \$50 on the purchase price of two hundred and forty-four acres of land in Cuming county under a petition containing allegations to the effect that defendant agreed to convey the land to plaintiff for \$12,810 and subsequently repudiated the contract. Defendant demurred on the grounds that the petition does not state facts sufficient to constitute a cause of action and that the action is barred by the statute of limitations. The district court sustained the demurrer on both grounds. Plaintiff refused to plead further and the action was dismissed. This is an appeal by plaintiff.

The questions presented require an examination of the ⁴⁵⁵ petition, which alleges, in substance, that on June 10, 1902, plaintiff by his agent, William Givens, purchased from defendant two hundred and forty-four acres of land in Cuming county at \$52.50 an acre, and as a partial payment gave Givens a \$50 check for defendant, who cashed it and retained the money with full knowledge that plaintiff was purchaser and that Givens acted as plaintiff's agent; that defendant agreed to convey the land within a reasonable time and to furnish an abstract showing good title, whereupon plaintiff was to pay \$12,760, the remainder of the purchase price; that the check was indorsed by Givens, and that it was in the following form: "West Point, Neb., June 10, 1902. Pay to the order of William Givens (\$50) fifty and no-100 dollars. J. Thiele. Part payment on land deal for J. E. L. Carey

land. Paid June 14, 1902. Nebraska State Bank, West Point, Nebraska"; that upon the giving of the check defendant gave a receipt as follows: "June 10, 1902. Received from William Givens \$50 on farm for two weeks. J. E. L. Carey. Witnessed by C. L. Stockman"; that plaintiff at all times has been and is now ready to perform his part of the contract, and has at all times insisted and now insists upon its performance; that the failure to perform was and is exclusively the fault and neglect of defendant; that plaintiff frequently, until the commencement of the suit, demanded performance of the contract, but defendant rescinded the same and refused to perform; that on July 15, 1903, plaintiff and his agent again demanded performance and the execution of a deed, and that defendant then repudiated his agreement, rescinded the contract, and stated he would not be bound by it and would never deed the property to plaintiff; that at the time of making the contract defendant had no title to a portion of the land, one hundred and sixty acres in extent, having acquired title thereto December 14, 1905, and conveyed the same February 28, 1906, to Johann Brehmer for \$8,574.15, thereby divesting himself of the power to keep his agreement. The prayer is for judgment for \$50 and interest from June 10, 1902.

⁴⁵⁶ The holdings of the trial court that the petition is insufficient and that the action is barred by the statute of limitations lead to an inquiry into the nature of plaintiff's cause of action, if one exists under the facts pleaded. The petition does not state that plaintiff entered into possession of the premises under his contract, and consequently no question of surrendering possession is material to the inquiry. It is clear the pleader did not attempt to sue for damages for breach of contract. The only relief sought is a recovery of the purchase money paid and interest, the consideration for the payment having failed. Plaintiff might have brought a suit on the contract for a breach of its provisions, and might have asked to recover the \$50 payment as an item of damages. Such a suit could have been brought as soon as vendor refused to perform: *Beck v. Staats*, 80 Neb. 482, 114 N. W. 633, 16 L. R. A., N. S., 768. This, however, he did not do. The petition nevertheless states a cause of action, if the facts alleged bring plaintiff's case within the well-established rule that a party who has made a payment of purchase money on a contract which has been rescinded under circumstances entitling him to a return of the amount paid may recover the same in an action for money had and received: *White v. Wood*, 15 Ala. 358; *Scott v. Wallick*, 24 Ind. 124; *Hunt v. Sanders*, 1 A. K. Marsh. *552; *Wright v. Dickinson*, 67 Mich. 580, 11 Am. St. Rep. 602, 35 N. W. 164; *Davis v. Strobridge*, 44 Mich. 157, 6 N. W. 205; *Atkinson v. Scott*, 36 Mich. 18;

Taylor v. Read, 19 Minn. 372; Weaver v. Bentley, 1 Caines (N. Y.), *47; Bier v. Smith, 25 W. Va. 830; Simmons v. Putnam, 11 Wis. *193; Tollensen v. Gunderson, 1 Wis. 113. While an action for money had and received is not recognized by the code, the courts of this state have authority to apply the principle on which it rests. Excluding immaterial statements as to defendant's breach of contract by refusal to perform, enough is alleged in the petition to show that defendant received and retained \$50 of purchase money which in justice and fairness he ought to return to plaintiff, and the latter's remedy under the facts stated is a civil action in the nature ⁴⁵⁷ of one for money had and received: School District v. Thompson, 51 Neb. 857, 71 N. W. 728.

The next inquiry is: When did the statute of limitations begin to run? The answer to this question depends on the date when the cause of action accrued. As long as the contract of purchase was in force, plaintiff could not maintain an action of this nature. Such an action will not lie until the contract has been terminated: Middleport Woolen Mills Co. v. Titus, 35 Ohio St. 253; Towers v. Barrett, 1 Term Rep. 133; Simmons v. Putnam, 11 Wis. *193. In Chesapeake & Ohio Canal Co. v. Knapp, 9 Pet. *541, 9 L. ed. 222, the supreme court of the United States said: "There can be no doubt that where the special contract remains open, the plaintiff's remedy is on the contract; and he must set it forth specially in his declaration. But if the contract has been put an end to, the action for money had and received lies, to recover any payment that has been made under it."

It is positively stated in the petition that defendant rescinded the contract July 15, 1903, and declared he would never deed the property to plaintiff. To that time at least plaintiff demanded performance and stood upon the contract. After that date he acquiesced in the rescission, elected to consider the contract at an end, and brought suit for the sole purpose of recovering his payment of purchase money. Until the contract was actually at an end by his consent to the rescission, plaintiff had a right to insist on performance. As long as plaintiff was in good faith demanding a conveyance under the contract, when it was in force, he could not maintain a suit to recover back the payment made. In Simmons v. Putnam, 11 Wis. *193, it is said: "If the contract is not rescinded, but remains open and in force, an action for money had and received would not lie to recover back the consideration paid, but the remedy was an action for damages." It follows, therefore, that the statute of limitations does not begin to run against an action for money had and received when brought for the sole purpose of recovering ⁴⁵⁸ back a payment made under a contract to purchase land, until the agreement has been rescinded or otherwise terminated: Col-

lins v. Thayer, 74 Ill. 138; Walker's Assignee v. Walker, 21 Ky. Law Rep. 1521, 55 S. W. 726; Richards v. Allen, 17 Me 296; Fogal v. Page, 13 N. Y. Supp. 656. In the present case the check through which defendant received the money was marked paid June 14, 1902, but it does not appear on the face of the petition that the contract had been terminated at a date earlier than July 15, 1903. Defendant admits the suit was commenced May 4, 1907. The time between these dates being less than four years, the petition does not show on its face that the action was barred. The contrary holding of the trial court was therefore erroneous.

Reversed.

A Vendee Under a Contract to Sell Land may Maintain an Action to recover payments made, if the vendor has no title or fails to furnish a proper title at the time the vendee is entitled to it: Davis v. Lee, 52 Wash. 330, 132 Am. St. Rep. 973.

Purchase Money Paid for Land can be Recovered in an Action for money had and received, whether the consideration fails for want of title or for want of a valid contract to convey. If the contract of purchase is void, it need not be rescinded before bringing an action to recover the purchase money paid under it; and the action is not premature on the ground that the invalidity of the contract was declared in an adjudication subsequent to the commencement of the action: Wright v. Dickinson, 67 Mich. 580, 11 Am. St. Rep. 602.

SNYDER v. COLLIER.

[85 Neb. 552, 123 N. W. 1023.]

PLEADING—Withdrawal of Statement Mistakenly Made in Petition.—If plaintiff's petition is prepared, signed and verified by his attorney, and by mistake an erroneous statement is included therein, the court should before judgment, upon terms just and equitable to all parties, permit the litigant to withdraw that allegation. (p. 684.)

ACTION—Right of Plaintiff to a Dismissal.—A plaintiff may, as a matter of right, under section 430 of the Code, dismiss his action without prejudice at any time before its final submission to the court. (p. 684.)

PLEADING.—If a Defendant Desires an Affirmative Judgment against the plaintiff, he should state in his answer the ultimate facts to support his contention. If he fails to allege an essential fact, but it is pleaded by his adversary, an affirmative judgment in defendant's favor may be sustained by the pleadings. (p. 685.)

VENDOR AND VENDEE—Conveyance to "Trustee"—Notice to Grantee.—The word "trustee" following the name of a grantee in a deed is notice that he may not be the owner of the real estate conveyed, and is sufficient to put those dealing with him concerning the property upon reasonable inquiry as to the existence and nature of the trust. (p. 686.)

TRUSTEE—Authority to Sell or Mortgage.—The presumption ordinarily is that a trustee does not have authority to mortgage the

trust estate, and mortgagees are bound to exercise reasonable diligence to ascertain whether that power exists. (p. 687.)

(Syllabi by the court.)

Baldrige & De Bord, for the appellant.

Warren Switzler, contra.

553 ROOT. J. This is an action to foreclose two real estate mortgages. The district court foreclosed one, and canceled the other alleged lien. Plaintiff appeals from the judgment canceling his mortgage, and reference will be made solely to the record relating to that instrument.

The mortgage and note secured thereby were executed by "George B. Collier, Trustee," and he is identified in said instrument and in the acknowledgment thereto by the same title. The note is payable to the order of Harrison Snyder, but was given for the benefit of Harrison Snyder & Son, a partnership. George E. Snyder is the surviving member of said firm and sole legatee of the will of Harrison Snyder, now deceased. The pleader stated in the petition: "Plaintiffs show that at the time of the execution of said mortgage and note the maker of said note and said mortgage, George B. Collier, was acting as trustee for Hettie L. Collier, and held said property and executed said mortgage as such trustee." Before this action was instituted, Hettie L. Collier and the maker and the payee of said note had all departed this life. The suit was commenced in the name of the executors of the last will and testament of Harrison Snyder, deceased, but during the trial, by consent of all parties, George E. Snyder was substituted as plaintiff.

Francis J. Collier, the only defendant answering herein, is the surviving executor of the will and a son of Hettie L. Collier, deceased, and has apparent title to the mortgaged lots. Defendant pleads several defenses immaterial for an understanding of this opinion, and charges: "At **554** the time the note and mortgage is alleged to have been given, sued for in plaintiff's second cause of action, the title and ownership of the real estate mentioned in plaintiff's second cause of action was in Hettie L. Collier, now deceased, and the defendants deny that said George B. Collier, as trustee or otherwise, acted for or on behalf of the said Hettie L. Collier, or that she received any benefit from the said note and mortgage, and they deny that he had any authority to make said mortgage or to encumber said property with the same." Defendant asks that the mortgage be canceled, his title to said property quieted, and for equitable relief. The original reply is a general denial.

Over defendant's objections that the evidence was irrelevant and immaterial, plaintiff introduced copies of all of the files and the record made in proceedings prosecuted in the

district court for Douglas county by the executor of Hettie L. Collier's will, for license to sell the mortgaged premises. The executor's deed and a conveyance from the purchaser to Francis J. Collier were likewise placed in evidence by plaintiff. During argument, plaintiff requested permission to file an amended and substituted petition, which omitted all reference to George B. Collier holding title to the mortgaged lots as trustee for his mother. Counsel for plaintiff made an affidavit that said allegation was inserted in the original petition by affiant after an examination of the records of Douglas county, and not because of any information furnished or instructions given by his client. Defendant objected, and was sustained, "for the reason that the testimony in the case has all been heard before the court, and part of the argument has been heard in the case," and that the amended pleadings would change the issue upon which the case was tried. Plaintiff then moved the court to dismiss without prejudice the second cause of action. The record discloses an extended discussion between counsel and the court, and that theretofore during the trial counsel had requested permission to file an amended reply ⁵⁵⁵ pleading that defendant is estopped from denying the validity of the mortgage. The court ruled that the second cause of action should be dismissed, but without prejudice to defendant's answer, which is referred to in this connection as a cross-bill. Thereupon the plaintiff presented his amended reply, wherein he alleged that the executor of Hettie L. Collier's estate had sold said lots subject to said mortgage, and "denies that George B. Collier, trustee, at the time of giving said note and mortgage mentioned in second paragraph of said petition, was acting as trustee for Hettie L. Collier." The court denied plaintiff's request "because it is inconsistent with the petition on file," but subsequently struck out said denial and permitted the pleading to be filed.

1. Plaintiff contends that he should have been permitted to file the amended petition. Section 144 of the Code authorizes amendments either before or after judgment in furtherance of justice, and the statute has always been liberally construed. The showing in the instant case is sufficient to bring plaintiff within the protection of the code, and he should have been permitted upon terms to file his amended petition.

2. Plaintiff argues that he had the right to dismiss the second cause of action, and that his pleading should not have been retained to support defendant's demand for affirmative relief. Section 430 of the Code is imperative that a plaintiff, before the final submission of his case, may dismiss it without prejudice to a future action. The instant case had not been finally submitted when plaintiff made his request, and, had he at that time dismissed his second cause of action,

the court would have been without jurisdiction to further consider it: *Grimes v. Chamberlain*, 27 Neb. 605, 43 N. W. 395. By requesting permission to dismiss, plaintiff merely observed that respect due the court, and it erred in not sustaining the application: *Beals v. Western Union Tel. Co.*, 53 Neb. 601, 74 N. W. 54; *Sharpless v. Griffen*, 47 Neb. 146, 66 N. W. 285; *Eden Musee Co. v. Yohe*, 37 Neb. 453, 55 N. W. 866; *Linton v. Cooper*, 75 Neb. 167, 106 N. W. 170.

⁵⁵⁶ 3. Plaintiff contends that the answer is insufficient to support a decree canceling his mortgage. Defendant argues that the petition and the reply cure all defects in the answer. If the answer had been defensive solely, it would have followed the dismissal of plaintiff's case, but defendant asked for affirmative relief, and it was not within plaintiff's power by retreating to bar his adversary from a trial of the latter's counterclaim. Defendant did not ask relief against a co-defendant, but pursued plaintiff, and therefore was not charged with the duty of filing a cross-bill; but the facts, to sustain an affirmative judgment in defendant's favor, should have been stated in his answer: Code, sec. 99; Maxwell's Pleading and Practice, 4th ed., pp. 152, 689. The actor in all suits not controlled by special statutes should allege in his pleading the ultimate facts upon which he demands affirmative relief; but, if he fails to state essential facts therein, the defect will be cured by an allegation thereof in his adversary's pleadings. The court will take into consideration all of the facts alleged in the various pleadings and render a judgment accordingly. The principle has generally been recognized in answer to assaults made upon pleadings in this court for the first time; but we would not reverse a case in equity for the sole reason that the district court had exercised that prerogative. In the instant case the allegations in the petition and answer, or those in the answer and reply, are sufficient to support a decree in defendant's favor. *American Exchange Nat. Bank v. Fockler*, 49 Neb. 713, 68 N. W. 1039, cited by plaintiff, is not in point, because allegations necessary to sustain a judgment in the defendant's favor were not inserted in any or all of the pleadings.

4. The district court should have permitted plaintiff to deny in his reply that George B. Collier held title to the property as trustee for his mother. Subsequent to dismissing his second cause of action, plaintiff was not presenting the petition with respect to that cause to the court, and a denial in the amended reply of a trust relation ⁵⁵⁷ was not repugnant to nor inconsistent with the petition.

5. Counsel for plaintiff assert that defendant is estopped from denying the validity of the lien because he purchased the lots at judicial sale subject to the mortgage. Defendant contends that by pleading the estoppel plaintiff admits the invalidity of the mortgage. The law is well established that

a grantee of real estate will not be permitted to question a lien deducted as part of his purchase price at either a private or a judicial sale. The mortgage is referred to in the application for license to sell, and the power given by the district judge conforms to the statute to sell subject to all liens; but we cannot say from the record before us that the lots were sold subject to the mortgage. Moreover, the lots were bid in by Reed as agent for the legatees named in Mrs. Collier's will, were conveyed by him to defendant as trustee for said legatees, and no consideration passed for either transfer. The evidence does not show that general creditors were prejudiced, or any person misled, or any advantage secured by the reference made in said proceedings to the Snyder mortgage. No error was committed in overruling the plea of estoppel. If no estoppel in fact exists, the plea in that regard is not a confession that the mortgage is invalid.

6. It has been suggested that we should permit amended pleadings to be filed in this court and render a judgment thereon; but we think the issues should be made up and the case first tried in the district court. Eliminating the elements of estoppel and confession from the case, the mind reverts to George B. Collier's title to the mortgaged premises and his authority to impress a lien thereon. Ordinarily a trust estate is created for administrative purposes, and he who deals therewith with notice of its character is bound in law to ascertain the trustee's authority with respect thereto. If a grantee receives title to real estate for the benefit of another, and next succeeding his name in the deed vesting him with title the ⁵⁵⁸ word "trustee" appears, all persons dealing with him concerning the land are charged with notice and placed upon reasonable inquiry concerning the nature of his title and the limits of his power: *Mercantile Nat. Bank v. Parsons*, 54 Minn. 56, 40 Am. St. Rep. 299, 55 N. W. 825; *Marbury v. Ehlen*, 72 Md. 206, 20 Am. St. Rep. 467, 19 Atl. 648; *Gaston v. American Exchange Nat. Bank*, 29 N. J. Eq. 98; *Union P. R. Co. v. Durant*, 95 U. S. 576, 24 L. ed. 391; *Farmers' Loan & Trust Co. v. Essex*, 66 Kan. 100, 71 Pac. 268. See, also, *Shaw v. Spencer*, 100 Mass. 382, 1 Am. Rep. 115, 97 Am. Dec. 107; *Sternfels v. Watson*, 139 Fed. 505; *Geyser-Marion Gold-Min. Co. v. Stark*, 45 C. C. A. 467, 106 Fed. 558, 53 L. R. A. 684.

In *Stark v. Olsen*, 44 Neb. 646, 63 N. W. 37, cited by plaintiff, the trustee's powers were defined in the instrument creating the trust, so that all persons dealing with him had notice of and were bound by the limitations of his power. The cited case is not in point because George B. Collier was not vested with apparent title to the lots mortgaged by him. The word "trustee" is notice to all the world that he may have no more than a dry, naked, legal title. On the other hand, the word may be merely descriptive of an individual whose title is in

fee simple. The evidence, independent of the allegation in the petition, does not prove that George B. Collier held the lots in trust, nor, conceding that he did, does it disclose the nature of that trust or the extent of his power? Ordinarily, the legal presumption exists that a trustee has no power to sell or mortgage the trust estate. Prospective purchasers and mortgagees must therefore exercise reasonable diligence to ascertain whether the trustee has authority to sell or encumber the real estate: *Sternfels v. Watson*, 139 Fed. 505; *Geyser-Marion Gold Mining Co. v. Stark*, 45 C. C. A. 467, 106 Fed. 558, 53 L. R. A. 684; *Jones v. Williams*, 24 Beav. (Eng.) 47, 62. The Nebraska cases cited by plaintiff do not sustain him. They refer to the official acts of trustees whose office was created by statute.

The judgment of the district court is reversed as to the second cause of action and the answer thereto, and the case is remanded, with directions to permit the litigants ⁵⁵⁹ to file amended pleadings. All costs in the district court up to and including April 8, 1908, are taxed absolutely to plaintiff. Judgment accordingly.

The Addition of the Word "Trustee" to the Name of a Person is notice of a trust, and calls for inquiry and examination: *Marbury v. Ehlen*, 72 Md. 206, 20 Am. St. Rep. 467. A person who takes an assignment of a note made payable to the order of a third person as trustee is put upon inquiry as to all of the terms and conditions under which the note was executed, and is presumed to have had full knowledge thereof: *McLeod v. Despaigne*, 49 Or. 536, 124 Am. St. Rep. 1066. It has been held, however, that the fact that the word "trustee" is on the face of securities cannot put the purchaser to any inquiry beyond ascertaining whether the trustee has power to sell or otherwise dispose of them: *Bank v. Looney*, 99 Tenn. 278, 63 Am. St. Rep. 830. A person who is dealing with a tax collector personally and accepts his check signed "John A. Perkins, T. C.," is bound to know that "T. C." stands for tax collector, and that he has accepted the officer's check upon his trust fund held for the state: *State v. Jahraus*, 117 La. 286, 116 Am. St. Rep. 208.

Though the Fact That a Grantee in a Deed is Described as "Trustee" gives no notice of the name of the beneficiary or of the character of the trust, yet it imposes the duty of inquiry as to its character and limitations upon a party who takes title under the deed; but all that is required of him is good faith and reasonable care in following up the inquiry which the notice given him suggests: *Mercantile Nat. Bank v. Parsons*, 54 Minn. 56, 40 Am. St. Rep. 299.

A Trustee is Presumed to Hold Property for Administration, and not for sale: *Marbury v. Ehlen*, 72 Md. 206, 20 Am. St. Rep. 467; *Goad v. Montgomery*, 119 Cal. 552, 63 Am. St. Rep. 145.

PETERSON v. FISHER.

[85 Neb. 745, 124 N. W. 145.]

HOMESTEAD—Purchase Money Mortgage, What is.—A mortgage executed to secure money borrowed for the specific purpose of satisfying a bid for real estate sold at sheriff's sale, and delivered simultaneously with the delivery of the officer's deed, is a purchase money mortgage, valid as against a claim of homestead made by the purchaser's spouse. (p. 688.)

(Syllabus by the court.)

Ernest R. Ringo, for the appellants.

James T. Begley, contra.

745 ROOT, J. This is an action to foreclose a real estate mortgage. Plaintiff prevailed, and defendants appeal.

Some time preceding the year 1899 Ebenezer Fisher died seised of the land described in the mortgage. In September of that year, the county judge of Sarpy county entered a final order in the matter of the estate of Ebenezer Fisher, deceased, and adjudged the decedent's widow, Henrietta Fisher, to be his sole heir at law. The collateral heirs of the deceased seem to have ignored the order, but the widow, by reason of the facts and the law, became the owner, during her natural life, of said real estate. In December, 1899, in an action to foreclose a tax lien upon said land, the widow and all of the heirs of Ebenezer Fisher were made parties. The succeeding year a decree of foreclosure was rendered, and the land duly sold by the sheriff to Casper Fisher, a brother of Ebenezer Fisher. The purchaser was unable to pay for the land, and borrowed from plaintiff five hundred dollars for that purpose. Henrietta Fisher departed this life intermediate the entry of the **746** decree of foreclosure and the execution of said deed and mortgage. Subsequently Casper Fisher died. The defense is that at the time said mortgage was executed the real estate constituted the homestead of Casper Fisher, and that Mrs. Fisher was then insane and the instrument for that reason void. The district court found that Mrs. Fisher was sane at the time she executed the mortgage, but we are of opinion that fact is immaterial. The money was loaned by plaintiff to Casper Fisher to purchase said land and for no other purpose. The money was paid and the mortgage and the sheriff's deed executed as simultaneous acts, so that at no time during the transaction did a homestead estate vest in Casper or Amanda Fisher which they can assert as against the lien of said mortgage: *Prout v. Burke*, 51 Neb. 24, 70 N. W. 512; *Jackson v. Phillips*, 57 Neb. 189, 77 N. W. 683; *Acruman v. Barnes*, 66 Ark. 442, 74 Am. St. Rep. 104, 51 S. W. 319.

Defendants argue that Casper Fisher was an heir of his brother Ebenezer and therefore part owner of the land before the suit to foreclose the tax lien was instituted; that his ownership continued up to the time he signed the mortgage in controversy, and that the evidence is undisputed that he occupied the land with his family for some years next preceding the execution of plaintiff's mortgage. The evidence, however, does not show in what capacity he occupied said land; whether as tenant of his brother's widow, who owned the life estate and was entitled to sole possession thereof, or by virtue of some right independent of his brother's seisin and title. In any event, consummation of the sheriff's sale cut off Amanda Fisher's estate in the land, and at no time between the instant her interest was thus extinguished and the lien of the mortgage created did a homestead estate vest in Mr. or Mrs. Fisher so as to prejudice the rights of the mortgagee. We have not overlooked the principle of law directing a sheriff's deed to relate back to the date of sale, but it has no application to the case at bar.

While we are willing at all times to protect a bona fide homestead, we shall not place a strained construction ⁷⁴⁷ upon evidence, nor the law applicable thereto, for the purpose of defeating an honest lien created for the benefit of defendant's privity in title, and but for which they probably would not at this time possess or enjoy any interest whatever in the land in litigation.

We find no error in the record, and the judgment of the district court is affirmed.

Liens for Purchase Money of Homestead are discussed in the note to *Brown v. Ennis*, 86 Am. St. Rep. 174. According to *Acrumen v. Barnes*, 66 Ark. 442, 74 Am. St. Rep. 104, money borrowed of a third person with which to purchase a homestead, when it is understood between the lender and borrower that it is to be used for that purpose, and it is so used, is purchase money, and the homestead is liable therefor. See, in this connection, *Dreese v. Myers*, 52 Kan. 126, 39 Am. St. Rep. 336.

HUBER MANUFACTURING COMPANY v. SILVERS.

[85 Neb. 760, 124 N. W. 148.]

PROMISSORY NOTE—Release of One of Several Makers.—The unconditional release of one of several makers of a joint and several promissory note, without the consent of the other makers thereof, operates as a release of all. (p. 692.)

(Syllabus by the court.)

George A. Adams, for the appellant.

Norval Bros., J. J. Thomas and Edwin Vail, contra.

761 FAWCETT, J. This action was commenced in the district court for Lancaster county upon five promissory notes, dated June 10, 1903, signed jointly by all three defendants. The defendants each filed a separate answer. Defendant Silvers alleged that "before this action was brought, and after the giving of several promissory notes mentioned and described in said petition, to wit, on or about August 17, 1903, the said plaintiff for a good and valuable consideration, to wit, the purchase by this answering defendant from the said plaintiff on or about said date one sixteen horse-power Huber traction engine, and one Huber steam thresher, and other property, released and discharged this answering defendant from the claims and cause of action set forth in its petition filed herein, and thereby this answering defendant was discharged by said plaintiff from the payment of the debts, or notes, mentioned in said petition." Further, "that the several promissory notes mentioned and described in the petition were given by the defendants herein for the purchase by these defendants from said plaintiff of one of the plaintiff's rigs, to wit, one Huber steam thresher separator; and this defendant further avers that the following is a copy of the said release heretofore mentioned and described, to wit: 'The undersigned of this order is to be released without recourse hereafter on the Co's Rig signed by Silvers, Britt and McKenney upon the approval of this order.' " Defendant further averred that he gave plaintiff, on or about August 17, 1903, a written order for the threshing outfit first above set out, and that thereafter the said order was accepted and approved by plaintiff under and in pursuance of said order given by defendant to the company; that plaintiff furnished and delivered to him the threshing outfit above mentioned; "that in pursuance of the said stipulation in said written order above set forth, and the approval thereof by said plaintiff as above set forth, this **762** answering defendant is released and discharged from the claims or debts sued for in the petition filed herein."

The defendants Britt and McKenney, in their separate answers, each alleged that the notes set out in plaintiff's petition were executed by the three defendants as joint makers, and that the consideration therefor was the joint obligation of all the defendants; "that on or about August 17, 1903, the plaintiff, for a good and valuable consideration, and without the knowledge and acquiescence, permission or consent of this answering defendant, released and discharged the co-defendant John C. Silvers from all liability on the notes set forth in plaintiff's petition and the consideration for which the same was given; that said release was absolute and unconditional, and that by reason thereof this answering defendant has been and is released and discharged from all liability upon said notes."

The reply alleged that the notes were joint and several notes, and were executed by the defendants to plaintiff for a threshing-machine outfit; that on or about August 17, 1903, defendant Silvers came to plaintiff, and represented to plaintiff that he had sold his interest in said threshing outfit to his codefendants Britt and McKenney, and that they had assumed and agreed to pay the notes and debt sued upon, and at that time offered to purchase, or wanted to purchase, of plaintiff, another threshing outfit; that plaintiff, relying upon what he said, and believing his statements to be true, and from his statements believing that he had sold his interest in the outfit for which the notes in suit were given, and believing that the defendants Britt and McKenney had agreed with him to assume and pay the notes in suit, "solely relying upon said representations and believing them to be true, sold to him another outfit, and in the order signed by said defendant Silvers for said outfit entered a release in the following language, to wit (the release above quoted); that thereafter the plaintiff was notified by some or all of the defendants that the defendant Silvers had not sold his interest ⁷⁶³ in said outfit to his codefendants herein, and that they had not assumed or agreed to pay the debt sued on herein, whereupon this defendant sought and has ever sought to hold all of the defendants liable for the debt sued on herein, and at once notified them that they were not released from liability because of said release secured by the defendant Silvers from this plaintiff. This plaintiff further alleges that it does not know whether said statements were true or false, and it has no means of knowing; that the defendant Silvers says they are true; that the defendants Britt and McKenney say they are not true; but this plaintiff avers and alleges that, if said statements were true, said release was valid and binding and the said defendants Britt and McKenney are liable upon the notes sued on herein; if said statements were not true, then said release was procured by and through the fraud of the said defendant Silvers, and is of no force and effect, and all of the defendants are liable on the notes herein sued upon; and the plaintiff demands that said question be in this case tried and determined as to whether or not said Silvers sold out to his codefendants herein, and whether or not they agreed and assumed to pay said debt; and, when said facts are found, that the law be pronounced upon them, and that this plaintiff have judgment, as in its petition set out, against the parties defendant herein found to be liable under the facts herein alleged."

There was a trial to the court and a jury. When plaintiff had rested, the court directed a verdict in favor of the defendants, and judgment was rendered thereon, from which plaintiff appeals.

Numerous questions of law are discussed as to what could be proved under the reply in this case, etc., but it could serve no good purpose to enter into a discussion of those questions here, for the reason that, under the undisputed evidence, there is no theory upon which plaintiff can recover. There is no dispute but that the notes in suit were signed by all of the defendants as part of the purchase price of a threshing outfit which they had jointly ⁷⁶⁴ bought from plaintiff; that some time thereafter, and before any of the notes in suit had matured, defendant Silvers called at plaintiff's place of business in the city of Lincoln and stated to plaintiff's agents that he had sold his interest in the threshing outfit to his co-signers, and that they had agreed to pay the notes; that plaintiff, some two or three days thereafter, sold him another threshing outfit, and in the written contract therefor unconditionally released him from all liability upon the notes in suit. Conceding every proposition of law contended for by plaintiff, it would avail plaintiff nothing, for the reason that the record is barren of proof to aid it in the application of those legal principles. The record before us fails to show whether Silvers had or had not sold his interest to the defendants Britt and McKenney. Plaintiff in its reply says that it has no means of knowing whether the statements made by Silvers are true or not; and the unfortunate thing for plaintiff is that we are left in the same condition. We have no means of telling from the record before us whether his statements were true or not. The evidence of plaintiff's agent is that the sale of the threshing outfit to Silvers was not made until some two or three days after he had called at their office and made the statements about his having sold his interest to Britt and McKenney. The sale in fact was not consummated until plaintiff sent one of its salesmen to the home of defendant Silvers to close up the deal. During this two or three days' time plaintiff made no inquiry of Britt and McKenney to ascertain whether or not the statements made by Silvers were true. They saw fit to rely entirely upon what Silvers had said; and even after plaintiff's agents learned that Silvers and Britt were having some difficulty over an accounting, so far as the record discloses, they still did not make any inquiry of either Britt or McKenney as to whether or not they had purchased Silvers' interest in the threshing outfit. On all of these important questions the record is painfully silent. We use this term advisedly; for it is with ⁷⁶⁵ great reluctance that we affirm a judgment which will release these defendants from a just obligation which some of them ought to pay. Common prudence, it seems to us, would have dictated to plaintiff's agents the necessity of their making inquiry of Britt and McKenney before they released Silvers. If they saw fit to refrain from making such inquiry when they had ample time to do so, and plaintiff must now suffer a loss on account

thereof, the loss must be charged to their own gross neglect, and not to the well-established rule of law which prevents a recovery in this case: *Lamb v. Gregory*, 12 Neb. 506, 11 N. W. 755. Under the evidence offered by plaintiff there was nothing to submit to the jury, and the district court did right in directing a verdict in favor of the defendants.

The judgment of the district court is therefore affirmed.

The Release of One Joint Promisor releases the others, except where the remedy against them is reserved: *Yates v. Donaldson*, 5 Md. 389, 61 Am. Dec. 283; *Hale v. Spaulding*, 145 Mass. 482, 1 Am. St. Rep. 475. However, where a release of one of two joint debtors expressly provides that it shall not affect or impair the claim of the creditor against the other debtor, the latter is not discharged thereby. The equitable rule which now prevails gives to a release operation according to the intention of the parties and the justice of the case: *Whittemore v. Judd L. & S. Oil Co.*, 124 N. Y. 565, 21 Am. St. Rep. 708.

CASES

IN THE

SUPREME COURT

OF

NEVADA.

NASH v. McNAMARA.

[30 Nev. 114, 93 Pac. 405.]

MINING CLAIMS.—A Location Made upon Ground Already Covered by a Valid existing location will not prevail over a subsequent location made on the same ground after a failure to do the required work on the senior location. (pp. 695, 707.)

MINING CLAIMS.—Where a Claim is Located by Posting Notice, and by marking the boundaries within ninety days thereafter, the right to the ground relates back to the time of the posting of the notice, and the land becomes segregated from the public domain, so that a subsequent location cannot be initiated until after failure to do the work required by statute to be done within ninety days from the posting of notice; but if the notice is posted and the claim is not staked or monumented within ninety days thereafter, the location is not completed and the land not segregated from the public domain, although the posting carries the right to define the boundaries within ninety days. (p. 707.)

MINING CLAIMS.—The Filing of a Certificate of Location is not essential to the validity of the claim, but relates to matters of proof. (p. 708.)

MINING CLAIMS.—Where the Location of a Claim is not a Valid and existing location at the time of a subsequent location on the same ground, the junior locator becomes entitled to hold the claim for the ninety days allowed for doing work, and by instituting suit prior to that time may recover judgment for possession and damages to the end of that period. If he fails to do the required work within ninety days, the claim will become subject to relocation by others. (p. 708.)

WITNESSES — Cross-examination. — The Court may Properly Limit the cross-examination of a plaintiff's witness to matters brought out in the direct examination; but this does not prevent the defendant from making the witness his own after the plaintiff has closed his case in chief, nor the court from then allowing, in its discretion, rigid examination if the witness is hostile. (p. 709.)

MINING CLAIMS—Manner of Relocation.—Persons can Establish their right as relocators only by proving a prior location, that it became subject to forfeiture, and that they made such forfeiture effectual by complying with acts necessary to make a valid relocation. (p. 709.)

MINING CLAIMS—Ground Subject to Relocation.—Where the right to make a location is initiated by the making of a discovery

and the posting of notice, but no further act is done to perfect the location and segregate it from the public domain, the ground is not subject strictly to relocation, for no valid location has been perfected. In such a case the land does not cease to be a part of the public domain, and it remains open to location. (p. 710.)

Wm. Forman, for the appellants.

Campbell, Metson & Brown, George A. Bartlett and Key Pittman, for the respondents.

¹²⁶ TALBOT, C. J. The respondents, who were plaintiffs in the district court, brought this action to recover certain claims called the "Unions," with designated numbers, situated in the Manhattan Mining District, and which had been located on the twenty-fourth and twenty-fifth days of July, 1905. It was also stated in the complaint that the defendants were breaking down and removing large quantities of ore from the premises, and the prayer was for the recovery of possession, for an injunction, and for ten thousand dollars damages. The defendants, who are the appellants here, set up ownership and possession of the ground in themselves under the Liberty and Justice mining claims, located September 29, 1905. The contending parties alleged that the respective locations on which they relied had ¹²⁷ been made on the unappropriated mineral lands of the United States. This allegation in the complaint was denied by the answer. Upon the trial, after evidence had been introduced regarding the location of these claims, the defendants offered to prove that on July 1, 1905, twenty-four days prior to the location of the Unions and ninety-one days before the location of the Liberty and Justice, three men, Kopenhaver, Meissner, and Lawson, had made valid locations on the unappropriated mineral lands of the United States of claims called the "Portlands," and numbered, and which covered the ground in dispute, and that these were valid, existing claims at the time the Unions, upon which respondents rely, were located. After argument and consideration the learned district judge sustained an objection to this offer, and, although he did not allow the defendants to prove that at the time the Union claims were located the ground was covered by prior and existing valid locations, he made a finding that the Unions were located upon the unappropriated public domain of the United States, and entered judgment in favor of respondents. Of the forty-two specifications of error, a number relate directly or indirectly to the rejection of this offer and to the making of this finding, and the controlling question involved is whether a junior location made upon ground covered by a valid existing senior location will prevail over one made after a failure to do the required work on the senior location, when the statute of limitations has not run in favor of either.

Upon the trial, and also upon the hearing in this court, respondents relied upon the case of *Lavagnino v. Uhlig*, 198 U. S. 443, 25 Sup. Ct. Rep. 716, 49 L. ed. 1119, contending that the facts there are similar to those in the present case, and that the law applicable to them has been settled by the latest expression of the highest tribunal. It is admitted by counsel for appellants that the language in the decision in that case is in conflict with *Belk v. Meagher*, 104 U. S. 279, 26 L. ed. 735, and other decisions of that and other courts favorable to appellants; but it is claimed that it is overruled by a later decision of that court in *Brown v. Gurney*, 201 U. S. 184, 26 Sup. Ct. Rep. 509, 50 L. ed. 717. Recognizing that it is the special prerogative of the supreme court of the United States ¹²⁸ to finally construe federal statutes, and that its opinions relating to other matters are entitled to special consideration as coming from the highest and ablest tribunal, it becomes important to examine and analyze the conflicting decisions of that court bearing on the issue before us, and to determine which are most in consonance with reason, justice, legal principles, and the statutes relating to the location of mining claims.

Congress, in the proper exercise of its control over the public domain, by act of May 10, 1872, chapter 152, section 2 (section 2319 of the Revised Statutes [U. S. Comp. Stats. 1901, p. 1424]), provided "that all valuable mineral deposits in lands belonging to the United States are free and open to exploration, occupation and purchase by citizens and those who have declared their intention to become such, under regulations prescribed by law." Section 2322 [page 1425] provides that "the locators of all mining claims, so long as they comply with the laws of the United States and with state and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right and enjoyment of all the surface included within their lines of location and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically" within planes drawn through parallel end lines. Section 2324 [page 1426] provides that "the location must be distinctly marked on the ground so that its boundaries can be readily traced; . . . that on each claim located after the tenth day of May, 1872, and until a patent has been issued therefor, not less than one hundred dollars' worth of work shall be performed or improvements made during each year; . . . and upon a failure to comply with these conditions the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location had ever been made; provided that the original locators, their heirs, assigns,

or legal representatives have not resumed work upon the claim after failure and before such location."

Section 208 of the Compiled Laws of Nevada directs that any person, a citizen of the United States, or one who has ¹²⁹ declared his intention to become such, who discovers a vein or lode, may locate a claim by defining the boundaries thereof in the manner prescribed and by posting at the point of discovery a notice containing the name of the lode or claim, the name of the locator or locators, the date of the location, the number of linear feet claimed in length along the course of the vein, with the width on each side of the center, and the general course of the vein or lode. Section 209, as amended by Statutes of 1901, page 97, chapter 93, section 2, requires that before the expiration of ninety days from the posting of notice of location the locator shall sink a discovery shaft upon the claim of the depth of at least ten feet or its equivalent.

It is the contention of the appellants that the Portland locations, if made on the first day of July, as they offered to prove, withdrew the land from location for ninety days, during which time the respondents could initiate no rights upon it; that as the ten feet of work required by the state statute was not done upon these claims within ninety days after they were located, upon the expiration of that period they became, similarly as upon a failure to do the annual work required by the federal statute, subject to relocation by the appellants at the time they made their locations. As the language of the opinion in the Uhlig case stands opposed, not only to the law as established by *Belk v. Meagher*, 104 U. S. 279, 26 L. ed. 735, and as held by lawyers and miners for a quarter of a century, but to numerous decisions of the court, state and federal, in the mining states, and to others of the supreme court of the United States, it will be advantageous to consider the *Belk* case as the leading one, representative of numerous others, and compare the two.

The facts in both are similar to the one before the court, in that the contest here is between a claim alleged to have been located upon ground covered by a prior, valid, existing location, and a relocation made upon the same ground after the expiration of the time for doing the required work on the senior claim. In regard to the periods of time between the making of the locations of the contestants, the *Belk* case is more like the one before the court than *Lavagnino v. Uhlig*, 198 U. S. 443, 25 Sup. Ct. Rep. 716, 49 L. ed. 1119. In the *Belk* case it was conceded by both parties that the ¹³⁰ original or senior claims lapsed on the first day of January, 1877, because of failure to perform the annual work. *Belk* made the location under which he claimed on the nineteenth day of December, 1876, and did all that was necessary to per-

fect his rights, if the premises were open to location at that time. His entry on the property was peaceful. On February 21, 1877, Meagher made his location, doing all that was necessary to perfect his rights, if the premises were then open to location. Here the difference in the respective dates of location of the contending claims is about seventy days, as in the Belk case. The two Uhligs, evidently at an expense of not less than sixteen hundred dollars for the annual work, had been located and maintained for nine years previous to the location of the claims upon which Lavagnino relied. The statute of limitations applicable to such cases in Utah is seven years. In Nevada it is five years for real estate and two years for mining claims: Comp. Laws, 3706. This difference of time, amounting to nearly nine years, a period longer than the one specified in the statute, and seventy days, is sufficient to distinguish the Uhlig case from the present one, and also from the Belk case, which is more nearly in point. State statutes of limitation relating to mining claims are recognized by section 13 of the act of Congress of July 9, 1870. Properly Uhlig was given his claims by the supreme court of Utah, and that judgment was affirmed by the supreme court of the United States; but, should force be given to all the language used in that case by the highest tribunal, it conflicts with the Belk case and other cases.

The following extracts from the unanimous opinion of the court, written by the Chief Justice, in *Belk v. Meagher*, 104 U. S. 279, 26 L. ed. 735, are appropriate: "Mining claims are not open to relocation until the rights of a former locator have come to an end. A relocater seeks to avail himself of mineral in the public lands which another has discovered. This he cannot do until the discoverer has in law abandoned his claim and left the property open for another to take up. The right of location upon the mineral lands of the United States is a privilege granted by Congress; but it can only be exercised within the limits prescribed by the grant. A location can ¹³¹ only be made where the law allows it to be done. Any attempt to go beyond that will be of no avail. Hence a relocation on lands actually covered at the time by another valid and subsisting location is void; and this, not only against the prior locator, but all the world, because the law allows no such thing to be done. It follows that the relocation of Belk was invalid. . . . The next inquiry is whether the attempted location in December became operative on the 1st of January, so as to give Belk the exclusive right to the possession and enjoyment of the claim after that. We think it did not. The right to possession comes only from a valid location. . . . A location is not made by taking possession alone, but by working on the ground, recording, and doing whatever else is required for that purpose by the acts of

Congress and the local laws and regulations. As in this case all these things were done when the law did not allow it, they are as if they had never been done. On the 19th of December the right to the possession of this property was just as much withdrawn from the public domain as the fee is by a valid grant from the United States under the authority of law, or the possession by a valid and subsisting homestead or pre-emption entry. As the United States could not at the time give Belk the right to take possession of the property for the purpose of making his location, because there was an existing outstanding grant of the exclusive right of possession and enjoyment, it would seem necessarily to follow that any tortious entry he might make must be unavailing for the purposes of a valid location of a claim under the act of Congress. A location, to be effectual, must be good at the time it is made. When perfected, it has the effect of a grant by the United States of the right of present and exclusive possession. . . . Here Congress has said in unmistakable language that what has been once located under the law shall not be relocated until the first location has expired."

In the Uhlig case, which was by a divided court, no intention of overruling any conflicting decision is expressed; but, in referring to certain text-books, it was said: "Statements are found which seemingly indicate that in the opinion of ¹³² the writers, on the forfeiture of a senior mining location, quoad a junior and conflicting location, the area of conflict becomes in an unqualified sense unoccupied mineral lands of the United States without inuring in any way to the benefit of the junior location. But in the treatises referred to no account is taken of the effect of the express provisions of Revised Statutes, section 2326 (U. S. Comp. Stats. 1901, p. 1430). Moreover, when the cases to which the text-writers referred as sustaining the statements made are examined, it will be seen that they were decided either before the passage of the adverse claim statutes of 1872, or concerned controversies between the senior and junior locators, or depended upon the provisions of state statutes." As *Belk v. Meagher*, 104 U. S. 279, 26 L. ed. 735, does not come within any of these classes, it may be inferred that by inadvertence the writer of the opinion did not have that case in mind and that the court did not intentionally overrule the principles laid down in that and followed in other cases.

This inference finds further support in the language of that tribunal in *Creed etc. Min. Co. v. Uinta etc. Tunnel Co.*, 196 U. S. 337, 25 Sup. Ct. Rep. 266, 49 L. ed. 501, submitted at the same term, in *Brown v. Gurney*, 201 U. S. 184, 26 Sup. Ct. Rep. 509, 50 L. ed. 717, determined a year later, and in *Clipper Min. Co. v. Eli Min. Co.*, 194 U. S. 220, 24 Sup. Ct. Rep. 632, 48 L. ed. 944, decided one year previously, in

which the court said: "It will be seen that section 2322 of the Revised Statutes (U. S. Comp. Stats. 1901, p. 1425) gives to the owner of a valid lode location the exclusive right of possession and enjoyment of all the surface included within the lines of the location. That exclusive right of possession forbids any trespass. No one without his consent, or at least his acquiescence, can rightfully enter upon the premises or disturb its surface by sinking shafts or otherwise. It was the judgment of Congress that, in order to secure the fullest working of the mines and the complete development of the mineral property, the owner thereof should have the undisturbed possession of not less than a specified amount of surface. That exclusive right of possession is as much the property of the locator as the vein or lode by him discovered and located. In *Belk v. Meagher*, 104 U. S. 279, 26 L. ed. 735, it was said by Chief Justice Waite that 'a mining claim perfected under the law is property in the highest sense of that term'; and in a later case (*Gwillim v. Donnellan*, 115 U. S. 45, 5 Sup. Ct. Rep. 1110, 29 L. ed. 348) he adds: 'A valid and subsisting location of mineral lands, made and kept up in accordance with the provisions of the statutes of the United States, has the effect of a grant by the United States of the right of present and exclusive possession of the lands located. If, when one enters on land to make a location, there is another location in full force which entitles its owner to the exclusive possession of the land, the first location operates as a bar to the second.'

"In *St. Louis Min. & M. Co. v. Montana Min. Co.*, 171 U. S. 650, 19 Sup. Ct. Rep. 61, 43 L. ed. 320, the present chief justice declared that, 'Where there is a valid location of a mining claim, the area becomes segregated from the public domain and the property of the locator.' Nor is this 'exclusive right of possession and enjoyment' limited to the surface, nor even to the single vein whose discovery antedates and is the basis of the location. It extends (so reads the section) to 'all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically.' In other words, the entire body of ground, together with all veins and lodes whose apexes are within that body of ground, become subject to an exclusive right of possession and enjoyment by the locator. And this exclusive right of possession and enjoyment continues during the entire life of the location, or, in the words of Chief Justice Waite, just quoted, while there is a 'valid and subsisting location of mineral lands, made and kept up in accordance with the provisions of the statutes of the United States.' There is no provision for, no suggestion of, a prior termination thereof. . . . And, if the surface is open to the entry of whoever seeks to explore for veins, his possession can be entirely

destroyed. In this connection it may be well to notice the last sentence in section 2322, . . . which is a limitation on such right, and reads: 'And nothing in this section shall ¹³⁴ authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another.' . . . The difficulty with the case presented by the plaintiff in error is that under the findings of fact we must take it that the entries of the locators of these several lode claims upon the placer grounds were trespassers, and as a general rule no one can initiate a right by means of a trespass: *Atherton v. Fowler*, 96 U. S. 513, 24 L. ed. 732; *Trenouth v. San Francisco*, 100 U. S. 251, 25 L. ed. 626; *Haws v. Victoria Copper Min. Co.*, 160 U. S. 303, 16 Sup. Ct. Rep. 282, 40 L. ed. 436. See, also, *Cosmos Exploration Co. v. Gray Eagle Co.*, 112 Fed. 4, 50 C. C. A. 79, 61 L. R. A. 230, in which the court said: 'No right can be initiated on government land which is in the actual possession of another by a forcible, fraudulent, or clandestine entry thereon: *Cowell v. Lammers* (C. C.), 21 Fed. 200; *Nevada Sierra Oil Co. v. Home Oil Co.* (C. C.), 98 Fed. 673; *Hosmer v. Wallace*, 97 U. S. 575, 24 L. ed. 1130; *Trenouth v. San Francisco*, 100 U. S. 251, 25 L. ed. 626; *Mower v. Fletcher*, 116 U. S. 380, 6 Sup. Ct. Rep. 409, 29 L. ed. 593; *Haws v. Victoria C. Min. Co.*, 160 U. S. 303, 16 Sup. Ct. Rep. 282, 40 L. ed. 436; *Nickals v. Winn*, 17 Nev. 188, 193, 30 Pac. 435; *McBrown v. Morris*, 59 Cal. 64; *Goodwin v. McCabe*, 75 Cal. 584, 17 Pac. 705; *Rourke v. McNally*, 98 Cal. 291, 33 Pac. 62.' "

Cases supporting this legal principle, including *Brown v. Killabrew*, 21 Nev. 437, 33 Pac. 865, are cited in the decision of the district court of Nye county rendered last year in *Ford v. Brown*.

The opinion in the Uhlig case quotes at length and relies upon section 2326 of the Revised Statutes (Act Cong. May 10, 1872, c. 152, sec. 7; 17 Stats. 93 [U. S. Comp. Stats. 1901, p. 1430]). This section relates to the procedure where an adverse claim is filed upon an application being made for patent. There is nothing in its language as to whether a second location, made before, may prevail over a third location, made after, failure to do the required work, and nothing is stated in regard to the time when claims become subject ¹³⁵ to relocation, and it does not in any way designate how or when the rights of parties by location or relocation may be acquired, and consequently has no bearing upon the question which was before the court, and lends no support to the conclusion reached. The part of this section upon which the opinion seems to be based enacts that "it shall be the duty of the adverse claimant within thirty days after filing his claim to commence proceedings in a court of competent juris-

diction to determine the question of right of possession and prosecute the same with reasonable diligence to final judgment and a failure to do so shall be a waiver of his adverse claim." This simply provides that by failure to assert them a claimant may lose any rights which he has in the same way that a defendant in any action may lose his by default and failure to answer, and neither litigant in that case had made any such default or failure. It relates to how rights already obtained may be defended, determined, preserved, and forfeited, but not as to how those rights may be acquired by location or otherwise. This was not passed later than the other sections of the Revised Statutes mentioned, but at the same time as a part of the same act of May 10, 1872. As there is nothing in its language relating to the time or method of locating claims, we are unable to perceive how it can in any way amend, modify, repeal, or affect the language in section 2322, providing "that the locators of all mining locations, so long as they comply with the laws of the United States and with state, territorial and local regulations not in conflict with the laws of the United States governing their possessory title . . . shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside their surface lines extended downward vertically" and within planes running through parallel end lines, or the language in section 2324 that "the location must be distinctly marked on the ground so that its boundaries can be readily traced; that on each claim located after the 10th of May, 1872, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements ¹³⁶ made during each year; . . . and that upon the failure to comply with these conditions the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made."

For the purpose of making the time uniform for doing the annual work, and for the relocation of claims on which such work is not performed, section 2324 was amended eight years later by the act of January 22, 1880, chapter 9, section 2. (21 Stats. 61 [U. S. Comp. Stats. 1901, p. 1426]), so as to provide that the period within which the work is required to be done annually on all unpatented mining claims shall commence on the first day of January succeeding the date of location. In the Uhlig opinion the court said: "It cannot be denied that under section 2326, if before abandonment or forfeiture of the Levi P. claim, the owners of the Uhlig locations had applied for a patent, and the owners of the Levi P. had not adversed the application, upon an establishment of a

prima facie right in the owners of the Uhlig claims, an indisputable presumption would have arisen that no conflict claims existed to the premises described in the location notice: *Gwillim v. Donnellan*, 115 U. S. 45, 5 Sup. Ct. Rep. 1110, 29 L. ed. 348. And the same result would have arisen had the owner of the Levi P. adversed the application for a patent based upon the Uhlig locations and failed to prosecute and waived such adverse claim. In both of the supposed instances the necessary consequence would have been to conclusively determine in favor of the applicant, so far as the rights of third persons were concerned, that the land was not unoccupied public land of the United States, but, on the contrary, as to such persons, from the time of the location by the applicant for the patent, was land embraced within such location and not subject to be acquired by another person. And this result, flowing from the failure of the owner of a subsisting senior location to adverse an application for patent by the owner of an opposing location, or his waiver if an adverse claim is made, must, as the greater includes the lesser, also arise from the forfeiture of the claim of the senior locator before an application for patent is made by the conflicting locator, and the consequent ¹³⁷ impossibility of the senior locator to successfully adverse after the forfeiture is complete. Of course, the effect of the construction which we have thus given to section 2326 of the Revised Statutes (U. S. Comp. Stats. 1901, p. 1430) is to cause the provisions of that section to qualify sections 2319 and 2324 (pages 1424, 1430), thereby preventing mineral lands of the United States, which have been the subject of conflicting locations, from becoming, quoad the claims of third parties, unoccupied mineral lands by the mere forfeiture of one of such locations."

By this language it is correctly stated at the beginning that where there are two claimants, and one applies for patent, the other may lose his rights under section 2326 by failing to adverse. Under the peculiar and unusual circumstances, the result in the Uhlig case was correct, and could have been justified on another ground; but we are unable to perceive the force and correctness of the conclusion, on which the opinion was based, that because a claimant may waive his rights in proceedings for patent under section 2326, and because a senior locator may forfeit his, that therefore a mining claim is subject to relocation, or, what is the same thing, a junior or second location may be initiated on the ground as soon as the first location has been made, instead of upon the failure of the first locator to perform the required work as enacted by the statute. By a literal construction, what is called a modification, we think, in effect would be a judicial repeal of a plain enactment, supported only by reference to another section which has no applica-

tion. The language used is equivalent to saying that because a claimant may waive his right under section 2326 by failing to adverse, and a senior locator may forfeit his, therefore mining locations do not become subject to relocation upon the failure to do the required work as provided by section 2324, but that they may be relocated and rights initiated at any prior time.

The sections relating to proceedings upon application for patent are for the purpose of enabling claimants to obtain a final grant of the legal title from the government for ground previously acquired and to avoid any necessity of doing the ¹³⁸ annual work. So long as one hundred dollars is expended each year upon the claim, as required by the act of Congress, the owner's right to exclusive possession and to extract and exhaust the ore is as complete as if he held a patent, for which he may never apply unless he desires. Not infrequently ore worth millions of dollars is taken from mines which are finally abandoned as worthless and no application to patent them is ever made. The right to obtain patent depends upon the making of a location or upon having held possession during the period of the statute of limitations; but the making of the location and the time for making it do not depend upon the section regulating the proceedings upon application for patent which the claimant may never institute.

Surely it will not be contended that Congress has not the power to regulate the disposition of the unappropriated public mineral lands. The statute having clearly provided that these are open to location by citizens of the United States and those who have declared their intention to become such, and that the locators of mining claims, upon complying with the laws, shall have the exclusive right of possession and enjoyment of the surface included within the lines of their locations, and that claims shall be subject to relocation upon the failure to do the required work, these provisions ought not to be nullified or repealed by the courts because there is another section providing that a claimant may waive his right by a failure to adverse when application has been made for a patent, or because a senior locator or others who are not parties to the litigation may forfeit their rights by failing to do the required work. It is the duty of courts to construe and interpret the laws; but they should be careful not to encroach upon the legislative department, or set aside statutes, federal or state, except when they are clearly in conflict with the constitution. As the Uhlig case was one on adverse proceedings against an applicant for patent, the decision being based on the statute regulating these, anything the court said regarding the rights or forfeiture of an applicant in such proceedings may be considered as dictum in the present case, which is not on such proceedings. To enforce

all the statements in that opinion in cases generally ¹³⁹ like the one at bar would necessitate the setting aside of the provisions in other sections of the act of May 10, 1872, to which reference has been made, and which were plainly followed and enforced by the Belk case and other cases. The senior locator in the Uhlig case waived his interests by failing to appear, and was not in court or trying to assert them, and anything said regarding the forfeiture of his rights was incidental.

If the plain provisions of the statute are to be overthrown, after having been enforced by numerous courts and universally accepted for a generation, not only will vested rights be endangered, but, as said in that case: "To hold that, before the former location has expired, an entry may be made and the several acts done necessary to perfect a relocation will be to encourage unseemly contests about the possession of the public mineral-bearing lands, which would almost necessarily be followed by breaches of the peace." Then, instead of claims becoming subject to relocation upon the first day of January and after failure to do the annual assessment, the ground might be relocated before there was any such failure, and a day, a month, or a year previously. If the junior locator may acquire rights by entering the ground before there is any failure to do the required work, and while the statute gives the exclusive possession to the senior locator, any number of locations may be made and rights initiated at any time prior to the one at which the statute states that the claim shall be subject to relocation, and the person who follows the statute and makes the relocation on the first day of January will be too late, and may find that the right to locate after failure to do the work has been acquired by one of several others in the order of their locations previously made and before the work was required to be done by the original locator. The one who located six or eleven months before the time in which the work was required to be done had expired would have a better right than the one who had located one or five months in advance of such time: but, if the former failed to do the required work on his part, the right would become initiated in the latter, which would prevail over anyone who relocated ¹⁴⁰ the ground on the first day of January, the time in which it is made relocatable by statute if the annual work is not done. Fraud would be encouraged, and the door opened for the evasion of the annual work, the purpose of which is to require the owner to develop the claim at least to that extent, or render his right subject to forfeiture and the claim to relocation. If others could initiate relocations on valid and existing claims, the question would arise whether the owner could relocate before they had lapsed, and if he could not, as an exception to the rule that others could,

he would be tempted to have some one relocate for him in order to avoid doing the work. For the reasons stated, and as the Uhlig opinion does not mention *Belk v. Meagher*, 104 U. S. 279, 26 L. ed. 735, and does not express an intention to overrule the principle therein announced, and affirmed in other decisions rendered about the same time, we do not think a result so revolutionary was intended to apply in cases generally, and that the Uhlig decision is applicable only to its own particular circumstances. It has already been so held, or that at most it is not controlling further than in actions in connection with proceedings for obtaining patents, by a number of courts and text-writers, and, so far as we are aware, by all who have determined that question.

In *Montagne v. Labay*, 2 Alaska, 575, the Uhlig case was examined, and it was held that it applies only in adverse proceedings, and only within its own limited sphere of exceptional facts, and *Belk v. Meagher* was followed, and held not to be overruled. In *Hoban v. Boyer*, 37 Colo. 185, 85 Pac. 837, decided more than a year after the Uhlig case, the supreme court of Colorado continued to adhere to the rule in *Belk v. Meagher*. In *Lockhart v. Farrell*, 31 Utah, 155, 86 Pac. 1077, the supreme court of Utah, the one by which *Lavagnino v. Uhlig*, 198 U. S. 443, 25 Sup. Ct. Rep. 716, 49 L. ed. 1119, had been determined, said regarding the decision by the supreme court of the United States in that case: "Giving the *Lavagnino* case the construction contended for by the respondent is, in effect, to make it overrule *Belk v. Meagher* and *Gwillim v. Donnellan*, 115 U. S. 49, 5 Sup. Ct. Rep. 1110, 29 L. ed. 348, and to render it in conflict with the decisions of both federal and state courts on the question. We do not believe any such result ¹⁴¹ was intended by that decision. Likewise, to give it the meaning contended for renders it in conflict with the more recent decision of *Brown v. Gurney*, 201 U. S. 184, 26 Sup. Ct. Rep. 509, 50 L. ed. 717." In a note in 68 L. R. A. 842-845, the *Belk*, *Uhlig*, and other cases are considered, and at page 837 appears the statement that "it is difficult to reconcile the decisions holding that one who relocates the claim after the original locator is in default in his assessment work will prevail over one who attempted to relocate the claim before the time for the performance of the assessment work had expired with the principle of the decision of the supreme court of the United States in the recent case of *Lavagnino v. Uhlig*, 198 U. S. 443, 25 Sup. Ct. Rep. 716, 49 L. ed. 1119, although it is not probable that the doctrine of these cases will be disturbed in consequence of the decision."

Numerous decisions in the state and federal courts in the mining states and territories from the Mexican border to the Canadian line, apparently without exception, support *Belk v. Meagher*, 104 U. S. 279, 26 L. ed. 735, and *Clipper Min. Co.*

v. Eli Min. Co., 194 U. S. 220, 24 Sup. Ct. Rep. 632, 48 L. ed. 944, and Gwillim v. Donnellan, 115 U. S. 49, 5 Sup. Ct. Rep. 1120, 29 L. ed. 348, in which it was said: "If, when one enters on land to make a location, there is another location in full force, which entitles its owner to the exclusive possession of the land, the first location operates as a bar to the second." Quoting with approval from the opinion in the Belk case, Justice Hawley, speaking for this court, in *Rose v. Richmond Min. Co.*, 17 Nev. 25, 27 Pac. 1105, said: "A relocation on lands actually covered at the time by another valid and subsisting location is void; and this, not only against the prior locator, but all the world, because the law allows no such thing to be done." In one end of the balance we have only the Uhlig case, based on a section of the Revised Statutes which has no bearing on the question involved; and against this we have the numerous decisions, cited and uncited, supporting *Belk v. Meagher*, including our own in *Rose v. Richmond Min. Co.*, 17 Nev. 25, 27 Pac. 1105, and the statutes which are clearly and directly applicable, and which would have to be overruled in order to maintain the judgment.

After the court had sustained an objection to the offer of appellants to prove that the notices of location were posted on the Portlands, and that they were valid, existing claims,¹⁴² covering the ground at the time the Unions were located, they asked the court to admit the evidence subject to objection and to a motion to strike it out, so that its admissibility could be considered more carefully later; but the court refused to receive it, and consequently there is nothing in the record to show what acts were performed toward locating the Portlands. If they were located by posting the requisite notices on July 1, 1905, and by the proper marking of their boundaries within ninety days thereafter, the right to the ground covered by them would relate back to the time of the posting of notices, and would in effect have been a segregation of the land from the public domain, so that the Unions could not have been validly located or initiated upon it on the twenty-fourth and twenty-fifth days of July, nor until after there was a failure to do the work required by the state statute to be done within ninety days from the posting of the notices. But if the Portland notices were so posted, and the claims were not staked or monumented within ninety days thereafter, then we think the locations were not completed under the act of Congress and the state statute, and, the land not having been marked within that period, so that its boundaries could be traced, it was not segregated from the public domain, although such posting carried the right to define the boundaries within ninety days. The period for this purpose has since been shortened by an act of the legislature to twenty days: Stats. 1907, p. 419, c. 194.

Erhardt v. Boaro, 113 U. S. 527, 5 Sup. Ct. Rep. 560, 28 L. ed. 1113, cited by appellants, is distinguishable; for it was said in the statement of facts there that "the evidence tended to show that, within ninety days from the discovery of the lode by Carroll, one French, on behalf of the plaintiff and Carroll, secretly caused the boundaries of the claim to be marked." It was correctly held there that the forcible eviction of the discoverer and locator from the vein or lode before the sinking of the shaft required by the Colorado statute and the prevention of his re-entry by threats of violence excuse him, as against the party keeping him out of possession, so long as he is kept out of it, from sinking the shaft required. There is no doubt that, if the locator discovered a vein and filed proper ¹⁴³ notices on the Portlands on the unappropriated public domain, he was entitled to go on the ground and mark the boundaries, and in doing so float the locations and do the required work; but, if he never did anything but post the notices, it would seem that no piece of ground was ever defined for segregation from the public domain, so as to notify or warn off others, or prevent the initiation of locations which would be good against a later one.

We find no errors in the record, except those resulting in different ways from the conclusion of the district court to adhere to the opinion in *Lavagnino v. Uhlig*, 198 U. S. 443, 25 Sup. Ct. Rep. 716, 49 L. ed. 1119. Upon the trial objection was sustained to evidence regarding the sinking of a shaft ten feet deep, or its equivalent, on the Unions, and the filing of certificates of location was objected to and withdrawn, because the work was not done and the certificates were not filed before this action was begun; and it is contended that proof of this work and the filing of those certificates were essential to plaintiffs' recovery. There was no supplemental complaint or pleading alleging that the work was done or completed or that the certificates were filed after the commencement of the suit to warrant its admission. We have recently held in the case of *Ford v. Campbell*, 29 Nev. 578, 92 Pac. 206, that the filing of a certificate of location is not essential to the validity of the claim, but relates to matters of proof. If the Portlands were not valid and existing locations at the time the Unions were located, and the Unions were located on the unappropriated public domain by posting notices and making their boundaries in accordance with law, respondents would have become entitled to hold them for the ninety days allowed for doing the work, and by instituting this suit prior to that time could recover a judgment for possession and damages to the end of that period. If, under these circumstances, respondents failed to do the required work within ninety days, the claims would become subject to relocation by the appellants or others.

The court sustained objections to a series of questions by which it may be surmised that defendants sought to prove, upon the cross-examination of plaintiffs' witnesses, that the Portland notices were posted on the ground at the time the ¹⁴⁴ Unions were located. The court properly limited the cross-examination to the matters brought out in the direct examination. This did not prevent defendants from making the witnesses their own after plaintiffs had closed their case in chief, nor the court from then allowing, in its discretion, a rigid examination if they were hostile.

The judgment is set aside, and the cause is remanded for a new trial, upon which defendants will be allowed to introduce evidence to show that at the time the Unions were located the ground was covered by the Portlands as valid and existing locations made by posting the requisite notices and by the defining of their boundaries within ninety days thereafter, and that by failure to do the work required by the state statutes the Portlands had lapsed at the time the Liberty and Justice claims were located.

NORCROSS, J., Concurring. I concur in the opinion of the chief justice, and express the following additional views, based upon my conception of the statutes and the decisions of the highest courts:

The right of respondents to offer proof that the Portland claims were valid and subsisting locations at the time the Union locations were made does not depend, as contended, upon any relations of privity between the locators of the Portland claims and themselves. They have the right to offer such proof, in order to establish the fact, if they can, that they have complied with the federal and state law as relocators of a prior existing claim, which had become, under the law, subject to relocation. Both the state and federal statutes have provided for the relocation of claims which have become subject to such relocation by reason of the failure to do the location work or annual assessment work provided for by law. A distinction is thus recognized, both by the federal and state laws, between a location and a relocation. If persons are claiming rights to the public domain as relocators, necessarily their rights depend upon the fact that a prior existing claim had become subject to forfeiture, and that by entering upon the ground and relocating it they had effected such forfeiture of the rights of the prior ¹⁴⁵ locators and established rights in themselves. They can only establish their rights as relocators by proving the prior location, that it had become subject to forfeiture, and that they had made such forfeiture effectual by complying with acts necessary to make a valid relocation. Where the right to make a location is initiated by the making of a discovery and the post-

ing of a proper notice, but no further act is done to perfect the location, and thus segregate the same from the public domain, the ground is not subject strictly to relocation, for no prior valid location had been perfected. In such a case the land does not cease to be a part of the public domain, never having been segregated therefrom, and thus it remains open to location. It frequently happens that a person upon making a discovery posts a location notice, and in common parlance this is called a "location"; but legally it is not a location, and may never become such. The first discoverer, who posts a valid notice, initiates a right which he is protected in and which he can follow up by doing the other acts necessary to perfect a valid location; but until he has done those other acts he has not acquired the right of exclusive possession given him by the statute upon a perfected location, which will have the effect of cutting off any inchoate right in another initiated in the meantime.

Sweeney, J., being interested in the result of the litigation, did not participate in the foregoing decision.

The Abandonment and Forfeiture of Mining Claims is the subject of a note to McKay v. McDougall, 87 Am. St. Rep. 403. If the location of an oil claim is not valid, its abandonment is not necessary to the making of a subsequent location: Miller v. Chrisman, 140 Cal. 440, 98 Am. St. Rep. 63.

Mining Claims are not Subject to Location until the rights of the former locator have come to an end; any relocation before that time is void: Buffalo Zinc etc. Co. v. Crump, 70 Ark. 525, 91 Am. St. Rep. 87. A mere cancellation of an entry of a mining location does not render the ground open to relocation: Rebecca Gold Min. Co. v. Bryant, 31 Colo. 119, 102 Am. St. Rep. 17.

STROSNIDER v. TURNER.

[30 Nev. 155, 93 Pac. 502.]

ELECTIONS.—A Ballot on Which Three Crosses are Stamped opposite the name of a candidate, two within and one without the square, is properly rejected. (p. 711.)

ELECTIONS.—A Ballot on Which the Crosses are not Stamped, but are apparently made by using one corner of the stamp as a pencil, is properly rejected. (p. 712.)

ELECTIONS.—A Ballot Which Contains Two Rectangular Marks or Blotches in squares opposite the names of two candidates is properly rejected. (p. 712.)

ELECTIONS.—A Ballot Which Contains Two Distinct Crosses deliberately stamped in the square opposite the name of a candidate is illegal. (p. 712.)

ELECTIONS.—Marks on a Ballot are not Double Crosses in the sense that they are distinguishing marks, if they have the appearance of an attempt to make a second impression of the stamp in order to make the first clearer or to rectify some defect, the second stamping not covering the first. (p. 712.)

ELECTIONS—Ballots.—Where There is a Double Cross in the Square opposite the name of a candidate, the voter evidently having first marked a cross using one corner of the stamp as a pencil, and, upon discovering his error, having made a proper cross beside the illegal one, the ballot should be rejected. (p. 712.)

ELECTIONS.—A Ballot not Stamped as Required by Law, but Marked With a Lead Pencil throughout, is properly rejected. (p. 713.)

ELECTIONS—Ballots.—Where the Crosses are Stamped Between the Name of the Candidate and the party designation, instead of in the square after the candidate's name, the ballot must not be counted. (p. 713.)

ELECTIONS.—A Ballot is not Invalid Because a Cross, Plainly Visible, is blurred, evidently by the use of too much ink or by some other accident. (p. 713.)

ELECTIONS.—Where a Small Portion of a Cross Projects Over the line dividing the squares opposite the names of two candidates, but the main portion of the cross is opposite one of the names, the ballot will be counted for the latter. (p. 714.)

ELECTIONS—Ballot—Imperfect Crosses.—A Ballot is not to be Rejected because some of the crosses stamped are imperfect. (p. 714.)

C. E. Mack, for the appellant.

Alfred Chartz, for the respondent.

159 NORCROSS, J. This is the second appeal of this cause: 29 Nev. 347, 90 Pac. 581. Action was brought by appellant to contest the election of respondent to the office of short-term commissioner of Lyon county. Upon the first trial the lower court found that the plaintiff, Strosnider, had received two hundred and seventy-six, and defendant **160** Turner, two hundred and seventy-five, lawful ballots. Upon the first appeal we held that the court had rejected certain ballots cast for respondent, which were lawful, and should have been counted. Upon the second trial of this cause the lower court found that the plaintiff had received two hundred and seventy-seven, and the defendant two hundred and seventy-eight, lawful ballots. This appeal again presents for consideration the rulings of the court upon the admission and rejection of certain ballots.

Plaintiff's Exhibit No. 11 was properly rejected, there appearing upon the face of the ballot three crosses stamped opposite the name of George Springmeyer, candidate for attorney general, two within, and one without, the square.

Plaintiff's Exhibits Nos. 3 and 10 were properly rejected, none of the crosses appearing thereon being stamped. Ap-

parently they were made by using one corner of the stamp as a pencil would be used. Section 20 of the act of the legislature, known as the "Australian Ballot Law," as amended March 21, 1901, provides, among other things, that: "On receiving his ballot the voter shall immediately retire alone to one of the places, booths or compartments. He shall prepare his ballot by stamping a cross or X in the square, and in no other place, after the name of the person for whom he intends to vote for each office. In case of a constitutional amendment or other question submitted to the voters, the cross or X shall be placed after the answer which he desires to give. Such stamping shall be done only with a stamp in black ink, which stamp, ink and ink pad shall be furnished in sufficient number by the county clerk for each election precinct in the county": Stats. 1901, p. 112, c. 100.

Plaintiff's Exhibit No. 9 was properly rejected. The ballot contains two rectangular marks or blotches in squares opposite the names of two candidates. Marks of this kind were fully considered upon the former appeal.

Plaintiff's Exhibit No. 8 was properly rejected. The ballot contains two distinct crosses deliberately stamped in the square opposite the name of J. A. Carter, candidate for justice of the peace. Ballots so marked have repeatedly been held illegal by this court.

¹⁶¹ Error is assigned in the court's refusal to reject ballot marked "Plaintiff's Exhibit No. 7." Objection was made upon the ground that in the squares opposite the names of two candidates there appear double crosses. We think these marks can hardly be considered double crosses in the sense that they would be regarded as distinguishing marks. They have the appearance of an attempt to make a second impression of the stamp in order to make it clearer, or to rectify some defect. The second stamping did not exactly cover the first. The resulting mark is in character similar to that held to be valid in the case of *State v. Sadler*, 25 Nev. 131, 83 Am. St. Rep. 573, 58 Pac. 284, 59 Pac. 546, 63 Pac. 128, and therein referred to as "the so-called double crosses, where it is apparent the voter had attempted to retrace the lines composing the cross."

Ballot marked "Plaintiff's Exhibit No. 6" was objected to on the ground that in the square opposite the name of George A. Bartlett, candidate for member of Congress, there appears a double cross. We think the court erred in overruling this objection. The voter evidently first marked a cross with one corner of the stamp as Plaintiff's Exhibit Nos. 3 and 10, *supra*, were marked. Upon discovering his error he made a proper stamp beside the illegal one. The voter, when he discovered his mistake, instead of trying him-

self to rectify it, should have returned his ballot to the election officers and obtained a new one, as the law prescribes. To hold a ballot of this kind to be legal would open the way for the secrecy of the ballot to be evaded, the prevention of which is one of the main purposes of the law. Error is assigned in not rejecting ballot marked "Plaintiff's Exhibit No. 5." This ballot is similar to exhibit No. 7, and the court, we think, did not err in counting it.

Ballot marked "Exhibit No. 4" was not stamped as required by law, but was marked with a lead pencil throughout, and was properly rejected.

Ballot marked "Exhibit No. 2" was erroneously counted over plaintiff's objection. All of the crosses were stamped between the name of the candidate and the party designation, instead of in the square after the name of the person for whom he intended to vote, as required by the statute. Ballots so ¹⁶²marked were held to be legal in *State v. Sadler*, 25 Nev. 131, 83 Am. St. Rep. 573, 58 Pac. 284, 59 Pac. 546, 63 Pac. 128. That case, however, was decided before the amendment of 1901, *supra*, which changed the law in respect to the place prescribed for marking the ballot. The law now requires the cross to be stamped "in the square, and in no other place after the name of the person for whom he intends to vote for each office." The printed ballots provide a square within which it is the intention of the law the stamp should be placed.

Ballot marked "Exhibit No. 1" is objected to upon the ground that a distinguishing mark appears after the name of O. A. Brooks, candidate for member of assembly. The mark in question is a blurred cross. The cross is plainly visible, and the defect apparently was occasioned by too much ink upon the stamp, or from some other accidental cause.

Appellant assigns error in the counting of three ballots, the legality of which we determined upon the former appeal. Such assignments require no further consideration.

The record in this case contains certain ballots, admitted and counted for appellant over respondent's objections. As we held upon the former appeal, following the case of *Dennis v. Caughlin*, 22 Nev. 447, 58 Am. St. Rep. 761, 41 Pac. 768, 29 L. R. A. 731, these ballots are not strictly before us. However, as their validity has been argued, we deem it advantageous to express our views upon them in order that the case may reach a final determination at the earliest possible date.

Ballot marked "Plaintiff's Exhibit No. 12" was objected to "upon the ground that there appear indescribable and distinguishing marks from which the ballot could be identified opposite nearly all the names." It is apparent that the person who prepared this ballot used a stamp containing very little ink upon it to begin with, and did not thereafter

apply it to the ink pad before completing the marking of the ballot. While one may readily conclude, from the fact that the first few crosses stamped were fairly distinct, that all the remaining marks were made by the stamp properly applied, it must be admitted that a number of the resultant marks have little, if any, resemblance to a cross, and taken alone would not be recognized as such. However, this ballot should have been rejected for the reason that two crosses ¹⁶³ appear to have been deliberately stamped opposite the name of Robert Raftice, candidate for state controller. It would seem quite probable from this ballot that the voter, having first stamped a cross in the square opposite the name of J. C. Knust, socialist party candidate for state controller, placed two opposite that of Raftice, possibly to impress the fact that Raftice was the one for whom he intended to vote.

Ballot marked "Defendant's Exhibit No. 2" was admitted and counted for appellant over respondent's objection, as follows: "That opposite the name of Orvis Ring there is an indescribable mark, and opposite the name of D. W. Melarkey there is a double cross." We think the objection is well taken, and the ballot should have been excluded.

Ballot marked "Defendant's Exhibit No. 1" was admitted, and counted for appellant over the following objection of respondent: "That, taking the ballot as a whole, it is impossible to determine for whom the voter intended to vote for county commissioner." So far as the objection made is concerned, we think it is not well taken. A small portion of the cross projects over the line dividing the squares opposite the names of appellant and respondent. The main portion of the cross, however, is opposite the name of appellant, and we think, "taking the ballot as a whole," it was the voter's intention to cast his vote for appellant.

Ballot marked "Defendant's Exhibit No. 3" was objected to upon the grounds: "That there appears a distinguishing mark after the name of D. P. Randall," etc. Without determining whether the ballot is subject to other objections noted, it is sufficient to say that it contains a cross deliberately stamped outside the square provided for such purpose, and in the blank space immediately below the words "Silver Party," thus rendering the ballot invalid.

Ballot marked "Defendant's Exhibit No. 4" is unobjectionable. The most that can be said against this ballot is that some of the crosses stamped are imperfect. The ballot is clearly admissible under the rule laid down in the case of *State v. Sadler*, 25 Nev. 131, 83 Am. St. Rep. 573, 58 Pac. 284, 59 Pac. 546, 63 Pac. 128.

If all of the ballots contained in the record were properly before us, we should affirm the judgment. However, as our ¹⁶⁴ action must find its basis upon some error assigned, and as

we have determined that the court admitted and counted for respondent, over appellant's objection, three ballots which we think should have been excluded, we are obliged to reverse the judgment and remand the cause for a new trial, which is ordered.

Distinguishing Marks Invalidating Election Ballots are discussed in the note to Taylor v. Bleakley, 49 Am. St. Rep. 246. The question is further considered at length in the recent cases of Winn v. Blackman, 229 Ill. 198, 120 Am. St. Rep. 237; Perkins v. Bertrand, 192 Ill. 58, 85 Am. St. Rep. 315.

STATE v. JUMBO EXTENSION-MINING COMPANY.

[30 Nev. 192, 94 Pac. 74.]

MANDAMUS—Order to Show Cause.—When an Application for a Writ of mandamus is filed, the practice of the supreme court is to issue an order to the respondents to show cause why the relief sought should not be granted. (p. 717.)

MANDAMUS—Manner of Raising Objections or Issues.—While there is little difference in the way issues are raised in mandamus proceedings, whether by motion to quash the citation or by demurrer, the better practice is to raise any objections to the petition by demurrer or answer. (p. 717.)

MANDAMUS—Demurrer by Directors of Corporation.—In mandamus proceedings entitled against a corporation and individuals who are its directors, separate demurrers filed by the directors individually are not improper. (p. 719.)

MANDAMUS—Absence of Adequate Remedy at Law.—Mandamus will not issue where the petitioner has a plain, speedy, and adequate remedy at law. (p. 720.)

MANDAMUS.—The Right of the Relator Must Appear Plain and Beyond Dispute before a writ of mandamus will issue. (p. 721.)

MANDAMUS to Compel the Issuance and Delivery of Corporate Stock will not lie unless the shares have some pecuniary or special value peculiar to themselves, differing from any other like number, or unless they are detained and the control of some corporation is at issue, and by securing them the person applying for the writ will obtain control; and in all such exceptional cases it must affirmatively appear from the petition that the relator has a clear, legal right to the possession of the stock, and that he has no plain, speedy, and adequate remedy at law. (p. 723.)

Lewers & Huskey and McNutt & Hannon, for the relator.

Key Pittman and Watson & Van Dyck, for the respondents.

196 SWEENEY, J. This is an application for a writ of mandamus by the relator, John B. Gleeson, against the Jumbo Extension Mining Company et al., for the purpose of having issued and delivered to him seven thousand five hundred shares of Jumbo Extension Mining Company stock and five thousand

six hundred and twenty-five shares of Vernal Mining Company stock of Goldfield.

Relator alleges in his petition for the writ that: "On or about May 10, 1904, the defendant corporation, the Jumbo Extension Mining Company, was organized under the laws of the territory of Arizona, by the name of 'Jumbo & Vernal Extension Mining Co.' with a capital stock of one million two hundred and fifty thousand shares, of the par value of one dollar per share, and having its principal places of business in the city of Phoenix, Arizona, and at Tonopah, in the state of Nevada, and at Goldfield, in the state of Nevada. Whereupon, on or about said tenth day of May, 1904, it transferred to R. A. Martin, C. B. Higginson, and J. T. Jones each two hundred thousand shares of its said capital stock, in consideration for certain mining claims transferred by them severally to said corporation. The other and remaining five hundred thousand shares of such stock were deposited in the company's treasury to be sold thereafter for development purposes. Afterward, on or about the twenty-first day of June, 1904, said corporation sold to this plaintiff and relator seven thousand five hundred ¹⁹⁷ shares of its said capital stock out of the treasury of the said company for the sum of three hundred dollars then and there paid to said corporation by this plaintiff and relator. At the time of the purchase of said stock by the plaintiff and relator the said defendant corporation, its officers and agents, claimed and represented, and the fact was, as plaintiff and relator was informed and believed, that the said company had not as yet procured its blank certificates of stock, and, because thereof, could not and did not issue a certificate in the usual form for said seven thousand five hundred shares so bought by him. But the said corporation through its proper officers did issue to the plaintiff and relator the following instrument, to wit: 'Goldfield, Nevada, June 21, 1904. This is to certify that, in consideration of J. B. Gleeson having this day paid into the treasury of the Jumbo and Vernal Extension Mining Company the sum of three hundred dollars (\$300), he, the said Gleeson, is entitled to have issued to him seven thousand and five hundred (7,500) shares of the capital stock of said company held in reserve as treasury stock. Jumbo & Vernal Extension Mining Company, by H. B. Lind, Its Secretary.' That later, as plaintiff and relator is informed and believes and therefore alleges, the said corporation procured such certificates of stock. Whereupon and continuously thenceforward hitherto this plaintiff and relator became entitled to have the said seven thousand five hundred shares of stock issued to him, and this plaintiff and relator has from time to time demanded of the said Jumbo Extension Mining Company, and of its proper officers, that a certificate of such stock should be issued to him, but to

issue the same the said corporation and its officers have declined and refused. On information and belief, plaintiff and relator alleges that there are in the treasury of the said company shares of its stock sufficient to enable the said company to perform its contract with the plaintiff and relator."

It is further alleged by reason of a consolidation of certain mining claims with the Jumbo and Vernal Extension Mining Company, and by reason of the alleged ownership of seven thousand five hundred shares of the Jumbo Extension and Vernal Mining Company as above set forth, the relator became entitled to five thousand six hundred and twenty-five shares of the stock of the Vernal Mining Company of Goldfield ¹⁹⁸ issued to him. Relator further alleges that none of the stock which it is alleged he purchased for said three hundred dollars has ever been delivered to him, and that the corporation and officers of said corporation, above-named defendants, refuse to issue and deliver the same to him. Upon the filing of this petition, this court granted an order to show cause to the above-named defendants commanding them to appear on a day certain, and show cause, if any they have, why this court should not on this said petition, and at such time issue a peremptory writ of mandate commanding the defendants to issue to said relator seven thousand five hundred shares of the capital stock of the Jumbo Extension Mining Company and five thousand six hundred and twenty-five shares of the capital stock of the Vernal Mining Company of Goldfield as claimed by relator in his petition. In due time defendants appeared and interposed a motion to quash the citation and also a demurrer, both of which set forth identically the same grounds.

If the motion to quash the citation were granted or denied, its effect would be the same as that sought to be obtained if the demurrer were sustained or overruled. This motion to quash the citation for a writ of mandamus and the demurrer interposed upon the same grounds is confessed to have been done by counsel for defendants because of a doubt in his mind as to which procedure was the proper one. In view of the fact that the court, on the filing of relator's petition, issued an order to respondents to show cause why the relief sought in the petition for writ of mandamus should not be granted, which is the practice now generally followed by this court in mandamus proceedings, defendants were given an opportunity on said date commanded in the citation to raise any objections they desired and chose to interpose their objections both by demurrer and motion to quash the citation. While there is little difference in the way these issues are raised, we think the better practice in the future to be pursued in similar cases is to raise any objections to the petition by demurrer or answer.

Defendants set forth in their demurrer and motion to quash the citation for writ of mandamus their reasons why said peremptory writ should not issue, as follows:

"1. That said affidavit or petition of said relator upon 199 which the alternative writ herein issued and wherein the relator seeks a peremptory writ of mandamus from this court does not state facts sufficient to entitle said relator to the relief in said petition prayed for, or to the peremptory writ of mandamus referred to in the alternative mandamus or citation herein issued.

"2. That it does not appear from said affidavit or petition that said relator has no plain, speedy, and adequate remedy at law.

"3. That it does appear from said affidavit or petition of said relator that he has a plain, speedy, and adequate remedy at law by an action against said defendant corporation for the value of the stock claimed by said relator. It further appears from said affidavit or petition that said relator has a plain, speedy, and adequate remedy in equity by an action against said defendant corporation for a specific performance of his said alleged contract.

"4. It affirmatively appears from said affidavit or petition of said relator that said defendant corporation is solvent, and is able to respond in damages for any judgment said relator may obtain against said corporation for the value of said stock so alleged to be wrongfully withheld from said relator by said defendant corporation and its officers.

"5. It affirmatively appears from said affidavit or petition that said defendant corporation has ample of said stock in its possession to satisfy any judgment said relator might obtain in a court of equity for the specific performance of said alleged contract and order to deliver said stock.

"6. That the remedy sought under the statement of facts in said affidavit or petition of said relator does not require the compelling of the performance of an act which the law specifically enjoins as a duty resulting from an office, trust, or station or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled.

"7. It does not appear from said affidavit or petition that the issuance of said stock was ever authorized by the board of directors of said defendant corporation, or that the execution of said agreement set out in plaintiff and relator's petition, dated June 21, 1904, and signed by H. B. Lind as 200 secretary of the defendant corporation, Jumbo and Vernal Extension Mining Company, was ever authorized by said defendant corporation, or ever ratified thereafter by the same; and it does not appear that the president or secretary or directors of said defendant corporation have any authority to issue to said relator any stock of said defendant corpora-

tion, or any other corporation upon the surrender of said instrument set up in said petition, dated June 21, 1904.

"8. It does not appear from said affidavit or petition that said Albert S. Watson, trustee, has ever executed his said trust or delivered said stock of said Vernal Mining Company of Goldfield into the possession of said Jumbo Extension Mining Company.

"9. That the court has no jurisdiction over the subject matter of said petition, or to issue the writ therein prayed for, for the reason that it does not appear from said petition that said plaintiff and relator has no plain, speedy, or adequate remedy at law."

Before considering the objections raised as to the issuance of the peremptory writ by the demurrer of the respondents, we believe it advisable to first pass upon a question raised in relator's brief wherein he raised the following objection to our considering the demurrer or motion to quash as interposed by the respondents.

In his opening brief relator asserts: "We respectfully submit that no question is or can be properly raised by the separate and independent demurrers and motions filed by T. G. Lockhart; by Edward S. Van Dyck; by Mrs. T. G. Lockhart, C. B. Higginson, J. L. Towley, and the Jumbo Extension Company; and by the Vernal Mining Company. These seem to have been filed by the above persons in their individual capacities, on the theory that the action is against the respondents as individuals, and not as a board of directors. There is no showing that any one of these numerous motions and demurrers are the motions or demurrers of the board of directors as such. In fact, it clearly appears that they are not, but are the pleadings of the individuals named. Therefore, it necessarily follows that there is no appearance of the board of directors of either company. This court ²⁰¹ cannot consider the personal and individual appearance of the above individuals."

We do not consider there is any merit in the objection raised by relator to preclude this court from considering the points raised in respondent's demurrer. The demurrer and motion complained of are entitled in every respect in the same way as relator's petition for a writ of mandamus, and have the same entitlement as the order of this court issued to said defendants commanding them to appear. It is evident that, if the objections raised by relator have any merit or force, their petition should be dismissed. We believe for the purposes of the petition and the order as issued that all parties are now before the court, and that the objections raised by respondents have been properly submitted. This court has repeatedly and recently held (*State v. District Judge*, 29 Nev. 459, 91 Pac. 737) in line with principles so

clearly and tersely expressed by High on Extraordinary Legal Remedies, here quoted and supported by innumerable authorities and text-writers when mandamus ought and will issue, and that it will not issue where the petitioner has a plain, speedy, and adequate remedy at law.

“The writ of mandamus being justly regarded as one of the highest writs known to our system of jurisprudence, it issues only where there is a clear and specific legal right to be enforced, or a duty which ought to be and can be performed, and where there is no other specific and adequate legal remedy. Since the object of a mandamus is not to supersede legal remedies, but rather to supply the want of them, two prerequisites must exist to warrant a court in granting this extraordinary remedy: First, it must be shown that the relator has a clear, legal right to the performance of a particular act or duty at the hands of the respondent; and, second, it must appear that the law affords no other adequate or specific remedy to secure the enforcement of the right and the performance of the duty which it is sought to coerce. The test to be applied, therefore, in determining upon the right to relief by mandamus, is to inquire whether the party aggrieved has a clear, legal right, and whether he has any other adequate remedy, since the writ belongs only to those ²⁰² who have legal rights to enforce, who find themselves without an appropriate legal remedy.” “From the origin, nature, and purpose of the writ, . . . it has been shown to be an extraordinary remedy, applicable only in cases where the usual and accustomed modes of procedure and forms of remedy are powerless to afford relief. It follows, therefore, from the principles already established, as well as from the very nature and purpose of the remedy itself, that the writ never lies when the party aggrieved has another adequate remedy at law, by action or otherwise, through which he may attain the same result which he seeks by mandamus. This principle is of the highest importance in all cases where it is necessary to determine upon the propriety of interference by mandamus, and the rule will be found to be firmly established as one of the fundamental principles underlying the entire jurisdiction, that the existence of another specific, legal remedy, fully adequate to afford redress to the party aggrieved, presents a complete bar to relief by the extraordinary aid of a mandamus. The rule has been recognized from the earliest times, and it has been applied throughout the entire growth and development of the law of mandamus. Indeed, it results from the very nature and origin of the writ, which was introduced to supplement the existing jurisdiction of the courts, and to afford relief in extraordinary cases where the law presented no adequate remedy. The existence or nonexistence of an adequate and specific remedy at law in the ordinary forms of

legal procedure is therefore one of the first questions to be determined in all applications for the writ of mandamus, and whenever it is found that such remedy exists, and that it is open to the party aggrieved, the courts uniformly refuse to interfere by the exercise of their extraordinary jurisdiction": High on Extraordinary Legal Remedies, 3d ed., 9, 10, 15.

In the light of these fundamental principles we believe, for the purpose of disposing of this case, all questions presented and objections raised can be properly resolved into the following query, and answered, to wit: Does the petition as presented state facts sufficient to warrant this court in issuing a peremptory writ of mandamus to compel ²⁰³ the issuance and delivery of stock in a corporation? An examination of the petition of relator reveals that it is nowhere alleged therein, nor is it claimed or maintained, that these seven thousand five hundred shares of Jumbo Extension stock and five thousand six hundred and twenty-five shares of Vernal Mining Company stock have any peculiar or especial or greater value in themselves over any like number of shares of stock in either of said companies; nor is it anywhere alleged that any stock in either of said corporations, so long as it is of the same number of shares, would not satisfy petitioner's demand; nor is it alleged or maintained that the defendants are insolvent, nor that they are incapable of delivering the number of shares of stock claimed; nor is it alleged that they are unable to respond in damages for a judgment for the stock should a judgment be awarded against defendants in a proper action for the recovery of said stock or damages for the conversion of same.

The petition further fails to disclose that the board of directors of said corporation authorized the secretary of said corporation to sell said stock, or to enter into any agreement with said relator to sell said stock for the amount alleged to have been paid.

The supreme court of this state has held in *State v. McCullough*, 3 Nev. 202, that, before a writ of mandamus will issue, the right of relator must appear plain and beyond dispute.

High on Extraordinary Legal Remedies, third edition, section 313, page 286, says: "In conformity with the general principle that mandamus will not lie when other adequate and specific remedy may be had at law, the courts refuse to lend their interference by this extraordinary writ for the purpose of compelling the transfer to a purchaser of shares of capital stock upon the books of an incorporated company, or to compel a company to issue certificates of stock. In all such cases full and complete satisfaction, equivalent to specific relief, may be had by an ordinary action at law to recover the value of the stock, and the existence of such other remedy is a complete bar to the exercise of the jurisdiction by man-

damus when it does not appear that the particular stock in question possesses any especial value over other stock of the ²⁰⁴ corporation. And upon similar grounds, the writ will be denied when sought to compel the officers of a corporation to issue shares of its capital stock to subscribers who are entitled thereto."

Bliss on the Law of Pleading, section 444, page 685, says: "Mandamus is never the remedy to enforce the performance of duties growing out of contractual rights." The same author, at section 446, page 685, says: "The remedy by mandamus will never be granted where the usual and ordinary modes of proceeding afford adequate redress to the party."

Cook on Corporations, volume 2, page 864, section 390, says: "The authorities are in irreconcilable conflict on the question whether mandamus lies to compel a corporation to allow a registry on its books of a transfer of stock. The weight of authority holds very clearly that mandamus will not lie. This rule is based largely on the historical origin of the writ of mandamus, and on the theory that the stock of a private corporation has no peculiar value, and may be readily obtained in open market or fully compensated for in damages." And at section 392: "An action at law for damages is an old and well-established remedy of a stockholder who has applied to the corporation for a registry of a transfer and has been refused."

The supreme court of Oregon in the case of *Durham v. Monumental Silver Min. Co.*, 9 Or. 41, held that, "where the plaintiff claimed to be the owner of certain shares in a mining corporation by purchase at a sheriff's sale which the secretary refused to transfer on the stock-book, mandamus was not the proper remedy, as plaintiff had an adequate remedy at law by an action against the corporation for the value of the stock claimed"; and by reason of this remedy, they had a plain, speedy, and adequate remedy in the ordinary course of law, and denied the application for a writ of mandamus. The same court in *Slemmons v. Thompson*, 23 Or. 215, 31 Pac. 514, quoted with approval and distinguished the principle laid down in *Durham v. Monumental Silver Min. Co.*, 9 Or. 41.

The supreme court of California in the case of *Kimball* ²⁰⁵ *v. Union Water Co.*, 44 Cal. 173, 13 Am. Rep. 157, held that: "It has been so frequently decided that a party entitled to stock in a private corporation has an action in damages against the corporation for the refusal of its officers to transfer the stock to him on the company's books that it must be considered as a settled principle of law, and that mandamus will not lie to compel the transfer": *King v. Bank of England*, 2 Doug. 526; *Shipley v. Mechanics' Bank*, 10 Johns. (N. Y.) 484; *Wilkinson v. Providence Bank*, 3 R. I. 22; *Ex parte Fireman's Ins. Co.*, 6 Hill (N. Y.), 243; *American*

Asylum v. Phoenix Bank, 4 Conn. 172, 10 Am. Dec. 112; Sargent v. Franklin Ins. Co., 8 Pick. (Mass.) 90, 19 Am. Dec. 306.

The supreme court of Missouri in the case of City of St. Louis v. Bissell, 46 Mo. 157, in an application for a writ of mandamus for the transfer of stock on its books, said: "It is very clear that relator misconceives his remedy, and that he may obtain adequate and ample redress without resorting to a proceeding by mandamus. If he has a good title to the stock, he can recover the market value in an ordinary action. It is the uniform and current rule of the courts that, when a corporation improperly refuses to transfer stock on its books, the party injured has an ample remedy by action, and therefore a mandamus to compel such transfer will not lie."

The supreme court of Nevada in the case of State v. Guerrero, 12 Nev. 105, in an action similar to this, held: "We are of the opinion that mandamus is not the proper remedy, for the reason that relator has a plain, speedy, and adequate remedy at law by an action against the corporation for the value of the stock claimed."

From an examination of the authorities as to when mandamus will lie to compel the issuance and delivery of stock of a corporation, I am of the opinion that it will never lie unless the stock sought to be recovered has some pecuniary or special value peculiar in itself and of a different value from any like number of shares sought to be recovered, or unless, where shares of stock are detained and the control of some corporation is at issue, and by the securing of the ²⁰⁶ same the party applying for a writ of mandate would obtain control, and in all such exceptional cases it must affirmatively appear from the petition that the relator has a clear, legal right to the possession of the same, and that he has no plain, speedy, and adequate remedy at law.

The present case does not disclose any such state of circumstances existing as to warrant this court in granting relator's petition for a peremptory writ of mandate; and said petition is dismissed.

COMPELLING THE ISSUE OF STOCK.

I. Origin of the Remedy, 723.

II. By Writ of Mandamus.

a. To Transfer Stock, 724.

b. To Issue Stock, 727.

c. Exception—Judicial Sales, 728.

III. By Suit in Equity, 729.

I. Origin of the Remedy.

The very word "compelling" in the title to this note takes us to the exercise of the power of compulsion by courts of equity to meet those cases where the award of damages did not compensate an

injured plaintiff, and where sometimes the jurisdiction of the chancellors' courts seemed to be short of the full complement of that wielded by those of the common law, for example, in cases for which neither the award of damages nor the decree of a specific performance of a contract afforded the appropriate remedy. In such exigencies the ancient writ of mandamus or mandate was called into requisition where there was a clear and specific right to be enforced or such a duty to be performed, a duty which not only ought to be, but was capable of being, performed and for which no other legal remedy was sufficiently specific or adequate. The courts of two states—Illinois and Louisiana—do not accept this definition in toto. They hold that the grant of the writ is irrespective of the existence of any other remedy and they thus deprive it, so far as they are concerned, of its claim to be an extraordinary legal remedy: *Smith v. Automatic Photographic Co.*, 118 Ill. App. 649; *State v. Consumers' Brewing Co.*, 115 La. 782, 40 South. 45. How these cases differ from the weight of both judicial and textual authority will be demonstrated.

It must not be lost sight of that the writ of mandamus is no new remedy. It has been used from time immemorial by the kings of England, though only for the purpose of royal commands, and its use as a judicial writ does not date farther back than the reign of Edward II. According to High on Extraordinary Legal Remedies, section 2, the reports afford but few instances of its application before the latter part of the seventeenth century, when it may be said to have been first systematically used as a corrective for official inaction. On the other hand, the right to direct specific performance was acknowledged as the chancellor's jurisdiction in the reign of Edward III.

To which of these divisions for the redress of wrongs and the adjustment of rights does the proceeding to force a recalcitrant corporation or board of directors to issue stock to one entitled to it belong? We shall consider them in the order of, first, mandamus, and then suit in equity for specific performance, leaving out the ordinary action at law for damages, for the obvious reason that it cannot properly be accounted a proceeding to enforce the issue of stock to a shareholder claiming it.

II. By Writ of Mandamus.

a. To Transfer Stock.—Having in view the scope and application of the writ of mandate and that it may be called into requisition only when the right to be enforced is specific, or the duty to be performed both ought to and can be performed, and that the writ was the last resort of the injured party, there being no other adequate legal redress, we cannot be surprised at the result of *State v. Jumbo Ext. M. Co.*, 30 Nev. 192, ante, p. 715, 94 Pac. 74.

Indeed, our only surprise is that the application to the court was made at all in the face of the numerous decisions almost on the point. The courts have consistently held that mandamus does not lie to compel the transfer of stock by a corporation to a purchaser except in the one case of a judicial sale hereafter referred to, and it would only be repeating the principle to quote at any length the opinions. In Ohio, the law as embodied in the Revised Statutes, sections 6741, 6744, after defining the writ, is that it must not be issued in a case

where there is a plain and adequate remedy in the ordinary course of the law. On these enactments *Freon v. Carriage Co.*, 42 Ohio St. 30, 51 Am. Rep. 794, was decided in favor of the principle enunciated. That case cites the language of the court in *Murray v. Stevens*, 110 Mass. 95: "Where the incidental rights of ownership, such as eligibility to corporate offices, or the right to vote at corporation meetings, do not depend upon the ownership of the specific shares which are the subject of dispute, but could be as well and fully enjoyed by virtue of the ownership of an equal number of other shares, there would seem to be no occasion to resort to the extraordinary remedy of mandamus. The damages which the relator might recover in an action at common law for the violation of his right would be exactly measured by the sum of money which it had cost him, or would have cost him, to obtain the same right in another way—namely, by purchase. That is to say, with the amount in money of the market value of the shares in dispute they could be replaced. Where recovering the value of the stock would indemnify the party, the writ ought not to be granted."

If it were thought at all necessary to emphasize or strengthen the rule, the necessary pabulum is contained in *Shipley v. Mechanics' Bank*, 10 Johns. 484: "The applicants have an adequate remedy by a special action on the case, to recover the value of the stock, if the bank have unduly refused to transfer it. There is no need of the extraordinary remedy by mandamus in so ordinary a case. It might as well be required in every case where trover would lie. It is not a matter of public concern, as in the case of public records and documents, and there cannot be any necessity or even a desire of possessing the identical shares in question. By recovering the market value of them, at the time of the demand, they can be replaced. This is not the case of a specific and favorite chattel, to which there might exist the pretium affectionis."

The leading text-writers on the subject are agreed that the weight of authority is against the writ issuing to compel the transfer of shares in a purely private money corporation: *Morawetz on Private Corporations*, sec. 215; *High on Extraordinary Legal Remedies*, sec. 313; *Wood on Mandamus*, 23; *Bliss on the Law of Pleading*, sec. 444, p. 685; 2 *Cook on Corporations*, secs. 390, 392.

If any doubts had ever been created by the decisions in *Weston v. Bear River Min. Co.*, 5 Cal. 186, 63 Am. Dec. 117, and *People v. Crockett*, 9 Cal. 112, they were practically shattered by *Kimball v. Union Water Co.*, 44 Cal. 173, 13 Am. Rep. 157, where it is expressly held that for a refusal to transfer shares in a private corporation a party has an action in damages and therefore mandamus will not lie. It was unfortunate that *People v. Crockett*, 9 Cal. 112, was followed in *Green Mount and State Line Turnpike Co. v. Bulla*, 45 Ind. 1, but at that time the Indiana statute was regarded as allowing the mandamus in such cases. It read: "Writs of mandate may be issued to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins or a duty resulting from an office, trust, or station": 2 G. & H. 322, sec. 739. In *Helm v. Swiggett*, 12 Ind. 194, which has crept into the digests with an inaccurate syllabus that mandamus will lie in the case in point, reference will show that the opinion merely says: "An action for damages lies against a corporation for refusing to

permit a transfer of stock: Angell and Ames on Corporations, 327. Perhaps a mandamus will lie: Redfield on Railways, 62." No reference to mandamus is contained in the opinion other than that just quoted.

Tobey v. Hakes, 54 Conn. 274, 1 Am. St. Rep. 114, 7 Atl. 551, concludes with this reaffirmance of the rule: "This suit is against a private corporation and its object is to enforce a mere private right. It is in no sense a proceeding to enforce the performance of a public duty. We have no precedent in this state for allowing this writ to compel the transfer of stock in a private corporation, and the authorities elsewhere are against it: *Cushman v. Thayer Mfg. J. Co.*, 76 N. Y. 365, 32 Am. Rep. 315; *Townes v. Nichols*, 73 Me. 515; *State v. People's Bldg. etc. Assn.*, 43 N. J. L. 389; *Bank of the State v. Harrison*, 66 Ga. 696."

Other decisions are to the same effect: *Stackpoole v. Seymour*, 127 Mass. 104; *State v. Rombauer*, 46 Mo. 155; *State v. St. Louis Paint Mfg. Co.*, 21 Mo. App. 526. In the opinion in the last-named case occurs the following strong expression of what exigency will be sufficiently clamorous to call for the issue of the writ of mandate. "That mandamus will not lie to compel the transfer of shares in any corporation, as the party injured has an adequate remedy at law in such event for conversion, is conceded. The case of *State ex rel. v. Rombauer*, 46 Mo. 155, establishes no new doctrine, but merely applies a very ancient rule thoroughly imbedded in our jurisprudence." *State v. Guerrero*, 12 Nev. 105, lays down the law equally emphatically, although in some legal publications it is cited in a manner not quite accurate. For instance, it is sometimes cited as an authority that mandamus will not lie where the ownership of the property is in dispute, whereas that was at most an obiter dictum of the court, which, after deciding the main question, added that there was an additional reason why the writ should be denied inasmuch as the relator had not established a clear and undisputed title to the stock in question.

Other cases to the same effect are *Bush v. Warren etc. Machine Co.*, 32 N. J. L. 439; *People v. Parker Vein Coal Co.*, 10 How. Pr. 543; *Durham v. Monumental Silver Min. Co.*, 9 Or. 41. One more case is given in conclusion in support of this principle (*People v. Utah Gold etc. Mines Co.*, 119 N. Y. Supp. 852) by reason of its pithy dicta: "Relator's only remedy is by action. Good title to stock can be passed by transfer in blank and delivery of the certificates. . . . If a corporation refuses to transfer, it is but the denial to the holder of an individual right and no one is affected but himself. . . . Our attention has not been called to, nor have we been able to find, any authoritative decision in this state to the contrary."

Two states have, however, stampeded from the main body of decisions—Illinois and Louisiana, as mentioned supra, subdivision I—and they grant the mandamus to compel the transfer of stock in private corporations. In *Smith v. Automatic Photographic Co.*, 118 Ill. App. 469, the court said: "It is no longer an objection to the granting of a mandamus in this state that the relator may have another specific remedy." In one case in Louisiana, *State v. Orleans R. R. Co.*, 33 La. Ann. 312, the writ was issued to compel a corporation to allow the transfer on its books of certain stock to which the relator had established a perfect title, but the objection does not appear to have

been taken to the impropriety of the remedy. The later cases, however, in that state have taken the question under advisement. In *State v. Consumers' Brewing Co.*, 115 La. 782, 40 South. 45, the court said that "mandamus was the only appropriate remedy to enforce the performance of a plain corporate duty," and this was followed in its most recent decision in *State v. Bank of Baton Rouge*, 125 La. 138, 51 South. 95.

b. To Issue Stock.—Almost coincident with *State of Nevada v. Jumbo Ext. M. Co.*, 30 Nev. 192, ante, p. 715, 94 Pac. 74, is the case of *Townes v. Nichols*, 73 Me. 515, which, strange to say, does not appear to have been cited in the argument of the former case. In *Townes v. Nichols*, 73 Me. 515, the main point was considered by the court, which admitted that the majority of the cases held that the applicant for the writ of mandamus to compel a corporation to issue stock would receive full indemnity by purchasing other shares in the market and recovering the price thereof against the corporation in an action at law. The case, however, finally turned on the relator's failure to establish an unquestionable claim and he failed accordingly. The receipt he held from the corporation was similar to that held by the relator in *State of Nevada v. Jumbo Ext. M. Co.*, 30 Nev. 192, ante, p. 715, 94 Pac. 74, with the addition of the words that the shares were "deliverable according to the special agreement" between the parties, and he failed to disclose what the special agreement was.

On the same lines and almost in the same words in the case of *State v. Carpenter*, 51 Ohio St. 83, 46 Am. St. Rep. 556, 37 N. E. 261: "When the proper officers of a private corporation organized for profit refuse, upon demand, to issue a certificate of stock to a person entitled thereto, his appropriate remedy is by action against the corporation for damages or in equity to enforce the issue and delivery of the certificate. If, for any reason, the one does not, the other will, afford him a plain and adequate remedy, and he may resort to either at his election. Mandamus cannot, therefore, be properly invoked."

In *State v. Jumbo Ext. M. Co.*, 30 Nev. 192, ante, p. 715, 94 Pac. 74, in a lengthy opinion—the length being more than justified by the excellence of the contents—the court deals with every aspect of the application for a writ of mandamus to a corporation to issue stock. While the reader must be referred to the case for details, we feel warranted in placing its most salient points on record in these notes. The court referred to the recent case of *State v. District Judge*, 29 Nev. 459, 91 Pac. 737, as laying down that mandamus will not issue where there is another plain, speedy and adequate remedy at law. This and other like judgments are founded on the law as concisely expressed in *High on Extraordinary Legal Remedies*, third edition, sections 10, 15, from which we make the following excerpts as truly asserting the principles which should guide the hearing of an application for the writ: "Since the object of mandamus is not to supersede legal remedies, but rather to supply the want of them, two prerequisites must exist to warrant a court in granting this extraordinary remedy: First, it must be shown that the relator has a clear, legal right to the performance of a particular act or duty at the hands of the respondent; and, second, it must appear that the law affords no other adequate or specific remedy to secure the enforce-

ment of the right and the performance of the duty which it is sought to coerce. . . . This principle is of the highest importance in all cases where it is necessary to determine upon the propriety of interference by mandamus, and the rule will be found to be firmly established as one of the fundamental principles underlying the entire jurisdiction, that the existence of another specific legal remedy, fully adequate to afford redress to the party aggrieved presents a complete bar to relief by the extraordinary aid of a mandamus."

The test applied by the court was a simple one: "Does the petition as presented state facts sufficient to warrant this court in issuing a peremptory writ of mandamus to compel the issuance and delivery of stock in a corporation?" After reviewing the facts which did not show the stock sought to be delivered was special in relation to other stock, or that other stock could not be purchased to take the place of it, or that the respondents could not pay damages if such were awarded against them, and after exhaustively dealing with the judicial and textual authorities, the court delivered the opinion that mandamus will never lie in such cases unless the stock sought to be recovered has some special value in itself, and of a different value from any like number of shares sought to be recovered, or unless, when shares of stock are detained and the control of some corporation is at issue, and by the securing of the same the relator would obtain control, and in all such cases the relator must show he has a clear, legal right to the possession of the same, and that he has no plain, speedy and adequate remedy at law. A case of "special" stock was decided in South Carolina. Under an act entitled "An act to authorize and empower certain counties to issue bonds in subscription for preferred stock of the Cheraw and Chester Railroad Company" the county of Chester subscribed the sum of seventy-five thousand dollars and became entitled, under the fourth section of the act referred to, to preferred stock for it. The company refused to deliver the preferred stock and mandamus was granted to compel them. In that case, the stock was of a special nature and the act of the legislature provided for its delivery. The objection to mandamus being the remedy was not taken: *State v. Cheraw & C. R. R. Co.*, 16 S. C. 524.

In concluding this branch of the subject, attention is drawn to the case of *State v. Ferracute Mach. Co.*, 68 N. J. L. 237, 52 Atl. 231, which decided that mandamus will not lie to compel redemption of preferred stock of a corporation issued in disregard of the provisions, in that respect, of its organic law, even though all the persons interested acquiesced in the unauthorized issue. The court said that judicial action, dependent on compliance with the organic law of the corporation could not be invoked when that law had been disregarded. The issue of the stock might have been the effect of a contract and on that theory there might be a way, legal or equitable, to compel its performance.

c. **Exception—Judicial Sales.**—The one, and it appears the only, exception is that where shares have been sold under a judicial sale, mandamus will lie to compel the corporation to transfer such stock. The reason appears to be that the ordinary duty of the corporation's officer becomes an official duty—the sheriff cannot put the purchaser in possession and therefore the proper officer of the corporation becomes *pro hac vice* a public officer under the law, and, refusing to perform his public duty, mandamus becomes the appropriate

remedy: *Bank of the State v. Harrison*, 66 Ga. 696, followed in *Terrell v. Georgia etc. Banking Co.*, 115 Ga. 104, 41 S. E. 262; *Hair v. Burnell*, 106 Fed. 280.

III. By Suit in Equity.

The authorities are numberless as to remedies against corporations by persons entitled either to the issuance of original stock or stock on transfer from a vendor in the ordinary course of business. To recount them would simply be cataloguing an immense number of cases all pointing one way. The person so entitled has the three modes of redress already mentioned open to him: 1. In certain and very exceptional cases a writ of mandamus to compel the corporation to issue the stock; 2. An action at law for conversion or on the case for damages which is outside the province of this note; and 3. A suit in equity to compel the delivery of the stock by the corporation in default. This last and perhaps most efficacious remedy has seldom been questioned. It is founded on the equitable right of the plaintiff to certain stock standing in the name of another on the books of the corporation. In other words, the corporation is the implied trustee for the plaintiff in respect of those shares, and under such circumstances the plaintiff is entitled to relief in equity to protect his right and to compel a transfer: *Harrell v. Mexico Cattle Co.*, 73 Tex. 612, 11 S. W. 863; *Mechanics' Bank v. Sexton*, 1 Pet. 299, 7 L. ed. 152; *Dewing v. Perdicaries*, 96 U. S. 193, 24 L. ed. 654; *Western U. Tel. Co. v. Davenport*, 97 U. S. 369, 24 L. ed. 1047; *Morawetz on Private Corporations*, secs. 208, 216, 219. In *Spencer v. James*, 10 Tex. Civ. App. 327, 31 S. W. 540, 43 S. W. 556, *Tarleton, C. J.*, said: "We are not prepared to hold that an action for damages as for the conversion of the stock would be an adequate remedy at law, since the owner of the stock might prefer the property itself to its equivalent in money. It would seem that where an action in equity and one at law would alike lie, it is not for the 'wrongdoer to prescribe to the injured person what his remedy should be': *Baker v. Wasson*, 59 Tex. 140. We have seen that this proceeding was to enforce the transfer of the stock, by virtue of the fact that the bank was the implied trustee for the plaintiff, and an equitable remedy therefor would be properly invoked." This was followed in several cases out of which we select *Ernst v. Elmira Municipal Imp. Co.*, 24 Misc. Rep. 583, 54 N. Y. Supp. 116. In that case the court said: "It is argued that the corporation owes no duty to the transferee of stock, and that there is no privity between him and the company until he has become a stockholder on its books. I cannot agree with the contention. It may be essential to the enjoyment of a stock owner of certain rights and privileges—such as receiving notice of stockholders' meetings and voting thereat—that the transfer of stock to him should be registered, and new stock issued; but without such registration he is the absolute owner of the stock, and as such may prosecute an action for injury to it, or to himself as proprietor thereof. It has long since been settled that an equitable action may be maintained by transferee of stock to compel the company to transfer the stocks upon its books, and that a wrongful refusal to transfer amounts to a waiver of the statutory requirement, and the corporation will not be permitted to take advantage of its own wrong, but the transfer will be deemed complete, and the company will be bound to recognize

it, precisely as if the entries had been made upon the company's books: *Cushman v. Thayer Mfg. J. Co.*, 7 Daly, 330, 76 N. Y. 365, 32 Am. Rep. 315; *Robinson v. National Bank*, 95 N. Y. 637; *Ervin v. Oregon Ry. & Nav. Co.*, 62 How. Pr. 492; *Rice v. Rockefeller*, 134 N. Y. 174, 30 Am. St. Rep. 658, 31 N. E. 907, 17 L. R. A. 237; *Molson's Bank v. Boardman*, 47 Hun, 149; *Archer v. American Waterworks Co.*, 50 N. J. Eq. 33, 24 Atl. 508; 2 *Thompson on Corporations*, sec. 2425; *Campbell v. American Xylonite Co.*, 55 N. Y. Super. Ct. 562, 3 N. Y. Supp. 822, 122 N. Y. 455, 25 N. E. 853, 11 L. R. A. 596."

Among the latest cases are *Everitt v. Farmers' & Merchants' Bank of Elm Creek*, 82 Neb. 191, 117 N. W. 401, 20 L. R. A., N. S., 996, which decided that a bona fide purchaser of the capital stock of a corporation may sue in equity to compel the corporation to enter the assignment upon its books, and to issue a new certificate therefor, and to restrain the sheriff from selling the said stock upon an execution against the vendor, the corporation and sheriff being parties to the action.

In *Pease v. Chicago Crayon Co.*, 235 Ill. 391, 85 N. E. 619, 18 L. R. A., N. S., 1158, 14 Ann. Cas. 263, the corporation was compelled to issue the stock to the purchaser, in face of alleged monetary complications between him and others as to the payment of the purchase price. In *Reilly v. Absecon Land Co.* (N. J. Ch.), 71 Atl. 248, after citing *Archer v. American Waterworks Co.*, 50 N. J. Eq. 33, 50, 24 Atl. 508, the court said: "This court will exercise jurisdiction to compel a transfer on the books of a corporation in a case of this nature, on the theory that the complainant is the equitable owner and seeks to consummate a legal title."

In *Rice v. Rockefeller*, 134 N. Y. 174, 30 Am. St. Rep. 658, 31 N. E. 907, 17 L. R. A. 237, the trial court refused to compel the issue of stock by a corporation to a rival in business, who purchased for the alleged purpose and in the spirit of hostility toward such corporation and left him to his remedy at law for damages. As the defendant corporation under its charter had no right or power of discrimination as to registering transfers, the judgment of the lower court reported in 56 Hun, 516, 9 N. Y. Supp. 866, was reversed. In the course of the opinion the court said: "In the case at bar the plaintiff's title to the stock derived from his purchase is not challenged by the evidence, but the ground of the defense is in the standing of the plaintiff in his relation to the trust, of which the defendants are trustees. And this was based upon the fact that his was an attitude of hostility to the Standard Oil Company, and after its creation to the Standard Oil Trust, arising out of rivalry in business. This may be a reason for making his recognition as a beneficiary undesirable. But while there may be an inherent power or discretion in the trustees of a corporation or company, when its due protection requires or justifies it, to decline to perfect title to stock by transfer on the books, it cannot be supposed, unless the power is duly reserved to or conferred upon them, that they are for that purpose permitted to discriminate between bona fide purchasers, who are owners and holders of its stock having assignment duly and in due form made to support application for such transfer."

HETTEL v. DISTRICT COURT.

[30 Nev. 382, 96 Pac. 1062.]

CORPORATION—Dissolution and Receivership—Who may Apply.—One who is a stockholder and a director in a corporation, and who is the administrator of an estate that owns nearly one-third of the stock in the company, is beneficially interested in proceedings instituted by another stockholder which result in *ex parte* orders dissolving the company and appointing a receiver, and hence may bring *certiorari* to review such orders. (p. 733.)

CORPORATION—Dissolution and Receivership Without Notice. A court has no power, upon the application of a stockholder, to order a dissolution of the corporation and the appointment of a receiver, without notice to the persons in interest and opportunity for hearing; and the Nevada statutes do not attempt to confer such authority. (pp. 734, 735.)

CORPORATION.—An Appearance on the Part of a Corporation, not made until after *ex parte* orders dissolving it and appointing a receiver on the application of a stockholder, confers no jurisdiction upon the court to make such previous orders. (p. 735.)

CORPORATION.—Where a Stockholder has Instituted Proceedings and obtained *ex parte* orders dissolving the corporation and appointing a receiver, another stockholder who files a petition alleging that there was no necessity or authority to dissolve the corporation and appoint a receiver, and who afterward filed a motion to vacate such orders, is not estopped to question by *certiorari* the jurisdiction of the court to make the orders. (p. 736.)

D. S. Truman, for the petitioner.

Thompson, Morehouse & Thompson, for the respondents.

384 NORCROSS, J. This is an original proceeding in *certiorari* to review certain orders of the trial court made in the case of W. T. Hall, Plaintiff, v. Interstate Lumber and Mill Company, a Corporation, dissolving said corporation and appointing a receiver therefor.

The petition herein alleges: That the petitioner is a director of said corporation, and, also, that he is the administrator of the estate of Frank H. Hill, deceased, which estate is the owner of about one-third of the capital stock of said corporation. That on or about the third day of March, 1908, said W. T. Hall, the owner of more than one-third of the capital stock of said corporation, and a director therein, filed in the above-entitled district court a complaint or petition setting forth that said corporation has a capital stock of one hundred thousand dollars. That said W. T. Hall is the president, and W. T. Hall, Jr., is the secretary and treasurer of said corporation, who, together with F. R. Hall, A. C. Wood and A. L. Hettel, petitioner herein, are the directors of said corporation. That two hundred shares of the par value of one hundred dollars per share have been paid up, and the remaining eight hundred shares are in the treasury. That the assets of said corporation, if properly managed and controlled, are the sum of one hundred and three thousand one hundred and forty-

two dollars, and liabilities exist in about the sum of thirty-three thousand five hundred and forty-four dollars. That owing to the depressed conditions in business, and the inability of said defendant corporation at the present time to meet the demands made against it, the said corporation is in danger of its assets being wasted through attachment or litigation, and is liable at any time to be attached, and therefore be unable to carry on and ³⁸⁵ continue its business, or be put to very large and useless expense by way of litigation, and its assets wasted thereby. By reason of these alleged facts it was averred that said corporation should be dissolved, and that a receiver should be appointed to take charge of the business and affairs of said corporation, that its property may be preserved, its creditors paid, and its assets cared for. An order was prayed for accordingly to be made upon the filing of the complaint or petition. That in said action so instituted by said W. T. Hall, no summons has ever been issued, or service had upon said corporation, its officers, or any person interested therein. That on the twenty-fifth day of February, 1908, on an ex parte application of W. T. Hall, and upon said complaint, and before the filing thereof, the said district judge made an order appointing one E. S. Rose receiver for said corporation, which order after entitlement of court and cause, reads as follows: "Upon reading the verified complaint of the plaintiff herein, and it duly appearing to the court that it is a proper case wherein to appoint a receiver, it is hereby ordered that E. S. Rose be appointed receiver in the above proceeding, with full power to take charge of the assets, control and business of the Interstate Lumber and Mill Company, a corporation transacting business at Goldfield, in the county of Esmeralda, state of Nevada, and to immediately list and report all of the assets of said corporation and its entire liabilities, and to do any and all things as may be ordered and directed by this court, and that he execute a bond for the faithful performance of his duties as such receiver in the sum of fifteen thousand dollars. . . . And the directors of said corporation and each of them are hereby restrained from exercising any of its powers, or doing any business whatever on behalf of said corporation, except through, by, and under the aforesaid receiver. [Dated] Feb. 25th, 1908. Frank P. Langan, Judge of the District Court, in and for the County of Esmeralda, State of Nevada. [Indorsed] Filed March 3, 1908. E. Hardy, Clerk, by A. C. Roach, Deputy." That thereafter, and on the fourteenth day of March, 1908, ex parte and upon said complaint or petition, said district judge made an order confirming the appointment of said receiver, and dissolving said corporation, ³⁸⁶ which order, after entitlement, reads as follows: "Upon the verified complaint of the plaintiff, and the facts therein appearing sufficient, under section 94 of an act of the legislature of the state of Nevada, entitled

'An act providing a general corporation law,' approved March 16, 1907, it is hereby ordered, adjudged, and decreed that the said defendant, the Interstate Lumber and Mill Company, a corporation, be and the same is hereby dissolved, and that the order heretofore made, appointing E. S. Rose receiver of said corporation, be and the same is hereby confirmed. . . . And it is further ordered that within ten (10) days from the making of this order, the said receiver shall file in office of the Secretary of State of Nevada a duly certified copy of the order appointing him receiver, and a duly certified copy of this order. And it is further ordered that the said receiver shall publish in the 'Goldfield Daily Tribune' . . . the decree appointing him receiver. . . . Frank P. Langan, Judge of said District Court. [Indorsed] Filed March 14, 1908. E. Hardy, Clerk, by J. B. Rourke, Deputy."

The petition herein further avers that for the reasons aforesaid said orders so made were without, and in excess of, the jurisdiction of said district court and the judge thereof, and that petitioner herein applied to said district court and the judge thereof, upon due notice and proper pleadings therefor served upon said W. T. Hall, to vacate and annul each of said orders, and the same, coming on to be heard on the sixteenth day of April, 1908, was denied. Petitioner herein further avers that the complaint upon which said orders were based fails to state facts sufficient to give the court jurisdiction to make said orders, and that petitioner has no appeal, nor other plain, speedy, and adequate remedy. In response to the writ, respondent certified up the original papers and files in the court below, and filed herein a motion to quash the writ. Without setting out the motion to quash, we will consider such points raised therein as are deemed essential to a determination of the questions involved.

The contention that the petitioner herein is not a party beneficially interested, so as to entitle him to institute this proceeding, we think is without merit. He is both a director ³⁸⁷ and a stockholder, and avers that he is the administrator of an estate which owns nearly one-third of the stock of the company. Necessarily both in his individual and official capacity he is interested in, and affected by, the proceedings sought to be reviewed.

The proceedings in the lower court were brought under the provisions of section 94 of "An act providing a general corporation law" (Stats. 1903, p. 155, c. 88), which section reads as follows: "Whenever a corporation has in ten consecutive years failed to pay dividends amounting in all to five per cent of its entire outstanding capital, or has willfully violated its charter, or its trustees or directors have been guilty of fraud or collusion or gross mismanagement in the conduct or control of its affairs, or its assets are in danger of waste through attachment, litigation or otherwise, or said corpora-

tion has abandoned its business, and has not proceeded diligently to wind up its affairs, or to distribute its assets in a reasonable time, or has become insolvent and is not about to resume its business with safety to the public, any holder or holders of one-tenth of the capital stock may apply to the district court, held in the district where the corporation has its principal place of business, for an order dissolving the corporation and appointing a receiver to wind up its affairs, and may by injunction restrain the corporation from exercising any of its powers, or doing any of its business whatsoever, except by and through a receiver appointed by the court. Such court may, if good cause exist therefor, appoint one or more receivers for such purpose, but in all cases directors or trustees, who have been guilty of no negligence nor active breach of duty shall have the right to be preferred in making such appointment, and such court may at any time for sufficient cause make a decree dissolving such corporation and terminating its existence."

The foregoing section provides for a number of situations, the existence of any of which would authorize the court to make an order appointing a receiver and dissolving the corporation. The corporation in the present instance is sought to be dissolved, and a receiver appointed, upon the ground that "its assets are in danger of waste through attachment and ³⁸⁸ litigation." Manifestly, the corporation, its officers and stockholders, are interested in any such proceeding. The statute makes no provision for the procedure to be followed to obtain such order.

For the holder or holders of one-tenth or any other interest of the capital stock of a corporation to be able to secure an order of dissolution, and as a result of such order place the corporation in the hands of a receiver upon the mere application for such order without notice or hearing, could not, we think, be sustained, even though an attempt to confer such authority upon a court by statute were made: 10 Cyc. 1309; Wright v. Cradlebaugh, 3 Nev. 341; People v. Seneca Lake G. & W. Co., 52 Hun, 174, 5 N. Y. Supp. 136; Crowder v. Moone, 52 Ala. 220. But the section of the statute in question does not confer such authority upon the court. It simply provides that a holder or holders of one-tenth of the capital stock may apply to the district court for such an order. The statute must be construed, if possible, to give it force and effect. It cannot have effect unless such an order can be made only upon a showing after all parties interested have had an opportunity to be heard. In the present case, for example, large property interests are involved. The stockholders not joining in the petition may be able to show, if given an opportunity, that no real cause exists for a dissolution and the appointment of a receiver, and that the making

of such an order might result in serious damage to stockholders opposing the order. Besides, the statute provides that "in all cases directors or trustees, who have been guilty of no negligence nor active breach of duty, shall have the right to be preferred in making such appointment" of receiver. This would seem to make the directors or trustees at least proper parties to the proceeding, in order that they may set forth their claims for the receivership, if they desire so to do. It is our conclusion that a district court has no jurisdiction to make an order dissolving a corporation and the consequent appointment of a receiver under the provisions of the statute, upon a mere petition such as was filed in the court below.

If the showing is such that some immediate action is necessary ³⁸⁹ to protect the interests of the corporation pending a hearing, the equitable powers of the court are ample for such purpose. It is claimed by counsel for respondent that the corporation defendant in the lower court appeared in the action in opposition to the motion of the petitioner herein made therein to vacate the orders in question, and the corporation expressly approved of such orders. This appearance on the part of the corporation was not made until after the order dissolving it. The corporation was represented by the same counsel who appeared for the plaintiff in the action, and its answer to the motion of petitioner was verified by the plaintiff in the action. Such an appearance, if it could be considered an appearance by the corporation (*Pressley v. Harrison*, 102 Ind. 14, 1 N. E. 188), conferred no jurisdiction upon the court to make the previous orders.

It is contended that petitioner is not entitled to be heard in this proceeding, because he acquiesced in the proceedings in the lower court by appearing therein and asking for his own appointment as receiver. The record certified up from the lower court shows that on the twenty-fourth day of March, 1908, the petitioner herein filed a petition in the lower court, in which, among other things, he averred: "There is absolutely no necessity in fact, nor in law, nor in equity, why this company should be placed in the hands of a receiver, nor why the same should be dissolved and wound up, nor why its business should not be continued. Your petitioner further shows that the appointment of said receiver, E. S. Rose, and the order hereinbefore made dissolving the Interstate Lumber and Mill Company, are entirely coram non judice, made without any authority of law, and that said orders, at the time when the same were made, were entirely unwarranted in this: First—There has never been any summons issued nor other process issued, nor ever served upon the Interstate Lumber and Mill Company, in this proceeding. Second—The court never has obtained jurisdiction, in any manner, of the said

defendant. Third—Said Interstate Lumber and Mill Company has never had, in any legal manner, nor been served, in any manner, with any notice whatsoever of this proceeding to dissolve it and destroy its ability to act in its corporate capacity. ³⁹⁰ Wherefore your petitioner prays that the order dissolving this corporation be revoked, that the order appointing said E. S. Rose receiver of the Interstate Lumber and Mill Company be dissolved, that your petitioner appointed receiver of said company, or that such other and further relief be had in the premises as shall be meet and proper herein.”

Upon March 27, 1908, the petitioner herein filed a motion to vacate the orders dissolving the corporation and appointing a receiver, which motion was made on the said petition filed on March 24th, and on the records and files in the proceeding, and based upon the following grounds: “First—That said orders were made in a case not allowed by law, as the complaint fails to show the conditions in law warranting the action of the court. Second—The court did not have any jurisdiction to make the orders, at the time the same were made, over the person of the defendant herein. Third—That the same were made without notice to this defendant first having been given. Fourth—That the receiver, who was appointed, is not the one preferred by law, in a proper case for the appointment of a receiver of a corporation.”

We think petitioner is not estopped by reason of his action taken in the lower court to question by certiorari the jurisdiction of said court to make the orders in question.

The court not having jurisdiction over the person of the corporation defendant and over the natural persons interested in the subject matter of the orders at the time when they were made, the order of date the twenty-fifth day of February, 1908, appointing a receiver for the defendant corporation, and the order of date the seventh day of March, 1908, dissolving the corporation and confirming the said order appointing the receiver, are, and each of them is, void, and the same are hereby annulled. Petitioner is entitled to the costs of this proceeding.

The Right of a Stockholder to Maintain a Bill to Dissolve the Corporation and distribute the assets is the subject of a note to Noble v. Gadsen Land etc. Co., 91 Am. St. Rep. 33. As to when courts will interfere to prevent the dissolution of a corporation by the directors or a majority of the stockholders, see White v. Kincaid, 149 N. C. 415, 128 Am. St. Rep. 663, and cases cited in the cross-reference note thereto.

A Court may, Upon a Proper Showing, Appoint a Receiver and issue an injunction without notice to the other side, but only in cases of great emergency, and even then the defendant should be afforded a speedy hearing on a motion to vacate the order: Tuttle v. Blow, 176 Mo. 158, 98 Am. St. Rep. 488.

CASES

IN THE

COURT OF ERRORS AND APPEALS

OF

NEW JERSEY.

WELSH v. LAWLER.

[73 N. J. Eq. 371, 68 Atl. 218.]

MORTGAGE FORECLOSURE—Stopping Sale After Issue of Fieri Facias.—After the entry of a final decree in foreclosure proceedings and the issuing of a fieri facias thereon, the complainant cannot prevent the sale of the mortgaged premises against the will of junior encumbrancers whose claims have been adjudicated by the decree and commanded to be satisfied by the fieri facias. (pp. 738, 739.)

MORTGAGE FORECLOSURE—Stopping Execution of Fieri Facias.—A writ of fieri facias issued on a decree in foreclosure for the purpose of satisfying the claims of several encumbrancers, although single in form, is multiform in substance, and the sheriff can be relieved from the duty of executing it only by the consent of all parties for whose benefit it is issued or by the satisfaction of their several encumbrances. (p. 739.)

MORTGAGE FORECLOSURE—Waiver of Right to Sale After Fieri Facias.—A waiver by one of several encumbrancers of his right to have the premises sold after the entry of a decree of foreclosure and the issuing of a fieri facias thereon, no matter in what order of priority his debt is entitled to be paid, merely nullifies the writ so far as his own claim is concerned; it has no effect upon the right of his fellow-encumbrancers to have the writ executed for their benefit. (p. 739.)

John Milton, for the appellant.

Frank P. McDermott, for the respondent.

371 GUMMERE, C. J. Welsh, the complainant below and appellant here, filed a bill to foreclose a mortgage held by him upon property of one Quinn. He joined, as defendants, the respondent Lawler and other parties holding encumbrances upon the mortgaged premises. In due course a final decree was entered, by which it was ordered that the mortgaged premises be sold to raise and pay the several sums of money due to Welsh, to Lawler, and to the other defendants who held encumbrances in the order of the priority of their

respective liens, and that a writ of fieri facias issue to the sheriff of Monmouth county, where the mortgaged ³⁷² premises were situate, commanding him to make sale thereof, and out of the proceeds of the sale to pay to the complainant and to the several defendants holding encumbrances their respective debts in their proper order of priority. In pursuance of the command of the decree the writ was issued and delivered to the sheriff, who thereupon proceeded to advertise the mortgaged premises for sale. Pending the sale the complainant's claim was in some way adjusted, and his solicitor then directed the sheriff not to proceed further with the sale under the execution. In this situation of affairs application was made to the chancellor, on behalf of Lawler, for an order compelling the sheriff to proceed and make sale of the mortgaged premises according to the command of the writ, notwithstanding the instruction of the complainant's solicitor. This application was granted and the sheriff ordered to proceed with the sale and distribute the moneys arising therefrom, as directed by the writ. From this order the complainant appeals.

The theory upon which the appeal is founded is that the complainant as magister litis has complete control of the decree and the execution issued upon it, and that he cannot be divested of that control by the chancellor without his consent. This theory, in our opinion, is untenable. If, during the progress of a foreclosure proceeding, the complainant desires to abandon its further prosecution he may do so. He cannot be compelled to carry it on to final decree against his will. But after the prosecution of the cause has been concluded by the entry of a decree, by which the rights not only of the complainant, but also of those defendants who hold liens, have been finally fixed and determined, the complainant's control of the suit is, in large measure, ended. The decree being equally for the benefit of all the lienholders whose rights have been adjudicated by it—in other words, it being in its legal effect, a separate judgment in favor of each of such lienholders—each one of them is entitled to have it executed so far as it establishes his particular lien; and consequently the writ of fieri facias which is issued for the purpose of executing the decree, although usually sued out by the complainant, directs the sale of the mortgaged premises to be made, not for the purpose of ³⁷³ satisfying the complainant's lien alone, but all the liens which have been established by the decree. The duty of a sheriff holding such a writ is similar to that which rests upon him where he has received from a court of law a number of executions against the same judgment debtor, and in favor of different plaintiffs. In such a case his duty is to execute the mandate of each of the junior writs, as well as that contained in the writ which first comes

to his hands, and the judgment creditor who is entitled to priority in payment out of the proceeds of the sale made under such executions, although he may prevent such sale being made under the execution issued upon his particular judgment, by satisfying his own claim, or otherwise, cannot, by so doing, prevent sale being made for the purpose of satisfying the claims of the junior encumbrancers. A writ of fieri facias issued on a decree in foreclosure for the purpose of satisfying the claims of several encumbrancers, although single in its frame, is multiform in substance, and the only two ways by which the sheriff can be relieved from the duty of executing it are the consent of all the parties for whose benefit it has been issued, or the satisfaction of their several encumbrances. The waiver by one of them of his right to have the mortgaged premises sold to satisfy his debt, no matter in what order of priority that debt is entitled to be paid, merely nullifies the writ so far as his own claim is concerned. It has no effect upon the right of his fellow-encumbrancers to have the writ executed for the purpose of raising the moneys which have been adjudicated by the decree to be due to them severally.

The order appealed from was properly made, and will be affirmed.

The Foreclosure of Mortgages Where There are Senior and Junior encumbrances on the premises is discussed in the note to Strobe v. Downer, 80 Am. Dec. 714.

SCHMITT v. TRAPHAGEN.

[73 N. J. Eq. 399, 69 Atl. 189.]

DEEDS.—Where the Description of Lands by Metes and Bounds as given in a deed actually closes, and the only apparent error is in one of the distances which is controlled by a division line as a monument, the location of which is not disputed, the question is one of construction of the deed and for the court; it is not a question of locating the description upon the ground, which would be for the jury. (p. 740.)

VENDOR AND VENDEE.—A Grantee is not Estopped to Deny His Grantor's Title, except under special circumstances not present in this case. (p. 741.)

ADVERSE POSSESSION—Constructive Possession.—Where a Grantee by deed acquires title to a portion of the land described and takes possession of that portion only, he does not thereby acquire constructive possession of the remaining land as against the real owner. (pp. 741, 742.)

ADVERSE POSSESSION — Constructive Possession. — Where Two Titles to Land Overlap, and each claimant has possession of a portion of his tract outside the overlap, the constructive possession of the overlap follows the real title. (p. 742.)

(Syllabi by the court.)

Collins & Corbin, for the appellants.

Maximilian T. Rosenberg and Edward Russ, for the respondent.

399 SWAYZE, J. This is a case of a feigned issue out of chancery on a bill to quiet title. The complainant was plaintiff, and a verdict was directed in his favor. An application for a new trial was denied by the chancellor and this appeal taken.

400 In 1795, John Stevens conveyed part of a tract of land owned by him to Merseles Merseles, under whom the defendants claim. In 1839, Stevens' successors in title conveyed the remainder of the tract to the Hoboken Land and Improvement Company, under whom the plaintiff claims. The first question is whether the land conveyed in 1795 included the tract of the defendants. The trial judge instructed the jury that under the deeds the plaintiff's title was complete. The appellants contend that he erred in this instruction, since there was, at least, a jury question as to the location of the land conveyed. We agree with the trial judge that the question is one of construction of the deed and not of location upon the ground. The description contained in the deed presents, in itself, no difficulty except that the last course but one runs eight chains to a corner on the line between the said Sale Marsalis (i. e., Merseles Merseles) and John Stevens. The distance, in fact, is only six chains, but since the line between Merseles and Stevens is a monument, it controls the distance (*Passage v. McVeigh*, 23 N. J. L. 729), and since the location of that division line was not disputed, it was unnecessary to have its actual location determined by a jury.

The defendants argue that the monument is not this division line but a corner on the line, and that the expression must mean an already established corner and not the new corner formed by the conveyance itself. But this also involves a question of construction and not of actual location on the ground. We think the construction adopted by the judge was correct. It is quite as much in harmony with the natural meaning of the words as the construction contended for by the defendants, and unlike the latter, does not require the assumption that a course was omitted from the description. Such an assumption ought not to be made in a case where the description, as given, closes, and errs only in making one distance too great, especially since this error may be explained by the precipitous nature of the ground.

The next question is whether Schmitt is estopped by the fact that in 1869, and long before he purchased, the Hoboken Land and Improvement Company bought of the defendants or their predecessors in title another tract, a portion of the land conveyed **401** by the deed of 1795, and included in their pur-

chase land which did not belong to the grantors if the plaintiff's construction of the deed is correct. The deed of 1869 was a mere bargain and sale deed with a covenant against the grantor's acts. The grantee, except under special circumstances, not present in this case, is not estopped to deny the grantor's title to the land conveyed: Rawle's Covenants for Title, sec. 268; Robertson *v.* Pickrell, 109 U. S. 608, 3 Sup. Ct. Rep. 407, 27 L. ed. 1049; Greene *v.* Couse, 127 N. Y. 386, 24 Am. St. Rep. 458, 28 N. E. 15, 12 L. R. A. 206. A fortiori, he is not estopped to deny the title to other land even though the chain of title may be identical.

Nor did the deed of 1869 amount to a practical location of the boundary by the acquiescence of the Hoboken Land and Improvement Company. It may have amounted to a recognition of a claim of the boundary by the defendants and a willingness on the part of the land and improvement company to buy the title, whatever it was, so far as concerned the land in question, but it lacks the elements of a practical location.

The last question in the case is whether there was evidence of adverse possession sufficient to require that the case be submitted to the jury. We fail to find in the case evidence of adverse possession of the locus in quo for the requisite length of time. The defendants' case, in this respect, rests upon acts of possession on land included in a deed made in 1823, which conveyed, not only the land in dispute, but also land to which the title of defendants' predecessors in title is unquestioned, and the proposition is that quarrying on any part of the tract was evidence of a possession coextensive with the boundaries of the deed of 1823. The subject of possession under color of title was thoroughly discussed by this court in Foulks *v.* Bond, 41 N. J. L. 527, and it was held (at p. 550) that acts of ownership, in places upon the tract, were considered as competent evidence of possession of the whole, where there was a unity of character in the location. The unity of character there referred to was of physical character, but the same reasoning would be applicable to the character of the title of the disseizor; a tract to which he had a legal title would, in contemplation of law, be distinct from a tract to which he had no title, and possession of ⁴⁰² one would not necessarily be possession of the other, even though they were contiguous and embraced in the same conveyance. The reason is obvious. His possession, in order to ripen into a right, must be adverse and hostile, visible or notorious. An actual possession of land which he owns would give no notice to the real owner of the other tract of a claim upon the latter, and would not even suggest an examination of the records to ascertain what land was included within the bounds of his deed, and that deed might not even be recorded. The cases therefore hold with good

reason that the occupation of that part of the land to which the grantor had title will not give the grantee constructive possession of the other part to which he had no title so as to disseize the real owner: 1 Cyc. 1130; *Turner v. Stephenson*, 72 Mich. 409, 40 N. W. 735, 2 L. R. A. 277; *White v. Burnley*, 20 How. 235, 15 L. ed. 886. The present case seems to be one where the land described in the deed of 1823 overlaps another tract, part of which was in the possession of the Hoboken Land and Improvement Company. In such cases the constructive possession under color of title yields to constructive possession under the real title: *Clarke v. Courtney*, 5 Pet. 319, 8 L. ed. 140; *Hunnicutt v. Peyton*, 102 U. S. 333, 26 L. ed. 113.

The order should be affirmed, with costs.

A Grantee is Sometimes Held Estopped to Deny His Grantor's Title or to acquire a title in hostility thereto: *Eames v. Armstrong*, 146 N. C. 1, 125 Am. St. Rep. 436; *Petroski v. Minzgohr*, 144 Mich. 356, 115 Am. St. Rep. 450, and cases cited in the cross-reference note thereto. For exceptions to this rule, see *Smith v. Babcock*, 36 N. Y. 167, 93 Am. Dec. 498; *Green v. Couse*, 127 N. Y. 386, 24 Am. St. Rep. 458.

Possession of Part of a Tract of Land as Possession of the Whole is the subject of a note to *Hornblower v. Banton*, 125 Am. St. Rep. 302.

MARR v. MARR.

[73 N. J. Eq. 643, 70 Atl. 375.]

TRUSTEE—Validity of His Purchase of Trust Property.—As a general rule, if a trustee becomes the purchaser of the trust property, such purchase is voidable at the instance of the cestui que trust. This rule applies notwithstanding the trustee purchase at a public sale. (p. 746.)

CORPORATION—Transactions Between Director and the Company.—The director of a corporation occupies a position of trust or agency for his company of such a character that dealings between him and the company, where his interest is opposed to that of the company, will be subject to close scrutiny and not sustained against the stockholders unless consistent with good faith and fair dealing on the part of the director. (pp. 747, 748.)

CORPORATION—Action by Director to Enforce His Debt Against Company.—A director, who is at the same time a creditor of his corporation, may, for the purpose of collecting his debt, assume a position antagonistic to his company and its stockholders by bringing action and proceeding to judgment and execution for the recovery of the debt. (p. 748.)

CORPORATION—Action by Director to Enforce His Debt Against Company.—But a director, who is also creditor of his company, must, on taking legal proceedings for collection of his debt, relinquish his trust *pro hac vice*, not covertly, but openly, and with

fair notice to his company. Whether such notice should be given to the stockholders or to the directors may depend on circumstances. (p. 748.)

CORPORATION—Purchase by Director at Execution Sale of Company's Property.—Under the circumstances of the present case—held, that the defendant director, who purchased at sheriff's sale all the property of the company under executions issued at his suit, and for a consideration not exceeding one-half the value of the property, took the title subject to an option on the part of his cestui que trust to have the benefit of the purchase. (pp. 750, 751.)

CORPORATION—Sale to Director—Laches of Infant in Seeking Relief.—Relief, under the circumstances, granted to a single stockholder who by reason of infancy was not chargeable with laches, notwithstanding that the other stockholders might be debarred on the ground of their acquiescence or laches. (p. 751.)

(Syllabi by the court.)

Bleakly & Stockwell, for the appellant.

Thomas B. Hall and Dwight M. Lowrey, for the respondents.

⁶⁴⁴ **PITNEY, C.** The bill of complaint herein is in form a bill filed by the complainant as a stockholder of the Beacon Land Company, in behalf of himself and other stockholders, for the purpose of either setting aside certain sheriff's sales of the real estate and personal property of the company made to the defendant William A. Marr under executions issued upon a judgment held by the latter against the company, or else to impress a trust upon his title in favor of the complainant and other stockholders. William A. Marr and the Beacon Land Company were named as defendants. It appears, however, by the averments of the bill ⁶⁴⁵ that in the year 1902, and long prior to the commencement of this suit, the charter of the company was forfeited by reason of its failure to pay the state taxes assessed against it: Pub. Laws 1902, p. 836. This fact was admitted at the hearing. It further appears from the answer of William A. Marr that there is no acting board of directors of the land company, and that from the time of the sheriff's sales in question, which took place in November and December, 1898, the organization of the company has been abandoned. Therefore the bill is in effect filed for the benefit of the complainant and other stockholders as upon a liquidation of the company.

It is argued that since, under sections 53 and 54 of the general corporation act (Pub. Laws 1896, p. 295), a corporation, when dissolved, is continued for the purpose of winding up its affairs and dividing its capital, and the directors are made trustees for the purposes of the winding up, it was incumbent upon the complainant to notify the board of directors of his claim and request them to take action in the matter. No such application having been made, it is insisted, upon the

authority of *Siegman v. Maloney*, 65 N. J. Eq. 372, 54 Atl. 405, that his action cannot be maintained. If this objection had been interposed by demurrer to the bill (as was done in *Siegman v. Maloney*), or otherwise before the hearing of the cause upon its merits, it might have required consideration. Since the case, however, has been fully heard upon the merits, no good purpose would now be accomplished by turning the complainant about and requiring him to ask the board of directors to do for him that which he has been able to do for himself, viz., produce the evidence necessary for a determination of his case upon the merits. It should be observed, also, that the point that the board of directors ought to be intrusted with control of the litigation is not raised by or in behalf of the corporation.

The bill was dismissed on the ground that the complainant had no equity. We will, therefore, upon this appeal, pass upon the merits.

The facts that give rise to the controversy are briefly as follows: The Beacon Land Company was incorporated in the year 1892 for the purpose of acquiring and operating a seaside ⁶⁴⁶ hotel at Point Pleasant, in Ocean county. The company was a sort of "close corporation," the principal stockholders being at the outset James H. Marr (father of the complainant), and his brothers, William A. Marr and George A. Marr, together with a personal friend of theirs, a physician by profession, named McWilliams. The outstanding capital (all of which was fully paid, so far as appears), amounted to \$24,000 in par value, divided into forty-eight shares of \$500 each, of which James H. Marr held twenty-one, William A. Marr ten, George A. Marr three, Dr. McWilliams ten, J. W. Felty three, Charles Lewis one and Mrs. Helen M. Crawford (a sister of the Marrs) one share. The directors at the beginning were William A. Marr, James H. Marr, George A. Marr and Dr. McWilliams (all residents of Pennsylvania), and Mr. Lewis, who resided at Asbury Park, in this state. William A. Marr was, from the beginning and at all times, the president. James H. Marr (father of the complainant) died in the year 1895, whereupon his sister, Mrs. Crawford, was elected a director in his stead. Upon the settlement of his estate, fourteen of his shares passed to a Philadelphia trust company, as guardian of the complainant, the latter being then but eleven years of age, and seven shares passed to Rebecca G. Marr, widow of the deceased and mother of the complainant. Except as mentioned, there appears to have been no change at any time in the stockholding interest, nor in the personnel of the board of directors.

At the death of James H. Marr the company was somewhat in debt, and during the next two years the indebtedness was considerably increased, either because the operations of the

hotel were unprofitable or because the profits were expended in improvements upon the property. Both before and after the death of James H. Marr, the defendant William A. Marr had advanced to the company considerable sums of money from time to time, and by the close of the year 1897 he had become its sole creditor. In the year 1896 Rebecca G. Marr sued the company in the supreme court of this state and recovered a judgment for \$2,057 and costs, and, upon her pressing for payment, William A. Marr paid to her the amount of the judgment and costs and took an assignment thereof in January, 1897. At the same time ⁶⁴⁷ the company owed him other moneys, aggregating upward of \$8,500, besides interest. In the month of September, 1898, he brought action against the company in the supreme court upon this claim, and recovered judgment a month later for \$10,287.90, besides costs. Upon execution issued upon this judgment he caused the entire visible assets of the company (and the whole assets, so far as appears) to be sold by the sheriff and became himself the purchaser. The real estate was struck off to him at the price of \$3,000 and the personal property at the price of \$850. There was no advertisement beyond such as is required by the statute, and there were no bidders in attendance at either sale besides William A. Marr. So far as the amount of the purchase price is concerned, we agree with the learned vice-chancellor that, since the corporation had no other assets, the bids are to be deemed, as between William A. Marr and the company, as in effect equivalent to the aggregate amount due upon the two judgments held by him, which, with interest, amounted to approximately \$12,500.

It was deliberately admitted at the hearing, and is therefore beyond controversy upon this appeal, that the property, real and personal, at the time of the sheriff's sales, was fairly worth \$25,000.

The complainant and appellant claims that, under the circumstances existing at the time of the sale, William A. Marr was a trustee for the stockholders of the company, and obliged either to protect their interest by preventing a sale, or to give them fair notice that the execution sale was in contemplation, so that they might take measures for their own protection; and that since such notice was not given, and since William A. Marr bought in the property at much less than its value, he must be deemed to have purchased, as a trustee, for his stockholders. The learned vice-chancellor entertained the view that the complainant was not entitled to relief, because, although no notice of the sale was given to the several stockholders other than the statutory notice, it would have been futile to give such notice, and that since defendant Marr had at a previous time earnestly tried to get the stockholders to interest themselves in raising the money due to him, and had

found this impossible, he ⁶⁴⁸ was warranted in putting his claim into judgment and bringing the property to sale without further notice to them.

The bill of complaint charges that some of the promissory notes upon which William A. Marr's judgment against the company was based were paid and satisfied before suit brought, and that the remaining notes were without consideration and fraudulently made by the defendant, as president, to himself. It is proper to say that the proofs wholly fail to support these allegations, and, on the contrary, affirmatively show that both the assigned judgment of Rebecca G. Marr and the judgment recovered by William A. Marr himself were based upon honest indebtednesses of the company owing for moneys advanced to it in order to enable it to carry on its proper business.

Nor do the proofs, as we think, support the charge that there was intentional fraud on the part of William A. Marr about bringing the property of the company to sale under his judgments.

It remains to be considered whether, under the circumstances obtaining at the time, and in view of the defendant's trust relation to his stockholders, and the fact that neither the directors nor the stockholders had notice of the sale, the defendant must be deemed to have taken title as trustee for his stockholders.

The learned vice-chancellor, of course, recognized the general principle of equity, that if a trustee becomes the purchaser of the trust property, such act is voidable at the instance of the cestui que trust. In *Staats v. Bergen*, 17 N. J. Eq. 554, this principle was applied by this court in a case where the property sold did not belong to the cestui que trust. The property consisted of certain real estate subject to several mortgages, the second of which was held by the trustee, and the purchase was made by him at a public sale under foreclosure of the first mortgage. In that case it was expressly laid down in the court of chancery (*Staats v. Bergen*, 17 N. J. Eq. 297) that the rule that where a trustee or any person as agent for others buys the trust property, the cestui que trust is entitled, as a matter of course, to an election whether to acquiesce in the sale or to have the property again exposed for ⁶⁴⁹ sale, applies, notwithstanding the sale to the trustee was made at public auction, bona fide or for a fair price. This statement of the rule was taken for granted in this court: *Staats v. Bergen*, 17 N. J. Eq. 557.

Another decision of this court to the same effect in *Marshall v. Carson*, 38 N. J. Eq. 250, where Mr. Justice Knapp said (at p. 252): "The rule that one clothed in a fiduciary character cannot, either directly or indirectly, become the purchaser of the trust property at his own sale and hold such

property against the dissent of the cestui que trust, is of such universal prevalence and so grounded in the demands of public policy that no one ventures to question its existence or seeks now to overthrow it. . . . It [the rule] recognizes the difficulty, if not impossibility, of tracing actual fraud in every case, and the frequent failure of justice and success of wrong that must be consequent thereon, and it attempts to apply a method that will remove all temptation from the mind of the trustee to profit by infidelity in the discharge of trust duties of every sort, and which will remove all inducement to act otherwise than faithfully toward the beneficiary, by utterly refusing to consider the question of good or bad faith, and holding the trustee who attempts to deal with the trust property as an individual to all the chances of loss and denying to him all possible gain. This rule, although perhaps most frequently found applied in the decided cases where the existing fact is a sale by or under the direction of the trustee, is by no means limited to that circumstance, as reference to decided cases will show."

But how far is the rule modified when the trust or agency arises out of the fact that one is president or director of a corporation, and he at the same time is a creditor of the company, and the company's property is brought to judicial sale for the purpose of satisfying such debt?

It is settled that a director has not complete freedom to contract with his corporation. In *Stewart v. Lehigh Valley R. R. Co.*, 38 N. J. L. 505, Justice Dixon, speaking for this court, said: "After an examination of all the cases cited, and such others as I have found, and a careful consideration of the principle and the results of regarding it and ⁶⁵⁰ of disregarding it, I have come to the conviction that the true legal rule is that such a contract is not void, but voidable, to be avoided at the option of the cestui que trust exercised within a reasonable time. I can see no further safe modification or relaxation of the principle than this. A director of a corporation may have rights not arising out of express contract—such as the right to pass over its railroad, or to transport his goods over its canal, on paying reasonable tolls, or to have money which he had loaned it repaid to him; but where the right is one which must stand, if at all, upon an express contract, and which does not arise by operation or implication of law, then he shall not hold it against the will of his cestui que trust; for in the very bargain which gave rise to it, in which he should have kept in view the interest of that cestui que trust, there intervened before his eyes the opposing interest of himself": See, also, *Gardner v. Butler*, 30 N. J. Eq. 702.

We cite the last two cases because they show that a director occupies a position of trust, or agency, for his company of

such a character that all dealings between him and the company, where his interest is opposed to that of the company, will be regarded with jealousy and suspicion and subjected to the closest scrutiny, and not sustained against the stockholders unless they are consistent with the utmost good faith and fair dealing on the part of the director.

Conceding, as we do, that a director may, under such circumstances as are presented in the case before us, become a creditor of his corporation, it follows *ex necessitate* that he may, for the purpose of collecting his debt, assume a position antagonistic to his company and its stockholders. He may, undoubtedly, bring action against the company and proceed to judgment and execution for the recovery of his debt.

But we deem it clear that the director, who is also creditor, must, on taking legal proceedings for collection of his debt, relinquish his trust *pro hac vice*, not covertly, but openly, and with fair notice to his company. Whether such notice should be given to the stockholders or to the directors may depend upon circumstances. If the company is equipped with other officers ⁶⁵¹ and directors who are actively representing the interests of the stockholders, it may well be that notice to such officers or directors would be deemed sufficient. But it is, as we think, inconsistent with the duty of a director (at least under circumstances such as are here presented) that he should assume an attitude antagonistic to his company, unless he sees to it that the interests of the stockholders, which he, by reason of his personal interest, is for the time disqualified from protecting, are in the charge of other officers and directors able and willing to protect them, and to whom his notice may be given, or else sees to it that fair notice of his contemplated action is given to the stockholders, so that they may take measures to protect themselves.

In the present case it appears, as already mentioned, that the defendant Marr was the sole creditor, so that the only other interest in the company was that of the stockholders, who were few in number and easily reached. It appears that the board of directors had practically ceased to act in the affairs of the company, their last meeting having been held in July of 1897, and no meeting having been called after that date, nor any new board of directors chosen. It appears that the defendant Marr was not only the president, but was practically in sole charge of the current business of the company during the year 1897, and also during the year 1898.

In the year 1897 the financial difficulties of the company became serious. What was done at the last meeting of the board of directors does not appear. A meeting of the stockholders was held in Philadelphia on December 29, 1897, at which the defendant Marr, George A. Marr, Mrs. Crawford and Dr. Felty were present, and also a Mr. Glenn, who was

the trust officer of the trust company that was guardian of the complainant. Mr. Glenn was at the same time acting as attorney for Mrs. Rebecca G. Marr, the mother of the complainant, who was herself a stockholder. At this meeting Mrs. Marr's judgment against the company and the assignment thereof to William A. Marr were reported and spread upon the minutes as a debt due to William A. Marr. The other indebtednesses due to William A. Marr were likewise mentioned and recognized. Another ⁶⁵² meeting of the stockholders was held in Philadelphia on February 16, 1898, at which William A. Marr, Dr. McWilliams, Mrs. Crawford, George A. Marr and Mr. Glenn were present. After a general discussion of the indebtedness of the company and of its prospects, Mr. George A. Marr and Mr. Glenn were appointed a committee to make arrangements with an auctioneer for the sale of the property. This sale was appointed to be held in Philadelphia on a date in April. An upset price of \$18,000 was agreed upon by the committee, but no bid was received for an amount approaching that sum. At the two stockholders' meetings just mentioned, William A. Marr stated to Glenn and to the others present that, unless a sale of the property of the company could be effected, defendant would put his claims into judgment and sell the property. It appears, indeed, that none of the stockholders was at this time willing to come forward to contribute toward the payment of the debts. But Mr. Glenn had no information respecting the prospects of the company or the value of its property except that which he received from William A. Marr, and this information gave him the impression that there was no equity in the property over and above William A. Marr's claims.

The hotel was operated by the company during the summer of 1898, and reports of its operations were made to the defendant Marr, as president, who advanced small sums to Mrs. Crawford, the manager, for expenses during that season. The defendant made no report to the stockholders or directors of the operations of the hotel for the season, and called no meeting of stockholders or directors after February, 1898. The indifference of the directors to the concerns of the company seems to have been his reason for pursuing this course; at least, that is the reason that is most favorable to him.

In September, as already mentioned, he brought his action, without notice to anybody representing the company, except, as it may be inferred, that some agent of the company received service of the process; in October he recovered the judgment and in November brought on the property for sale—all without notice to anybody concerned.

⁶⁵³ Directors' meetings having been abandoned since July, 1897, and meetings of the stockholders substituted in December of that year, and in February, 1898, and Mr. Glenn, rep-

resenting the trust company, which was guardian for the complainant, having appeared and taken an interest in the company's affairs, it seems to us that the scrupulous care which the defendant Marr owed to his *cestui que trust* required, under the circumstances, that at least the trust company, or Mr. Glenn, should have been notified when steps were actually taken to put the defendant's claim into judgment and sell the property thereunder. It is true Mr. Glenn testifies that, with the information he had at his command, he would not have felt warranted in expending the complainant's money in protecting the property at the sale. But if he had been informed that there was an equity in the property worth as much as \$12,500, it is not to be presumed that he would have omitted reasonable efforts to secure competition in bidding at the sale.

The general notice given by defendant Marr at the meetings of December and February, that unless something was done about his claims he would have to press them—the notice given hardly amounted even to a threat—did not, we think, dispense in fairness with the more specific notice that might, and, in our view, ought to have been given when steps were actually imminent to sell the property of the company for the payment of his claim.

The property of the company, having an admitted value of \$25,000, and its total indebtedness being only half that amount (all held by the defendant Marr), it would seem that a sacrifice of the property might have been prevented by the expedient of a mortgage loan. Yet, so far as appears, this was not attempted, nor even suggested. Nor was any statement of the assets of the company, or of their value, submitted by the defendant, either to the directors or to the stockholders.

It thus clearly appears that the defendant Marr did not, upon bringing action against the company, openly relinquish his trust, nor give notice to the company that he had done so. If the directors were indifferent to the affairs of the company, he ⁶⁵⁴ should have given such notice as would have brought home to them their responsibility. At least, he could have called them in meeting and informed them of his action. If they had abandoned the duties of their office, there was all the more reason for him to give his notice to the stockholders direct.

An important and perhaps controlling circumstance is that in the outcome the property sold for only half its value. We cannot agree with the learned vice-chancellor that it is a sufficient answer to this to say that the law court from which an execution issues can set the sale aside for inadequacy of price. He cites *Palladino v. Hilpert*, 72 N. J. Eq. 270, 65 Atl. 721. In that case application was made to the court of chancery to restrain the sheriff from delivering the deed. In that juncture the application might have been made to the court out

of which the execution had issued. After the delivery of the deed it is, of course, too late to do this. Where the law court sets aside a sale made under its process, it does so in the exercise of its equitable, not of its common-law, powers: See *Miller v. Barber*, 73 N. J. L. 38, 62 Atl. 276, and cases cited. But these equitable powers are only incidental to the control which the court has over its own process of execution, and do not survive after the writ is fully executed. After the deed has been delivered to the purchaser, any application to set it aside for inadequacy of price must necessarily be made to the court of chancery, which court, in the exercise of its independent equitable powers, may either set aside the deed or treat the grantee as a trustee for others to the extent that he has reaped an undue profit from the transaction at their expense.

We hold that, under the circumstances disclosed by the evidence, the defendant Marr took title at the sheriff's sale subject to an option on the part of his cestui que trust to have the benefit of the purchase. Treating the company as a going concern, the option would have resided in it and would have had to be exercised within a reasonable time. But it is asserted by the defendant himself in his answer, and is abundantly clear from the evidence, that since the sheriff's sales the organization of the company has been abandoned. In 1902, as already observed, the ⁶⁵⁵ charter of the company was forfeited. As there were no other creditors, the individual stockholders were the actual cestuis que trustent. But none of the stockholders, other than complainant, has asked relief, and it may well be that the others are debarred from having any remedy against the defendant on the ground either of acquiescence or of laches. The present decision will therefore determine only the rights of the complainant.

Although complainant's bill was not filed until seven years after the sale, it was filed very promptly after he arrived at his majority, and laches is not attributable to him. Such notice as was given to his guardian was that already referred to, and was merely to the effect that unless the defendant Marr's claim was paid he would probably take legal proceedings. The guardian had no specific notice that legal proceedings had been commenced, nor was it placed in possession of such information concerning the value of the property as should have put it upon guard to protect the infant's interest. It is therefore unnecessary to decide whether, under other circumstances, the nonaction of the guardian would bar the infant's claim in equity.

The remaining question is, just what measure of relief ought to be accorded to the complainant under the circumstances. Defendant has been in possession of the property since the sheriff's sales, and the evidence indicates that he has

placed some improvements upon it; whether these have increased the value of the property, and if so to what extent, does not appear.

Under the peculiar circumstances of this case we think the complainant is entitled to an option whether he will affirm the sale to the defendant Marr and treat the latter as a trustee for the complainant to the extent that he profited by the purchase, or whether he will insist upon setting the sale aside.

If he accepts the first alternative, then upon ascertaining the difference between the market value at the time of the sheriff's sale, which was \$25,000, and the amount of the claims held by the defendant Marr against the property, with interest to the time of sale, the defendant Marr should be required to pay to the complainant his share of the difference, that is, fourteen forty-eighths, or seven twenty-fourths, with interest thereon from the time of filing the bill of complaint herein.

656 If complainant accepts the second alternative, an account should be taken of the amount due at the time of the sheriff's sale to the defendant Marr upon his judgments, and he should be credited likewise with the present value of any betterments placed by him upon the property since his purchase, and charged with a proper rental for the property since the sheriff's sales, and with a proper amount for depreciation and damage to the personal property, if any, during his possession thereof. In this accounting interest should be allowed with proper rests.

Upon ascertaining the amount now due to defendant Marr upon such accounting, the property should be subjected to judicial sale and out of the proceeds he should be first paid the amount due to him, and out of the residue seven twenty-fourths should be paid to the complainant and the remainder to the defendant Marr.

In either case, the complainant is entitled to his costs in the court of chancery and in this court, to be paid by the defendant Marr.

Let the decree under review be reversed, and the record remitted to the court of chancery for further proceedings in accordance with the views above expressed.

The Directors of a Corporation are Trustees for the stockholders, to whom they owe perfect fidelity in the discharge of their duties; and ordinarily they cannot be permitted to have or acquire any personal or pecuniary interest antagonistic to their duties as trustees: Hinkley v. Oil & Pipe Line Co., 132 Iowa, 396, 119 Am. St. Rep. 564; Hooker v. Midland Steel Co., 215 Ill. 444, 106 Am. St. Rep. 170; Scott v. Farmers' etc. Nat. Bank, 97 Tex. 31, 104 Am. St. Rep. 835; Pacific Vinegar etc. Works v. Smith, 145 Cal. 352, 104 Am. St. Rep. 42.

A Sale of Corporate Property to a Director is voidable as a general rule: Millsaps v. Chapman, 76 Miss. 942, 71 Am. St. Rep. 547; Beach v. Miller, 130 Ill. 162, 17 Am. St. Rep. 291; Sweeney v. Grape Sugar Co., 30 W. Va. 443, 8 Am. St. Rep. 88. However, a director who in

good faith loans his credit to the corporation and takes its bonds as indemnity acquires the same right as any other mortgagee to protect himself, even to the extent of being a purchaser at a foreclosure sale, which is rendered inevitable through no fault of his: *New Memphis Gaslight Co.*, 105 Tenn. 268, 80 Am. St. Rep. 880. A director has the right to obtain judgment against a corporation, levy execution upon and sell its property, the same as any other creditor, where it is justly indebted to him and refuses to pay: *Hoffman v. Reichert*, 147 Ill. 274, 37 Am. St. Rep. 219; and the general rule is that directors or officers of a solvent corporation, acting in good faith, may deal with it and loan it money and take security therefor, and the subsequent insolvency of the corporation does not affect their rights to recover such loans or enforce their securities: *Illinois Steel Co. v. O'Donnell*, 156 Ill. 624, 47 Am. St. Rep. 245.

TAYLOR IRON AND STEEL COMPANY v. NICHOLS.

[73 N. J. Eq. 684, 69 Atl. 186.]

RESTRAINT OF TRADE—Reasonableness of Contracts.—A contract in restraint of trade will not be enforced unless the restraint is no more extensive than is reasonably required to protect the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. (p. 755.)

TRADE SECRETS — Contract of Employé not to Divulge. — A contract for personal services which forbids the employé to divulge any information known to him or acquired by him during his employment relating to the process of manufacture, and to hold inviolate the treatment, processes and secrets known to or used by him in the works of the employer, which is unlimited as to time and place, will not be enforced. (p. 755.)

TRADE SECRETS—Evidence of Secret Processes.—Where the bill avers and the answer denies that the complainant has secret processes, and the secrecy of the process is an issue in the cause, it is erroneous to exclude evidence as to the details of the alleged secret processes. (pp. 756, 757.)

TRADE SECRETS — Taking Evidence of Secret Processes in Camera.—In order to protect the complainant from an unnecessary disclosure of a secret process, the evidence may be taken in camera and sealed. (pp. 757, 758.)

MASTER AND SERVANT—Agreement to Give Exclusive Service to Employer.—An agreement by an employé to serve for five years and during that time to devote his entire time, skill, labor and attention to the service of the employer, though valid, is not enforceable under the circumstances of this case, even if the court of chancery will ever enforce by injunction a contract for ordinary personal services. (pp. 758, 759.)

(Syllabi by the court.)

Gilbert Collins and Charles L. Corbin, for the appellants.

John R. Hardin and Richard V. Lindabury, for the respondents.

685 SWAYZE, J. The bill seeks to enjoin Nichols from divulging to anyone other than the complainant any information known to him at the time of the agreement hereafter to be mentioned, or acquired by him during the term of the agreement, relating to the making of steel, that may have been used in the complainant's works, and from divulging treatments, processes and secrets known to or used by him in the complainant's works, and from devoting during the term of said agreement any part of his time, skill, labor and attention to the service of anyone except the complainant. It also seeks to enjoin the other defendant from employing Nichols or using any information acquired from him relating to the process of steel making that may have been used in the complainant's works.

686 The complainant has been engaged since 1891 in making steel under what is known as the Hadfield process and patents. Hadfield, in 1891, had licensed Howe and others to use his processes, and they had agreed to keep the same secret until January 1, 1902. Subsequently the complainant succeeded to the rights of the licensees. In 1892 Hadfield granted another license to the complainant covering projectiles, and they agreed to keep the process secret until December 31, 1903. Afterward, in 1901, the agreement for secrecy was extended to July 1, 1908. Meantime on March 16, 1896, the complainant had employed the defendant, and he had agreed in writing that he would not, before January 1, 1902, make known to any person any information which he should receive at the complainant's works. Nichols continued in plaintiff's employ from 1896 to July, 1905. On March 15, 1905, he entered into a new agreement, in writing, for the term of five years from March 1, 1905. It is this agreement which the complainant's bill seeks to enforce. The important paragraph reads as follows:

“(2.) The said Wesley G. Nichols agrees that he will devote his entire time, skill, labor and attention during the term of this agreement to the service of the Taylor Iron and Steel Company, and that he will at all times faithfully perform the duties that may be assigned to him by the management of the said Taylor Iron and Steel Company to the best of his skill and ability for the compensation aforesaid, and that he will not at any time, directly or indirectly, during the term of this agreement or afterwards, divulge to any person, firm or corporation, except to the Taylor Iron and Steel Company and its officers, any information of any nature now known to him, or hereafter acquired by him during the term of this agreement, relating to or regarding any process of steel making or molding or treating steel that may have been, is now, or may be hereafter during the term of this agreement, used in the works of the Taylor Iron and Steel Company, and that

he will at all times hold inviolate the treatments, processes and secrets known to or used by him in the works of the said Taylor Iron and Steel Company."

The validity of this agreement is assailed by the defendant on several grounds. We think it is necessary to consider only the objection that it is invalid because it constitutes an excessive restraint of trade.

The rule of this state is that a contract in restraint of trade will not be enforced unless the restraint is no more extensive ⁶⁸⁷ than is reasonably required to protect the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public: *Mandeville v. Harman*, 42 N. J. Eq. 185, 7 Atl. 37; *Sternberg v. O'Brien*, 48 N. J. Eq. 370, 22 Atl. 348—both of which were cited with approval by this court in *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507, 78 Am. St. Rep. 612, 43 Atl. 723, 46 L. R. A. 255. Where the contract relates to personal services of a special, unique or extraordinary character which can be performed by no one else and there is a negative covenant, the court sometimes enforces the negative covenant by injunction, as in *Lumley v. Wagner*, 1 De Gex, M. & G. 604. But the jurisdiction of equity rests upon the inadequacy of the legal remedy (*Pomeroy's Equity Jurisprudence*, sec. 1344), and the courts of other jurisdictions, as well as our own courts in the cases cited, have shown a reluctance to extend the jurisdiction: *Whitwood Chemical Co. v. Hardman* [1891], 2 Ch. 416, 60 L. J. Ch. 428; *Rice v. D'Arville*, 162 Mass. 559, 39 N. E. 180. The present case does not even show that Nichols' services were of so special, unique or extraordinary character that an injunction should issue.

The contract not only forbids Nichols to disclose any secret of the complainant, but also any knowledge he might have relating to the process of making steel that may have been used in the complainant's works, whether matter of common knowledge or not, whether known to him before he entered their employment or not; and it also requires him to hold inviolate, not only the secrets of the complainant, but his own secrets, if he had any, and treatments or processes, whether secret or not. The necessary result of the enforcement of the contract would be that Nichols must either work for the complainant or remain idle; and since the restraint is unlimited in point of time or place, he might, at the option of the complainant after the expiration of five years, be without employment for the rest of his life at the only trade he knows. Such a restraint savors of servitude, unrelieved by an obligation of support on the part of the master. The courts have refused to enforce similar contracts: *Alger v. Thacher*, 19 Pick. 51, 31 Am. Dec. 119; *Albright v. Teas*, 37 N. J. Eq. 171.

⁶⁸⁸ The learned vice-chancellor perceived the difficulty we have mentioned, but held that the agreement was limited to processes in use by the complainant which were not known to Nichols until they were disclosed to him by the complainant. If we were able to adopt this restricted meaning, we should still think the covenant an unreasonable restraint. Some of the secret processes were those known as the Hadfield processes, which had been communicated to the defendant under the contract of 1896. That contract bound him to secrecy only until January 1, 1902, the same time fixed by Hadfield's original license to Howe. By necessary inference, after that time he was no longer bound. "*Expressio unius exclusio alterius.*" On the vice-chancellor's construction of the agreement of 1905, he bound himself forever not to disclose secrets learned under the contract of 1896. There is nothing to show that circumstances had so changed as to require a perpetual restraint in 1905, when a restraint for six years only had been adequate in 1896, or that reasonable protection of the complainant required a perpetual restraint of the defendant from disclosing what by agreement he had been entitled to disclose for the three years preceding. The complainant itself is restrained only until July 1, 1908. In our judgment the complainant's case fails, as far as it rests upon the written contract.

The complainant's right does not rest on the contract alone. We have held that a contract for secrecy may be implied from a confidential relation between employé and employer, and the divulging of a secret be enjoined: *Stone v. Grasselli Chemical Co.*, 65 N. J. Eq. 756, 103 Am. St. Rep. 794, 55 Atl. 736, 63 L. R. A. 344. The circumstances of this case require such a contract to be implied as to all secrets not covered by the special contract of 1896. As to those secrets, that written contract controls. Our difficulty in this respect arises out of the manner in which the case was tried. The bill avers, and the answer denies, that the complainant has secret processes. This was the very issue to be determined. The vice-chancellor, however, refused to admit evidence as to the details of the alleged secret processes, or cross-examination with reference thereto. The decree awards an injunction restraining Nichols from divulging the secret methods and processes used by the ⁶⁸⁹ complainant in making manganese steel, taught to or acquired by him while in their employment.

The difficulty which arises in this class of cases is that of affording adequate protection to a secret, if any disclosure of it is required. The court, in a proper case where the details of the secret are known to all the parties and no doubt arises as to its secret character, may well refuse to compel a disclosure. Such a case was *Eastman Co. v. Reichenbach*, 20 N. Y. Supp. 110. But in the ordinary case, a disclosure to

the court is necessary, and that for two reasons—first, that the court may determine the issue of fact, and second, that the terms of the injunction may be so specific that the question of a violation may be determined. In the present case, the evidence is convincing that the complainant made a product of peculiar excellence, which had obtained high repute in the market, and quite persuasive that it has special methods of manufacture; but it is impossible to tell, from the evidence, whether the results achieved were due to skill in manipulation acquired by experience, or to some secret process, or whether, if there was a secret process, it was more than the Hadfield process which the defendant Nichols had agreed not to disclose before January, 1902, or different from the process described in the Brinton patent which was taken out after the bill was filed and before the decree. Mr. Brinton himself testified that the process was essentially the Hadfield process with such modifications as the complainant had made. A careful reading of the testimony has not enabled us to determine exactly what the complainant claims as a secret process.

The terms of the injunction are very broad. It restrains the defendant from divulging secret methods and processes, as if there was more than one, as, indeed, there may be, and it contains nothing by which it can be hereafter determined what are the methods and what are the processes, or whether the two are to be distinguished. The difficulty was thus expressed by Lord Eldon in an early case: "The only way by which a specific performance could be effected would be by perpetual injunction, but this would be of no avail, unless a disclosure were made to enable the court to ascertain whether it was or was not infringed; for, if a party comes here to complain of a breach of injunction, ⁶⁹⁰ it is incumbent on him first to show that the injunction has been violated": *Newbery v. James*, 2 Meriv. 446, 451.

The difficulty felt by the vice-chancellor is not removed by the procedure he adopted. It is merely postponed to the time when it may become necessary to take proceedings in contempt for violation of the injunction. We think orderly procedure requires that before the defendant is enjoined, he should be definitely informed what it is he is forbidden to do. In no other way could the judge in the court of first instance, or this court on appeal, determine hereafter whether there had been a violation of the injunction, in case of proceedings for contempt. For the protection of the complainant, the usual course is to take the evidence as to the secret in camera, as was done in *Stone v. Grasselli Chemical Co.*, 65 N. J. Eq. 756, 103 Am. St. Rep. 794, 55 Atl. 736, 63 L. R. A. 344. Everyone may be excluded except the parties, both of whom must already know the secret, and their counsel, who must have been apprised thereof. When, as in this case, a third person, to

whom the secret has not yet been disclosed, is a party, he may well be excluded without injustice. It is not necessary to embody the description of the secret in the injunction itself. The testimony taken in camera may be sealed and used only when it becomes necessary to determine whether there has been a violation. It is true that the procedure involves a risk to the complainant of his secret becoming public; but that difficulty is inherent in the subject. It is a difficulty to which the complainant must submit if he seeks to retain the benefit of his secret for an indefinite time, and is not content with the more effective protection for a shorter period which is offered by our copyright and patent laws.

We have examined the cases cited to the contrary by the complainant, but, with the exception of the Reichenbach case (20 N. Y. Supp. 110), they fail to sustain the contention, and in that case the opinion shows that the existence of the secret process was not squarely put in issue.

The decree must be reversed to the extent that it enjoins Nichols from divulging or disclosing, directly or indirectly, to any person, firm or corporation, the secret methods and processes used by the complainant, and enjoins the American Brake Shoe and Foundry Company from disclosing or making use of any ⁶⁹¹ information relating to the secret methods and processes communicated to it by Nichols.

This determination does not dispose of the case. By the contract Nichols also agreed that he would devote his entire time, skill, labor and attention during the term of his agreement to the service of the Taylor Iron and Steel Company and to faithfully perform the duties that might be assigned to him. This portion of the agreement is severable from the agreement not to divulge secrets, and is in itself valid. We see no objection to an agreement to serve an employer to the exclusion of all others for a term of five years. A similar agreement has been sustained in the English courts: *William Robinson & Co., Ltd., v. Heuer* [1898], 2 Ch. 451. Assuming that if this portion of the agreement stood alone, we could, upon proper pleadings, sustain that portion of the decree which restrains the American Brake Shoe and Foundry Company from employing Nichols during the term of the agreement, such an injunction would necessarily rest upon the fact that both the obligation and opportunity of service under the agreement were still subsisting. The agreement itself, however, provides that it shall be terminated "by the failure of the said Wesley to faithfully observe and keep the terms and conditions by him to be kept and performed." The complainant, indeed, charges that Nichols' resignation was not accepted, but its whole case rests upon the theory that he had failed to faithfully observe and keep the terms of the agreement. The further provision that no termination of the

agreement shall deprive the complainant of any remedy it might have had during the continuation of the agreement, or at any other time, for violation of its terms, is not sufficient to entitle the complainant to this injunction; for such a decree is in effect a decree for specific performance, and the complainant can hardly claim specific performance of a contract by virtue of a clause giving a remedy for breach of its terms, even if we assume that the court of chancery will ever enforce, by injunction, a contract for ordinary personal services. As is said in the brief for the defendant, "the complainant has the choice to claim damages for breach or to claim performance under the terms of the contract, in which case he must offer to perform on his part. The complainant in the bill does not offer to ⁶⁹² continue to employ Nichols, and the decree does not impose on the complainant any terms that such employment shall be offered."

The decree must therefore be reversed, but as this results as to the important question involved, because of the rejection of evidence, the reversal should be without prejudice to further proceedings in the court of chancery (*Charlton v. Columbia Real Estate Co.*, 67 N. J. Eq. 629, 110 Am. St. Rep. 495, 60 Atl. 492, 69 L. R. A. 394, 3 Ann. Cas. 402), or to the filing of a new bill, if the complainant prefers that course.

PROTECTION OF SECRET PROCESSES AND TRADE SECRETS.*

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*REFERENCES TO MONOGRAPHIC NOTES.

Validity of contracts in restraint of trade: 7 Am. Dec. 743; 92 Am. Dec. 751; 74 Am. St. Rep. 235.

Right as between employer and employé to inventions made by the latter: 52 Am. St. Rep. 820.

I. Nature and Extent of Property Right in Secret Processes and Trade Secrets.

a. Extent of Use in Commerce.—The use of secret processes and trade secrets is more extensive in Europe than in our country. But their use here is rapidly growing, due, doubtless, to a feeling that the issuance of a patent does not in all cases protect the inventor from infringement by commercial pirates, who, by their ability to sustain expensive litigation, may enjoy the profits of the invention pending the termination of prolonged litigation. And in many cases it is more than likely that the discoverers of secret processes and trade secrets fear that the publicity of a patent will give other inventors too large a chance to discover some method of attaining the same results without danger of infringement. But regardless of the reasons for the extensive use of such secret processes, the fact exists that they are used in various lines of commercial activity ranging from the manufacture of fromage de brie to the distillation of chartreuse, the compounding of liniments to the preparation of paints and kodak films, the making of steel and metal alloys to the saving of tin from defunct fruit cans.

Considering the frequency of such uses in large factories, the infrequency of cases involving a breach of trust on the part of employes who necessarily have come into knowledge of the secret speaks well for the average honesty of humanity.

b. What Constitutes a Secret Process or Trade Secret.—The only case which we have been able to find which definitely defines a trade secret is one which is reported from the circuit court of Ohio and which was affirmed on appeal by the supreme court of that state without any written opinion. It is the case of *National Tube Co. v. Eastern Tube Co.*, 23 Ohio Cir. Ct. 468, affirmed in 69 Ohio St. 560, 70 N. E. 1127. The circuit court judge said: "A trade secret is a plan or process, tool, mechanism or compound, known only to its owner and those of his employes to whom it is necessary to confide it in order to apply it to the uses for which it is intended. It is not protected by patent, for the secret then is made public, and the inventor is protected by letters patent from infringement thereof, while, as soon as anyone fairly and honestly discovers a trade secret, either by examination of the manufactured products sold or offered for sale to the public, or in any other honest way, that person discovering it has full right to use the same. That is the risk the owner takes, and if he would have further protection, he must seek it in a patent."

By a secret process is undoubtedly meant such a method of manufacture or operation in the production of a commercial product as is understood to constitute a process under the patent laws; a mode of treatment of certain materials to produce a given result. It is a conception of the mind seen only by its results: *Eastern Extracting Co. v. Greater New York Extracting Co.*, 126 App. Div. 928, 110 N. Y. Supp. 738. Thus where the ingredients used in the manufacture of an article were well known, but by combining them by a different method from any other in use the result is a product of a different character than that produced by the ordinary method of combining them, the method of mixing the ingredients and so treating them is a secret process which will be protected by the courts: *Stone v. Grasselli Chemical Co.*, 65 N. J. Eq. 756, 103 Am. St. Rep. 794, 55 Atl. 736, 63 L. R. A. 344. But where the method depends merely upon

skill in manipulation and no definite and invariable rule is observed in combining and treating the ingredients other than is used by other manufacturers of the same article, it cannot be said that there is any secret process which needs the protection of a court: *Bell & Bogart Soap Co. v. Petrolia Mfg. Co.*, 25 Misc. Rep. 66, 54 N. Y. Supp. 663. The combination of well-known ingredients in such a manner as to produce new results which give a manufacturer great advantage over his competitors will constitute a trade secret entitled to protection. Thus where the principal ingredient of a composition is a well-known substance, known as saponin, and it is also a well-known scientific fact that it is useful for the removal of grease, a combination of that article with other chemicals in such a way as to be effective for the removal of the spots which appear upon bromide paper and photographic plates, thereby giving the manufacturer a remedy for those defects which no competitor possessed, is a trade secret: *Eastman K. Co. v. Reichenbach*, 20 N. Y. Supp. 110, affirmed in 79 Hun, 183, 29 N. Y. Supp. 1143.

Where a drug concern puts up preparations for physicians from formulae furnished by them, and it is not shown that the physicians had any intent to keep the formulae secret or had any desire to retain to themselves a property therein, the drug concern cannot have its employes restrained from using the formulae, since it has no exclusive property therein: *G. F. Harvey Co. v. National Drug Co.*, 75 App. Div. 103, 77 N. Y. Supp. 674.

The fact whether the article is a proper subject for a patent does not affect the right to have it protected as a trade secret: *O. & W. Thum Co. v. Tloczynski*, 114 Mich. 149, 68 Am. St. Rep. 469, 72 N. W. 140, 38 L. R. A. 200. But where a person obtains a patent for an invention, he cannot maintain a trade secret as to part of the method employed in the invention. "In applying for the patent it was his duty to disclose the most available method known to him of carrying the discovery into effect—in other words, of manufacturing his new fabric. This information, which may be used by others after his patent has expired, is an important part of the compensation which the public obtains for the temporary monopoly granted him. If he could withhold it, disclosing an inferior method simply, which he does not employ, the discovery would never become available public property as the patent laws contemplate it shall. He would have a monopoly after his patent had expired, which would continue so long as he could conceal this material part of his discovery": *Dornan v. Keefer*, 49 Fed. 462.

But the mere fact that a patent, which has expired, was issued for substantially the same process, will not prevent the process from being deemed a secret process after the expiration of the patent, where the knowledge of the process was not had by those engaged in the line of business to which it pertained. After the expiration of the patent it was open to anyone who should rediscover the process to use it and, by guarding it as a secret of manufacture, reap all the benefit possible therefrom: *Benton v. Ward*, 59 Fed. 411.

Where in the construction of a pump it is necessary to have patterns of exact sizes in order to make allowances for the shrinkage of the various metals used in the construction, such patterns constitute a trade secret. The sale of the pump itself does not constitute a publication of the patterns so used in its construction. The size of the patterns cannot be ascertained from an examination of the various

sections of the pump, but must be ascertained from a series of experiments involving both time and money. Hence patterns of the exact size constitute a secret of the owner which cannot be unlawfully appropriated by another by a clandestine possession of the patterns: *Tabor v. Hoffman*, 118 N. Y. 30, 16 Am. St. Rep. 740, 23 N. E. 12. A table of dimensions of various types of fire-engines has also been regarded as a trade secret: *Merryweather v. Moore*, L. R. 2 Ch. Div. 518.

c. **Extent of Property Right Therein.**—The owner of a secret process or trade secret has a qualified right in it to the extent that he is entitled to maintain its secrecy and prevent its disclosure or use by one who has obtained knowledge of it through fraud, breach of confidence or violation of a contract with him. He has, however, no exclusive right to use the secret process or trade secret except as against persons obtaining their knowledge in the manner just stated: *Stewart v. Hook*, 118 Ga. 445, 45 S. E. 369, 63 L. R. A. 255; *Westervelt v. Nat. Paper etc. Co.*, 154 Ind. 673, 57 N. E. 552; *Peabody v. Norfolk*, 98 Mass. 452, 96 Am. Dec. 664; *Chadwick v. Covell*, 151 Mass. 190, 21 Am. St. Rep. 442, 23 N. E. 1068, 6 L. R. A. 839; *Thum v. Tloczynski*, 114 Mich. 149, 68 Am. St. Rep. 469, 72 N. W. 140, 33 L. R. A. 200; *Watkins v. Landon*, 52 Minn. 389, 38 Am. St. Rep. 560, 54 N. W. 193, 19 L. R. A. 236; *Vulcan Detinning Co. v. American Can Co.*, 67 N. J. Eq. 243, 58 Atl. 290; *Taber v. Hoffman*, 118 N. Y. 30, 16 Am. St. Rep. 770, 23 N. E. 12; *O'Bear-Nester Glass Co. v. Anti-explo Co.*, 101 Tex. 431, 130 Am. St. Rep. 865, 108 S. W. 967, 109 S. W. 93, 16 L. R. A., N. S., 520; *John D. Park & Sons Co. v. Hartman*, 82 C. C. A. 158, 153 Fed. 24, 12 L. R. A., N. S., 135. The right to the use of a secret process for the manufacture of an article has been regarded as of the same character as the right to a trademark, copyright or patent, and entitled to the same protective remedies: *Vulcan Detinning Co. v. American Can Co.* (N. J. Ch.), 69 Atl. 1103. Courts of equity have always regarded the rights of the owner of a secret process or trade secret as a property right entitled to their protection: *Stewart v. Hook*, 118 Ga. 445, 45 S. E. 369, 63 L. R. A. 225; *Elaterite Paint etc. Co. v. S. E. Frost Co.*, 105 Minn. 239, 117 N. W. 388; *Salomon v. Hertz*, 40 N. J. Eq. 400, 2 Atl. 379; *Champlin v. Stoddart*, 30 Hun, 300; *Morison v. Moat*, 9 Hare, 241, 68 Eng. Reprint, 492. But in Texas it has been held that the transfer of an unpatented formula to a corporation in payment of its stock does not constitute a payment in property under the terms of the state constitution which requires property so exchanged to be "actually received." The opinion in the case seems to be based on the theory that the corporation could not be protected in its use of the formula or sell the secret in such a manner as to protect the purchaser from the use of the same by such of the stockholders as had obtained knowledge of it: *O'Bear-Nester Glass Co. v. Anti-explo Co.*, 101 Tex. 431, 130 Am. St. Rep. 865, 108 S. W. 967, 109 S. W. 931, 16 L. R. A., N. S., 520. In New York, however, the value of several secret recipes for medical porous plasters held by a corporation were held to be property susceptible of valuation, the court saying: "While this species of property is not tangible, and is, to some extent, of uncertain and precarious value, dependent upon the good faith of those who possess the secret, still I apprehend that a large portion of their value lies not so much in the secret itself as upon the judicious advertising which these proprietary articles have had, and the names under

which they are sold have become thereby a valuable trademark. As I have said, property of this kind is, to some extent, precarious. At the same time it has always been regarded as of value, and vested interests therein have always been protected by the courts, whether it be called secret knowledge, goodwill, or trademark rights. The appraiser, therefore, properly considered these secret recipes of value in ascertaining the value of the corporate shares": *In re Brandreth*, 28 Misc. Rep. 468, 59 N. Y. Supp. 1092.

The proprietor of a secret formula may waive its secrecy to the extent that he has represented it as being composed of certain ingredients: *Moxie Nerve Food Co. v. Modox Co.*, 152 Fed. 493.

d. Right of Public to Discover the Secret.—Where an instrument which is not patented is put upon sale, anyone has a right to manufacture and sell a similar instrument, provided, of course, that he does not violate any trademark in so doing: *Mahler v. Sanche*, 223 Ill. 136, 79 N. E. 9.

Any person has a right to discover and use a secret process or trade secret, provided that in doing so he violates no confidence and does not commit a breach of trust or contract: *Stewart v. Hook*, 118 Ga. 445, 45 S. E. 369, 63 L. R. A. 255; *Chadwick v. Covell*, 151 Mass. 190, 21 Am. St. Rep. 442, 23 N. E. 1068, 6 L. R. A. 839; *Watkins v. Landon*, 52 Minn. 389, 38 Am. St. Rep. 560, 54 N. W. 193, 19 L. R. A. 236; *Elaterite Paint etc. Co. v. S. E. Frost Co.*, 105 Minn. 239, 117 N. W. 388; *Vulcan Detinning Co. v. American Can Co.*, 67 N. J. Eq. 243, 58 Atl. 290; *Eastman K. Co. v. Reichenbach*, 20 N. Y. Supp. 110, affirmed in 79 Hun, 188, 29 N. Y. Supp. 1143; *John D. Park & Sons v. Hartman*, 82 C. C. A. 158, 153 Fed. 24, 12 L. R. A., N. S., 520; *James v. James*, L. R. 13 Eq. 421. Thus, for instance, in the case of a valuable medicine, not protected by patent, a person may, if he can, by chemical analysis and a series of experiments, or by any other use of the medicine itself, aided by his own resources only, discover the ingredients and their proportions, and if he thus finds out the secret of the proprietor, he may use it to any extent that he desires without danger of interference by the courts: *Tabor v. Hoffman*, 118 N. Y. 30, 16 Am. St. Rep. 740, 23 N. E. 12. But where a person learns of the secret through a breach of confidence, he will be enjoined from using it, even though he might have obtained the same results through his own efforts: *Stone v. Grasselli Chemical Co.*, 65 N. J. Eq. 756, 103 Am. St. Rep. 794, 55 Atl. 736, 63 L. R. A. 344.

II. Right of Owner to Protection Against Disclosure by Employé.

a. General Rule.—Where the employé of one who uses a secret process or trade secret in his business learns such secret during the course of his employment, he may be restrained from either using or disclosing such secret to others. And it is immaterial whether the duty not to use or disclose the secret arises by express or implied contract: *Westervelt v. Nat. Paper etc. Co.*, 154 Ind. 673, 57 N. E. 552; *Peabody v. Norfolk*, 98 Mass. 452, 96 Am. Dec. 664; *Thum v. Tloczynski*, 114 Mich. 149, 68 Am. St. Rep. 469, 72 N. W. 140, 38 L. R. A. 200; *Sanitas Nut Food Co. v. Clener*, 134 Mich. 370, 96 N. W. 454; *Elaterite Paint etc. Co. v. S. E. Frost Co.*, 105 Minn. 239, 117 N. W. 388; *Salomon v. Hertz*, 40 N. J. Eq. 400, 2 Atl. 379; *Stone v. Grasselli Chemical Co.*, 65 N. J. Eq. 756, 103 Am. St. Rep. 794, 55 Atl. 736, 63 L. R. A. 344; *Taylor Iron etc. Co. v. Nichols* (N. J. Eq.), 65 Atl.

695; *Little v. Gallus*, 4 App. Div. 569, 38 N. Y. Supp. 487; *Baldwin v. Von Micheroux*, 5 Misc. Rep. 386, 25 N. Y. Supp. 857, affirmed in 83 Hun. 43, 31 N. Y. Supp. 696; *Eastman K. Co. v. Reichenbach*, 20 N. Y. Supp. 110, affirmed in 79 Hun. 184, 29 N. Y. Supp. 1143; *G. F. Harvey Co. v. Nat. Drug Co.*, 75 App. Div. 103, 77 N. Y. Supp. 674; *Fralich v. Despar*, 165 Pa. 24, 30 Atl. 521; *Sterling Varnish Co. v. Macon*, 217 Pa. 7, 66 Atl. 78; *Chain Belt Co. v. Von Spreckeisen*, 117 Wis. 106, 94 N. W. 78; *Simmons Medicine Co. v. Simmons*, 81 Fed. 163; *Harrison v. Glucose Sugar Ref. Co.*, 53 C. C. A. 484, 116 Fed. 304, 58 L. R. A. 915; *Thibodeau v. Hildreth*, 60 C. C. A. 78, 124 Fed. 892, 63 L. R. A. 480; *H. B. Wiggins Sons Co. v. Cott-A-Lapp Co.*, 169 Fed. 150; *Yovatt v. Winyard*, 1 Jac. & W. 394, 37 Eng. Reprint, 425; *Merryweather v. Moore* [1892], 2 Ch. 518.

A contract for the maintenance of the secret is implied from the confidential relation arising from the employment of a person to perform duties which necessarily place him in the possession of such secret processes or trade secrets: *Taylor Iron & Steel Co. v. Nichols*, 73 N. J. Eq. 684, ante, p. 753, 69 Atl. 186, 24 L. R. A., N. S., 933. "If one person has a trade secret which is valuable to him, and another person enters into confidential employment with him in and about the business which demands the use of that secret, and by such employment learns the secret, he cannot utilize his secret knowledge to the disadvantage of his employer. If he does so, he robs his employer. That is the contract relationship between them, and it makes no difference whether it is expressed in writing or not. If not expressed, it will be implied": *H. B. Wiggins Sons Co. v. Cott-A-Lapp Co.*, 169 Fed. 150.

Where the employé knows that his employer is trying to keep secret a process of separating tin from scrap and the plant is so managed as to indicate such intent, an implied agreement is raised on the part of such employé not to divulge the secret process: *Vulcan Detinning Co. v. American Can Co.*, 70 N. J. Eq. 588, 62 Atl. 881.

So, also, where a person is employed as an inventor, secret processes and trade secrets discovered by him during the course of such employment belong to the employer and the employé may be restrained from using or disclosing the same: *Baldwin v. Von Micheroux*, 5 Misc. Rep. 386, 25 N. Y. Supp. 857; *Silver Spring B. & D. Co. v. Woolworth*, 16 R. I. 729, 19 Atl. 528.

b. Contract Against Disclosure as in Restraint of Trade.—In the principal case the contract between the employer and employé was attacked as being in restraint of trade. The contract in that case went beyond the limits necessary to protect the employer's business. It not only prohibited the employé from disclosing any secret of the employer, but also any knowledge he might have had relating to the process of steel making that may have been used in the employer's works, whether matter of common knowledge or not, whether known to him before he entered the employment or not, and also required him to keep inviolate his own secrets if he had any, and treatments or processes, whether secret or not. The contract was not limited as to time or place. The effect of the contract was that the employé could not seek other employment. The contract was held not enforceable as being in restraint of trade: *Taylor Iron & Steel Co. v. Nichols*, 73 N. J. Eq. 684, ante, p. 753, 69 Atl. 186, 24 L. R. A., N. S., 933. The contractual circumstances were somewhat similar in the case

of *Mallinckrodt Chemical Works v. Nemnich*, 83 Mo. App. 6, affirmed in 169 Mo. 388, 69 S. W. 355. The court in that case also held the contract as unreasonable in restraint of trade. But such contracts where they merely protect the secret processes or trade secrets of the employer are not in restraint of trade: *Magnolia Metal Co. v. Price*, 65 App. Div. 276, 72 N. Y. Supp. 792; *Thibodeau v. Hildreth*, 60 C. A. 78, 124 Fed. 892, 63 L. R. A. 480.

c. What Conduct on Part of Employé is Sufficient to Warrant Injunction.—The mere fact that a former employé of one who possesses a trade secret has accepted employment with a rival manufacturer is not sufficient to warrant an injunction against such rival and the employé, unless the circumstances surrounding the hiring are such as to persuade one that the ulterior purpose of such hiring is evil. The mere opportunity of the employé to do wrong and a suspicion on the part of the employer that wrong will be done are not sufficient: *H. B. Wiggins Sons Co. v. Cott-a-Lapp Co.*, 169 Fed. 150. But where one of the organizers of a corporation obtained employment disguised as a laborer, and after two days' observation of the processes and appliances used in the plant left without calling for his wages, an injunction is properly granted against the corporation and the employé: *Eastern Extracting Co. v. Greater New York Extracting Co.*, 126 App. Div. 928, 110 N. Y. Supp. 738. So, also, where one with whom secret pump patterns were placed for purposes of repair surreptitiously copied them at the request of a rival manufacturer, an injunction against their use is proper: *Taber v. Hoffman*, 118 N. Y. 30, 16 Am. St. Rep. 740, 23 N. E. 12. And where the employé had blue-print copies of secret machinery and drawings made at his own expense and copied a secret formula of a varnish, a prima facie case of fraudulent breach of contract is shown: *Sterling Varnish Co. v. Macon*, 217 Pa. 7, 66 Atl. 78. So, also, where the employé, after entering the employ of the rival concern, is shown to have advised the superintendent by information and sketches of the apparatus and methods used by his former employers, an injunction is proper: *Stone v. Grasselli Chemical Co.*, 65 N. J. Eq. 756, 103 Am. St. Rep. 794, 55 Atl. 736, 63 L. R. A. 344.

III. Protection of Vendor and Purchaser Under Contracts for Sale or Use of the Secret.

a. Right to Protection Against Further Disclosure or Use.—In *Vulcan Detinning Co. v. American Can Co.*, 67 N. J. Eq. 243, 58 Atl. 290, it was argued that a trade secret, from its inherent quality, was not assignable, and hence that the protection afforded the original owner did not pass to his assignee, but the court said: "It is to be observed, however, that a valid patent protects its owner and his assignees and licensees against everyone infringing it; while a trade secret protects its owners only against those who have learned the secret under a contractual or confidential obligation to preserve the secrecy. The assignability of a secret process was recognized in *Tode v. Gross*, 127 N. Y. 480-485, 24 Am. St. Rep. 475, 28 N. E. 469, 13 L. R. A. 652; *Thum v. Tloczynski*, 114 Mich. 149, 68 Am. St. Rep. 469, 72 N. W. 140, 38 L. R. A. 200; *Fowle v. Park*, 131 U. S. 88, 9 Sup. Ct. Rep. 658, 33 L. ed. 67; *Simmons Medicine Co. v. Simmons (C. C.)*, 81 Fed. 163. No case has been cited in which the ability of a discoverer of a trade secret to sell the same has been denied."

Not only have sales of such secrets been recognized by the courts, but it is held that where a person sells the exclusive right to use a secret process or trade secret, he impliedly agrees that he will not himself use it or disclose it to others, since he must do so in order to make the secret of any value to the purchaser: *Vickery v. Welch*, 19 Pick. 523. And where the owner of such a secret sells it to another, an agreement on the part of the vendor not to use the secret or disclose it to others is not objectionable as being in restraint of trade and against public policy. The restraint placed upon the vendor in such cases is not more than is necessary to make the secret of value to the purchaser and besides the secret is a thing to which the public has no right. The owner of the secret being under no obligation to use it or disclose it to others, the public is not interested in its ownership. Hence the purchaser of the secret under contracts of that nature is entitled to be protected by the courts against a use or disclosure of the secret by the vendor: *Brewer v. Lamar*, 69 Ga. 656, 47 Am. Rep. 766; *Vickery v. Welch*, 19 Pick. 523; *Morse Twist Drill etc. Co. v. Morse*, 103 Mass. 73, 4 Am. Rep. 513; *Thum v. Tloczynski*, 114 Mich. 149, 68 Am. St. Rep. 469, 72 N. W. 140, 38 L. R. A. 200; *Grand Rapids Wood Finishing Co. v. Hatt*, 152 Mich. 132, 115 N. W. 714; *Jarvis v. Peck*, 10 Paige, 118; *Hard v. Seeley*, 47 Barb. 428; *Tode v. Gross*, 127 N. Y. 480, 24 Am. St. Rep. 475, 28 N. E. 469, 13 L. R. A. 652; *Nat. Gum & Mica Co. v. Braendly*, 27 App. Div. 219, 51 N. Y. Supp. 93; *Harrison v. Glucose Sugar Ref. Co.*, 53 C. C. A. 484, 116 Fed. 304, 58 L. R. A. 915; *Fowle v. Park*, 131 U. S. 88, 9 Sup. Ct. Rep. 658, 33 L. ed. 67.

Where one who has title to a trade secret stands by silently while another sells it as his own, he will be estopped from setting up title to it as against the purchaser: *Champlin v. Stoddart*, 30 Hun, 300.

In *C. F. Simmons Medicine Co. v. Simmons*, 81 Fed. 163, the competitor claimed to have obtained the secret of a liver medicine from his mother after it had been sold by the father, but the court said: "There can be no question that no court of equity would permit a person, after he had sold the absolute and exclusive property in a patent medicine for a valuable consideration, to impart the formula and secret recipe, which are the most valuable part of the purchase, to others, that they may be used in competition with his vendee. Whatever knowledge Mrs. Simmons possessed she acquired as wife of Dr. M. A. Simmons, and she could not do what her husband would be restrained from doing, and especially if, as in this case, nearly the entire consideration was paid to her as voluntary alimony. To permit this would enable every owner of a patent medicine to sell the secret thereof to one person, and have his wife, or some other member of the family to whom it had theretofore been confided, either use it, or sell it to others to be used, in competition with the purchaser. 'Equity prevails against the party who gets the secret of another delivered to him in breach of contract or of trust': *Green v. Folgham*, 1 Sim. & S. 398."

So, also, the assignee of a secret process may by an injunction restrain the employe's of his assignor, who have learned the secret while in his employ, from using the process: *Vulcan Detinning Co. v. American Can Co.*, 67 N. J. Eq. 243, 58 Atl. 290.

b. Right to Restrict Use to Certain Territory or Control Sale of Product.—A contract of sale of a trade secret may ordinarily restrict

the use of the secret to a specified territory: *Fowle v. Park*, 131 U. S. 88, 9 Sup. Ct. Rep. 658, 33 L. ed. 67. The question whether the manufactured product of a trade secret or private formula is immune from the common-law rule against monopoly and restraint of trade and the provision of the federal anti-trust law was elaborately and exhaustively discussed by Judge Lurton in *John D. Park & Sons v. Hartman*, 82 C. C. A. 158, 153 Fed. 24, 12 L. R. A., N. S., 135, and it was there held that contracts affecting the sale and resale of such articles by retailers were not immune. A distinction was raised between such products and those produced under the monopoly created by a patent, trademark or copyright. The various cases referring to the subject will be found in the opinion rendered by Judge Lurton.

c. Right of Protection as Between Different Purchasers of the Secret.—The general rule is that there can be no exclusive right to the use of a secret formula, although there is a right to prevent anyone from obtaining it or using it through a breach of contract or of trust. Anyone who honestly gets the knowledge of such secret may use it in like manner as the original owner: *Chadwick v. Covell*, 151 Mass. 190, 21 Am. St. Rep. 442, 25 N. E. 1068, 6 L. R. A. 839. Thus where two persons had, unknown to each other, obtained knowledge of a secret formula from the discoverer in an honest manner, neither can be prevented from using it: *Stewart v. Hook*, 118 Ga. 445, 45 S. E. 369, 63 L. R. A. 255. In the case cited the court said: "It does not even appear that they knew of any right in the plaintiffs to manufacture or sell this preparation. It is quite evident that the plaintiffs have sued the wrong man. According to their allegations, Tilden was bound by them by contract not to divulge the secret formula of the Acme Opium Cure, but (whether to relieve the suffering of a drug-cursed world or to increase the dimensions of his bank account does not appear) he has violated his agreement, and in so doing has well nigh compassed the ruin of plaintiff's business. As has been seen, whatever Tilden's liability may be—and this we are not called upon to decide—the ones to whom he made the second sale of his discovery cannot, in the absence of a showing that they obtained the formula through some fraud or unfairness practiced upon the plaintiffs, be held liable to them in any way whatever."

Where defendants in a suit to restrain them from using a secret process had obtained their knowledge of the process from officers and employes of the complainant, they cannot defend upon the ground that the complainant had no title to the process because its assignor had procured the secret by fraud from the original discoverer, although complainant had obtained it honestly from such assignor: *Vulcan Detinning Co. v. American Can Co.*, 67 N. J. Eq. 243, 58 Atl. 290.

d. Right of Protection Where Held by Partnership.—The question whether a trade secret known by one member of a partnership is a partnership asset is one of intention depending upon the contract relations between the parties. The fact that the partnership deals in the product manufactured as a trade secret does not of itself determine such ownership: *Morison v. Moat*, 9 Hare, 241, 68 Eng. Reprint, 492. But where a trade secret is owned by a partnership, upon the dissolution of the partnership, in the absence of any agreement to the contrary, each partner has a right to use the trade secret: *Baldwin v. Von Micheroux*, 5 Misc. Rep. 386, 25 N. Y. Supp. 857.

e. **Right of Protection Where Held by Corporation.**—Where a corporation acquires a secret process or trade secret through a breach of contract or of trust of one of its officers, it may be enjoined from using such secret: *Stone v. Grasselli Chemical Co.*, 65 N. J. Eq. 756, 103 Am. St. Rep. 794, 55 Atl. 736, 63 L. R. A. 344; *Vulcan Detinning Co. v. American Can Co.*, 72 N. J. Eq. 387, 67 Atl. 339, 12 L. R. A., N. S., 102; *G. F. Harvey Co. v. National Drug Co.*, 75 App. Div. 103, 77 N. Y. Supp. 674; *Eastern Extracting Co. v. Greater New York Extracting Co.*, 126 App. Div. 928, 110 N. Y. Supp. 738.

IV. Judicial Proceedings for Protection of Secret Processes and Trade Secrets.

a. **In General.**—Although the court cannot compel one to disclose a secret process to one entitled to it under a contract, it may restrain such person from disclosing it to others: *National Gum etc. Co. v. Braendly*, 27 App. Div. 219, 51 N. Y. Supp. 93. As was said by the court in the much cited case of *Eastman Co. v. Reichenbach*, 20 N. Y. Supp. 110, in discussing the remedy of the owner of a secret process which is about to be used by his employés: "The very nature of the case, the peculiar character of the injury liable to be inflicted, and the incalculable damages which may possibly result, all show most conclusively that legal relief is totally inadequate for plaintiff's protection, and that its only resort must be to a court of equity. . . . By a careful reading of the various decisions upon this subject it will be seen that some are made to depend upon a breach of an express contract between the parties, while others proceed upon the theory that, where a confidential relation exists between two or more parties engaged in a business venture, the law raises an implied contract between them that the employé will not divulge any trade secrets imparted to him or discovered by him in the course of his employment, and that a disclosure of such secrets, thus acquired, is a breach of trust and a violation of good morals, to prevent which a court of equity should intervene."

In the case of a proposed use or disclosure of a trade secret by an employé, equity will always intervene to prevent it, because such use or disclosure is not only a breach of contract but also a breach of trust: *Westervelt v. National Paper & S. Co.*, 154 Ind. 673, 57 N. E. 552. And in a proper case a court of equity may award an accounting of profits earned by the one who has improperly used such a secret process or trade secret: *Vulcan Detinning Co. v. American Can Co.* (N. J. Eq.), 73 Atl. 603; *Green v. Folgham*, 1 Sim. & S. 398, 57 Eng. Reprint, 159. But where the parties in dealing with the trade secret have fixed by contract the amount of damages at a specified sum in case of a disclosure of the secret, an injunction will not be granted to restrain a disclosure of the secret, since the agreement itself has provided a complete remedy at law: *Nessle v. Reese*, 29 How. Pr. 382.

b. **Protection of Secret During Course of Litigation.**—In seeking relief in the courts the moving party is not required to make public his trade secrets in order to protect them against unlawful disclosure: *Sterling Varnish Co. v. Macon*, 217 Pa. 7, 66 Atl. 78; *S. Jarvis Adams Co. v. Knapp*, 58 C. C. A. 1, 121 Fed. 34. But where the owner of a secret process claims that another is fraudulently selling a spurious article as genuine, it is incumbent upon him to prove it and if he does not wish to disclose the secret ingredients constituting his own

article, he cannot recover on that theory: *Baglin v. Cusenier Co.*, 164 Fed. 25. A disclosure to the court of a trade secret does not, however, constitute a publication of it: *Stone v. Grasselli Chemical Co.*, 65 N. J. Eq. 756, 103 Am. St. Rep. 794, 55 Atl. 736, 63 L. R. A. 344. It may become necessary in some cases that the secret process or trade secret be disclosed to the court in order that the court may determine issues of fact raised in respect to it and in case of granting an injunction in order to make the terms of it sufficiently specific that the question of its violation may be determined. Of course, where the details of the secret are known to all the parties and no doubt arises as to its secret character, the court may well refuse to compel a disclosure of it: *Taylor Iron & Steel Co. v. Nichols*, 73 N. J. Eq. 684, ante, p. 753, 69 Atl. 186, 24 L. R. A., N. S., 933. An injunction in such cases should be sufficiently specific to protect the secret formula involved: *G. F. Harvey Co. v. National Drug Co.*, 75 App. Div. 103, 77 N. Y. Supp. 674.

The courts will not compel the disclosure of a secret process or trade secret in the course of examination of a witness in a case unless its disclosure is indispensable for the ascertainment of truth: *Moxie Nerve Food Co. v. Beach*, 35 Fed. 465; *Dobson v. Graham*, 49 Fed. 17; *Herreshoff v. Knietzsch*, 127 Fed. 492; *Crocker-Wheeler Co. v. Bullock*, 134 Fed. 241. But where the evidence is deemed to be material and pertinent, the fact that it will disclose a trade secret is held not sufficient to base a refusal to testify to it: *Johnson Steel etc. Co. v. North Branch Steel Co.*, 48 Fed. 191. But in another case in a suit for infringement where defendant denied the infringement of the plaintiff's patent and claimed to be operating his factory under a secret process and produced evidence tending to show that it was so conducted long prior to plaintiff's patent, the court refused to allow an inspection of his factory: *Stokes Bros. Mfg. Co. v. Heller*, 56 Fed. 297. In other words, the court will not allow a discovery of a litigant's trade secret if the rights of the other party can be ascertained without disclosing the secret: *Ashworth v. Roberts*, L. R. 45 Ch. Div. 623.

But where it is necessary to have the secret process or trade secret disclosed to the court, the court may still protect the secret against becoming known by taking the evidence as to the secret in camera. Everyone may be excluded except the parties and their counsel, and if the secret is not known to one of the parties to the action, such party may be excluded. The testimony so taken is sealed and only used in case it becomes necessary to determine whether any injunctive order of the court has been violated. The injunction itself need only refer to the secret. Such a mode of procedure allows the court to pass intelligently upon the case and affords ample protection to the secret: *Stone v. Grasselli Chemical Co.*, 65 N. J. Eq. 756, 103 Am. St. Rep. 794, 55 Atl. 736, 63 L. R. A. 344; *Taylor etc. Steel Co. v. Nichols*, 73 N. J. Eq. 684, ante, p. 753, 69 Atl. 186, 24 L. R. A., N. S., 933; *Badische Anilin etc. v. Levinstein*, L. R. 24 Ch. D. 156.

CASES

IN THE

COURT OF APPEALS

OF

NEW YORK.

PEOPLE v. ROCHESTER RAILWAY AND LIGHT COMPANY.

[195 N. Y. 102, 88 N. E. 22.]

A CORPORATION is Liable to be Indicted Either for Non-feasance or Misfeasance, the limitations on such liability being in the former case that the corporation must be capable of doing the act for the nonperformance of which it is charged, and that in the second case the act for the performance of which it is charged must not be beyond its authorized powers. (p. 771.)

A CORPORATION may be Liable Criminally for an Offense of Which a Specific Intent is a necessary element. (pp. 771, 772.)

A CORPORATION cannot be Convicted of a Homicide Under a Statute defining that crime as "the killing of one human being by the act, procurement or omission of another." Homicide as thus defined means the killing of one human being by another human being. (p. 774.)

Howard H. Widemer, district attorney, and Charles B. Bechtold, for the appellant.

Daniel M. Beach, for the respondent.

¹⁰³ **HISCOCK, J.** The respondent has been indicted for the crime of manslaughter in the second degree because, as alleged, it installed certain apparatus in a residence in Rochester ¹⁰⁴ in such a grossly improper, unskillful and negligent manner that gases escaped and caused the death of an inmate.

The demurrer to the indictment has presented the question whether a corporation may be thus indicted for manslaughter, under section 193 of the Penal Code.

Before proceeding to the interpretation of this specific provision we shall consider very briefly the general question discussed by the parties, whether a corporation is capable of committing in any form such a crime as that of manslaughter.

Of the correctness of the proposition urged in behalf of the people that it may do so, subject to various limitations, we entertain no doubt.

Some of the earlier writers on the common law held that a corporation could not commit a crime. Blackstone in his Commentaries, book 1, page 476, stated: "A corporation cannot commit treason or felony, or other crime, in its corporate capacity: though its members may, in their distinct individual capacities." And Lord Chief Justice Holt (Anonymous, 12 Mod. 559) is said to have held that "a corporation is not indictable, but the particular members of it are." In modern times, however, the courts and text-writers quite universally have reached an opposite conclusion. A corporation may be indicted either for nonfeasance or misfeasance, the obvious and general limitations upon this liability being in the former case that it shall be capable of doing the act for nonperformance of which it is charged and that in the second case the act for the performance of which it is charged shall not be one of which performance is clearly and totally beyond its authorized powers: Bishop's New Criminal Law, secs. 421, 422.

The instances in which it has been held that a corporation might be liable criminally simply because it did or did not perform some act, and where no element of intent was supposed to be involved, are so familiar that any extended reference to them is entirely unnecessary. The latest authority in this state upholding such liability is found in the case of *People v. Woodbury Dermatological Institute*, 192 N. Y. 105 454, 85 N. E. 697, where it was held that a corporation might be punished criminally for disobeying the statute providing that "any person not a registered physician who shall advertise to practice medicine, shall be guilty of a misdemeanor." There was involved no question of intent, but simply disobedience of a statutory prohibition against doing certain acts.

At times courts have halted somewhat at the suggestion that a corporation could commit a crime whereof the element of intent was an essential ingredient. But this doctrine, again with certain limitations, may now be regarded as established, and there is nothing therein which is either unjust or illogical.

Of course, it has been fully recognized that there are many crimes so involving personal, malicious intent and acts ultra vires that a corporation manifestly could not commit them: Wharton's Criminal Law, 9th ed., sec. 91; Morawetz on Private Corporations, 2d ed., sec. 732 et seq. But a corporation, generally speaking, is liable in civil proceeding for the conduct of the agents through whom it conducts its business so long as they act within the scope of their authority, real

or apparent, and it is but a step farther in the same direction to hold that in many instances it may be charged criminally with the unlawful purposes and motives of such agents while so acting in its behalf.

Only a few citations need be made of eminent authorities approving and illustrating this rule.

Mr. Bishop in his *New Criminal Law*, section 417, says: "But within the sphere of its corporate capacity, and to an undefined extent beyond, whenever it assumes to act as a corporation it has the same capabilities of criminal intent and of act—in other words, of crime—as an individual man sustaining to the thing the like relations. . . . Some have stumbled on the seeming impossibility of the artificial and soulless being, called a corporation, having an evil mind or criminal intent. . . . But the author explained in another work that since a corporation acts by its officers and agents, their purposes, motives and intent are just as much those of the corporation as are the things done."

¹⁰⁶ In *Telegram Newspaper Co. v. Commonwealth*, 172 Mass. 294, 70 Am. St. Rep. 280, 52 U. S. 445, 44 L. R. A. 159, a corporation was held liable for a criminal contempt. In the course of the opinion it was said: "It is contended that a corporation cannot be guilty of a criminal contempt although it may be fined for what is called a civil contempt. It is said that an intent cannot be imputed to a corporation in criminal proceedings. . . . We think that a corporation may be liable criminally for certain offenses of which a specific intent may be a necessary element. There is no more difficulty in imputing to a corporation a specific intent in criminal proceedings than in civil."

The most recent authority upon this subject is found in the decision of the supreme court of the United States in the case of *New York etc. R. R. Co. v. United States*, 212 U. S. 481, 29 Sup. Ct. Rep. 304, 53 L. ed. 613. In that case the railroad company and one of its officials had been convicted of the payment of rebates to a shipper. On the argument of the appeal it was urged that inasmuch as no authority was shown by the board of directors or the stockholders for the criminal acts of the agents of the company in contracting for and giving rebates, such acts should not be lawfully charged against the corporation, or as expressed in the opinion, "That owing to the nature and character of its organization and the extent of its power and authority, a corporation cannot commit a crime of the nature charged in this case." The court then said: "In this case we are to consider the criminal responsibility of a corporation for an act done while an authorized agent of the company is exercising the authority conferred upon him. It was admitted . . . that at the time mentioned in the indictment

the general freight traffic manager and the assistant freight traffic manager were authorized to establish rates at which freight should be carried. . . . Thus the subject matter of making and fixing rates was within the scope of the authority and employment of the agents of the company whose acts in this connection are sought to be charged upon the company. Thus clothed with authority, the agents were bound to ¹⁰⁷ respect the regulation of interstate commerce enacted by Congress, requiring the filing and publication of rates and punishing departures therefrom. Applying the principle governing civil liability, we go only a step farther in holding that the act of the agent, while exercising the authority delegated to him to make rates for transportation, may be controlled, in the interest of public policy, by imputing his act to his employer and imposing penalties upon the corporation for which he is acting in the premises. It is true that there are some crimes which in their nature cannot be committed by corporations. But there is a large class of offenses, . . . wherein the crime consists in purposely doing the things prohibited by statute. In that class of crimes we see no good reason why corporations may not be held responsible for and charged with the knowledge and purposes of their agents, acting within the authority conferred upon them."

Within the principles thus and elsewhere declared, we have no doubt that a definition of certain forms of manslaughter might have been formulated which would be applicable to a corporation, and make it criminally liable for various acts of misfeasance and nonfeasance when resulting in death, and amongst which very probably might be included conduct in its substance similar to that here charged against the respondent. But this being so, the question still confronts us whether corporations have been so made liable for the crime of manslaughter as now expressly defined in the section alone relied on by the people, and this question we think must be decisively answered in the negative.

Section 179 of the Penal Code defines homicide as "the killing of one human being by the act, procurement or omission of another." We think that this final word "another" naturally and clearly means a second or additional member of the same kind or class alone referred to by the preceding words, namely, another human being, and that we should not interpret it as appellant asks us to, as meaning another "person," which might then include corporations. It seems to us that it would be a violent strain upon a criminal statute to construe ¹⁰⁸ this word as meaning an agency of some kind other than that already mentioned or referred to, and as bridging over a radical transition from human beings to corporations. Therefore we construe this

definition of homicide as meaning the killing of one human being by another human being.

Section 180 says that "Homicide is either: 1. Murder; 2. Manslaughter"; etc. Section 193 says that: "Such homicide," that is, "the killing of one human being . . . by another," is manslaughter in the second degree when committed "without a design to effect death. . . . 3. By any act, procurement or culpable negligence of any person, which . . . does not constitute the crime of murder in the first degree or second degree, nor manslaughter in the first degree." Thus we have the underlying and fundamental definition of homicide as the killing of one human being by another human being, and out of this basic act thus defined and according to the circumstances which accompany it are established crimes of varying degree, including that of manslaughter for which the respondent has been indicted. In the definition of these crimes as contained in the sections under consideration (sections 183-193) we do not discover any evidence of an intent on the part of the legislature to abandon the limitation of its enactments to human beings or to include a corporation as a criminal. Many of these sections could not by any possibility apply to a corporation and in our opinion subdivision 3 of section 193 relating to manslaughter manifestly does not. It is true that the term "person" used therein may at times include corporations but that is not the case here. The surrounding and related sections are not calculated to induce the belief that it has any such meaning, and the classification of manslaughter as a form of homicide and the definition of homicide already quoted forbid it.

The judgment should be affirmed.

Cullen, C. J., Gray, Edward T. Bartlett, Werner, Willard Bartlett and Chase, JJ., concur.

Judgment affirmed.

THE PROSECUTION AND PUNISHMENT OF CORPORATIONS FOR CRIME.

- I. The Establishment of the Criminal Jurisdiction Over Corporations, 775.
- II. For What a Corporation may and may not be Indicted.
 - a. Misfeasance and Nonfeasance, 775.
 - b. Nuisances, 777.
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- III. Corporations in Hands of Receiver, 779.
- IV. The Mode and Measure of Punishment.
 - a. The Mode, 779.
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I. The Establishment of the Criminal Jurisdiction Over Corporations.

The variations that exist between modern decisions and ancient cease to lose any antagonistic significance when a searching investigation is made of causes rather than effects. In the days of Blackstone it was laid down that "a corporation cannot commit treason or felony, or other crime, in its corporate capacity, though its members may, in their distinct individual capacities": Blackstone's Commentaries, bk. 1, 476. Indeed, up to the middle of the last century a corporation was described by a humorous legal luminary as "without a body to be kicked or a soul to be damned"; and now at this date we find that the corporation has not only nearly all the civil liabilities of the citizen but many of the criminal as well. This is easily reconcilable and without doing violence to the great exponent on the reach and authority of the common law. The ordinary effect of the march of civilization, combined with the adaptation to new times of old methods, is the simple explanation. In the days when Blackstone wrote, the scope of corporations was circumscribed both by reason of their paucity and their novelty. Their very fiction was a protecting atmosphere which proved a resilient buffer against any new and therefore unknown force. But with the recognition of their convenience there came also, to thoughtful men, the necessity for their regulation—the growth of right and power was to be cherished by the assimilation of duties and responsibility; and hence we find at the present day a certain and unqualified trend of judicial legislation in favor of establishing the criminal liability of the corporation itself—entirely apart from its constituent officers—wherever the commission of the crime does not so call for personal malicious interest as to render a prosecution a *reductio ad absurdum*. At the present time the contrast is well marked between the period when the "artificial and soulless being called a corporation" was liable only in the civil jurisdiction of the courts on certain contracts and torts and the present, when "within the sphere of its corporate capacity and to an undefined extent beyond, whenever it assumes to act as a corporation, it has the same capabilities of criminal intent and of act—in other words, of crime—as an individual man sustaining to the thing the like relations": Bishop's New Criminal Procedure, sec. 417; *United States v. Alaska Packers' Assn.*, 1 Alaska, 217. The further extension of that criminal responsibility must nevertheless be jealously watched, lest in the zeal for reform or novelty, the real criminal be allowed to shelter himself under the shadow cast by the corporation, lest he who should be deprived of liberty is through the corporation simply deprived of the amount of a fine. Henceforth, the legislatures must hasten slowly, and perhaps the real remedy may be found to lie in the punishment of both.

II. For What a Corporation may and may not be Indicted.

a. **Misfeasance and Nonfeasance.**—Having thus seen that the responsibilities of corporations have increased in proportion with their privileges and functions and numbers, and that such responsibilities have increased by a sort of natural change in degree—from civil to criminal—we purpose examining the class of crime or offense to which the extension of that responsibility is due by recent decision. So far back as 1854 the liability of a corporation both for misfeasance and nonfeasance was established. Even at that time it was admitted

that the tendency of the more recent cases in courts of the highest authority was to extend the application of all legal remedies to corporations, and assimilate them, as far as possible, in their legal duties and responsibilities, to individuals. While they could not be guilty of treason or felony, of perjury or offenses against the person, there was no good reason for their exemption from the consequences of unlawful and wrongful acts committed by their agents in pursuance of the authority derived from them. In *Commonwealth v. Proprietors of New Bedford Bridge*, 2 Gray, 339, we find: "There is no principle of law which would thus furnish immunity to a corporation. If they commit a trespass on private property or obstruct a way, to the special injury and damage of an individual, no one can doubt they are liable therefor. In like manner and for the same reason, if they do similar acts to the inconvenience and annoyance of the public, they are responsible in the form and mode appropriate to the prosecution and punishment of such offenses. . . . The distinction between nonfeasance and misfeasance is often one more of form than of substance. There are cases where it would be difficult to say whether the offense consisted in the doing of an unlawful act or in the doing of a lawful act in an improper manner. The difficulty in distinguishing the character of these offenses strongly illustrates the absurdity of the doctrine that a corporation is indictable for a nonfeasance and not for a misfeasance."

In Vermont the law had been settled long before that. The case of *Lyman v. White River Bridge Co.*, 2 Ark. 255, 16 Am. Dec. 705, laid down that corporations were liable for torts committed in the prosecution of the business of their incorporation as much as natural persons. After that the English courts began to adopt the American decisions, and the transition from civil liability only for tort to criminal responsibility was all but accomplished. An indictment for a nuisance is only a mode of trying, in a public form, the same right which is involved in every private action for the same reason. Any course of reasoning which attempts to deny the liability of defendants to an indictment for such tort also equally excuses them from all civil liability for such tort, and would carry us back to the old common-law notions upon the subject of the utter inability of a corporation to commit a tort at all: *State v. Vermont Cent. R. Co.*, 27 Vt. 103.

The law thus early laid down has been followed almost without question, whether the particular act of which the corporation is guilty is misfeasance or nonfeasance. With the exception of a few cases opposed to the principle, to be examined later on, the law in regard to the subject is fairly well settled to be that corporations are liable to be indicted both for malfeasance and nonfeasance in exactly the same way as private individuals: *Southern Ry. Co. v. State*, 125 Ga. 287, 114 Am. St. Rep. 203, 54 S. E. 160, 5 Ann. Cas. 411; *Southern Exp. Co. v. State*, 1 Ga. App. 700, 58 S. E. 67; *Illinois Cent. R. Co. v. People*, 95 Ill. 313; *Cincinnati R. Co. v. Commonwealth*, 80 Ky. 137; *Commonwealth v. Pulaski County Agr. etc. Assn.*, 92 Ky. 197, 17 S. W. 442; *Louisville R. Co. v. Commonwealth*, 130 Ky. 728, 132 Am. St. Rep. 408, 113 S. W. 517; *State v. City of Portland*, 74 Me. 268, 43 Am. Rep. 586; *Commonwealth v. Hancock Free Bridge Corp.*, 2 Gray, 58; *Boston C. & M. R. R. v. State*, 32 N. H. 215; *State v. Boston & M. R. R.*, 58 N. H. 410; *State v. Morris & E. R. Co.*, 23 N. J. L. 360; *Sus-*

quehanna Turnpike Co. v. People, 15 Wend. 267; Syracuse & T. Plank Road Co. v. People, 66 Barb. 25; People v. Woodbury Dermatological Institute, 192 N. Y. 454, 85 N. E. 697; People v. Rochester Ry. & L. Co., 195, N. Y. 102, ante, p. 770, 88 N. E. 22, 21 L. R. A., N. S., 998; Norris v. State, 25 Ohio St. 217, 18 Am. Rep. 291; Louisville & N. R. Co. v. State, 3 Head, 523, 75 Am. Dec. 778. One of the latest expositions of the law on the subject is contained in United States v. Alaska Packers' Assn., 1 Alaska, 217: "It is true that a corporation cannot be imprisoned or hanged, but a corporation can be fined just as a natural person can, when it does any act in the line of its business resulting in a violation of the law. If, in the course of its business, it kill a person, then if the law fix a fine or damages for such unlawful killing, even though it were a felony, the law could be enforced for payment of such fine and the property of the corporation made to answer; and where life is taken by a corporation in pursuing its business and it is compelled to answer civilly because of such wrongful death, there is no good reason why it may not be required to answer criminally for the same act done in the line of its business, if the law so provides." It is to be noted that at the time of giving the opinion just cited the case was regarded as a test to determine the right to indict a corporation.

As against the recognition of the new rule there is left a very feeble array of authority. State v. Ohio & M. R. Co., 23 Ind. 362, may be disregarded now as authoritative, for while it decides that a corporation is not liable for misfeasance it professes to and does follow State v. Great Works Milling & Mfg. Co., 20 Me. 41, 37 Am. Dec. 38, which has been overruled by State v. City of Portland, 74 Me. 268, 43 Am. Rep. 586, from which latter case the following excerpt is of use: "The doctrine laid down in State v. Great Works Milling & Mfg. Co., 20 Me. 41, 37 Am. Dec. 38, so far as it relates to indictments of this character, is not merely obsolete, but properly overruled upon grounds so satisfactory and heretofore so well stated by other courts, that it is needless to reiterate them: See Commonwealth v. Proprietors of New Bedford Bridge, 2 Gray, 345 and 346; People v. Corporation of Albany, 11 Wend. 539, and Freeman's note on that case, 27 Am. Dec. 99; Mayor of New York v. Furze, 3 Hill, 615."

State v. French Lick Springs Hotel Co., 42 Ind. App. 282, 82 N. E. 801, 85 N. E. 724, is the only case which says that corporations are only indictable where the legislature has specifically provided that they may be proceeded against, but that there are in Indiana certain offenses so legislated for.

The historic case of McKim v. Odom, 3 Bland (Md.), 407, can hardly be relied on at this date. It was a decision of 1829 before the movement for the adoption of the present rule set in. While it contains an obiter dictum that corporations may not be indicted, we find in it the germ of the new principle, for at page 421 of the voluminous opinion the following passage occurs: "It is now settled that a corporation may be charged in actions ex delicto as well as ex contractu, notwithstanding the general rule that they can only act and bind themselves by means of their corporate seal."

b. Nuisances.—While nuisances might well come within the category of misfeasance and nonfeasance, we have preferred to keep them separate for the reason that whatever difference of opinion there has been as to the class of liability under either of those heads, there is

a consensus of opinion that indictment is the proper remedy for nuisance: *State v. Louisville N. A. & C. Ry. Co.*, 86 Ind. 114; *State v. Baltimore O. & C. R. Co.*, 120 Ind. 298, 22 N. E. 307; *State v. Sullivan County Agr. Soc.*, 14 Ind. App. 369, 42 N. E. 963; *Paragon Paper Co. v. State*, 19 Ind. App. 314, 49 N. E. 600; *Commonwealth v. Vermont & M. R. Corp.*, 4 Gray, 22; *People v. Detroit White Lead Works*, 82 Mich. 471, 46 N. W. 735, 9 L. R. A. 722; *State v. White*, 96 Mo. App. 34, 69 S. W. 684; *Morris & E. R. Co. v. Prudden*, 20 N. J. Eq. 530; *State v. Western N. C. R. Co.*, 95 N. C. 602.

In Ohio there appears a ruling to the contrary, but it is rather on the construction of the statute of April 15, 1857, for the prevention of offenses. That act uses the word "persons" which has been there construed as not including corporations: *State v. Cincinnati Fert. Co.*, 24 Ohio St. 611.

c. Manslaughter.—While it may be found a little difficult to reconcile the latest authorities with the trend of legislation toward increasing the criminal responsibilities of corporations, it must not be forgotten that the path of reform, to be sure and lasting, must be trodden slowly and the steps of the reformer carefully chosen. Hence, those eager to see the extinction of the old fictional person in the corporation replaced by an entity as responsible as an individual human being must be satisfied with the short distance which has been covered during the last two centuries. To-day the liability of the corporation criminal stands established, as has been shown (*United States v. Alaska etc. Assn.*, 1 Alaska, 217), for all offenses not punishable personally, and therefore stops short at the felony of homicide. The authority for this is *People v. Rochester Ry. & L. Co.*, 195 N. Y. 102, ante, p. 770, 88 N. E. 22, 21 L. R. A., N. S., 998, which clearly shows that under the accepted definition of homicide a corporation cannot be indicted for the offense.

So long as homicide is defined to be the "killing of one human being by the act, procurement, or omission of another," and so long as the legislature refrains from directly expressing that the word "another" in that definition shall include a corporation, just so long will the present immunity exist. That is the law as it stands. Does the progress of civilization demand that it should go further? We think that it does—that there is room for legislation which shall prevent the placing on the shoulders of some scapegoat employé crimes which are awful in their consequence, such as railway, steamship, factory and other machinery catastrophies, and shall annex a criminal responsibility to the individual directors or controllers of the corporation, or on the corporation itself, or if need be and possibly the solution will be found to be in the punishment of both.

The question of intent has been settled and a corporation may be liable criminally for certain offenses of which a specific intent may be a necessary element. In *Telegram Newspaper Co. v. Commonwealth*, 172 Mass. 294, 70 Am. St. Rep. 280, 52 N. E. 445, 44 L. R. A. 159—to be regarded as a leading case—we find: "There is no more difficulty in imputing to a corporation a specific intent in criminal proceedings than in civil." So that with the exceptions named—those offenses in which the personal element of individual malice is in question—corporations may be indicted for felony or misdemeanor punishable by fine: *United States v. Alaska etc. Assn.*, 1 Alaska, 217; 3 *Purdy's Beach on Private Corporations*, sec. 1016.

d. Other Offenses.—Corporations have been held indictable for conspiracy: *State v. Eastern Coal Co.*, 29 R. I. 254, 132 Am. St. Rep. 817, 70 Atl. 1; for criminal contempt of court in publishing articles likely to influence a trial: *Telegram Newspaper Co. v. Commonwealth*, 172 Mass. 294, 70 Am. St. Rep. 280, 52 N. E. 445, 44 L. R. A. 159; for criminal libel: *Brennan v. Tracy*, 2 Mo. App. 540; *State v. Boogher*, 3 Mo. App. 442; *State v. Atchison*, 3 Lea, 729, 31 Am. Rep. 663; *People v. Star Co.*, 120 N. Y. Supp. 498; for criminal negligence: *Texas & St. L. R. Co. v. State*, 41 Ark. 488; *Commonwealth v. Boston & M. R. Co.*, 133 Mass. 383; disobedience to stamp acts: *United States v. Baltimore & O. R. Co.*, Fed. Cas. No. 14,509; for keeping a disorderly house: *State v. Passaic County Agr. Soc.*, 54 N. J. L. 260, 23 Atl. 680; for gaming when it amounts to a nuisance: *State v. Sullivan County Agr. Soc.*, 14 Ind. App. 369, 42 N. E. 963; for peddling without a license: *Standard Oil Co. v. Commonwealth*, 107 Ky. 606, 55 S. W. 8; *Crall v. Commonwealth*, 103 Va. 855, 862, 49 S. E. 638, 1038; for nonrecording bonds pursuant to statute: *Southern Ry. Co. v. State*, 125 Ga. 287, 114 Am. St. Rep. 203, 54 S. E. 160, 5 Ann. Cas. 411, overruling *McDaniel v. Gale City Gas Light Co.*, 79 Ga. 58, 3 S. E. 693; for violating the eight-hour labor law: *United States v. John Kelso Co.*, 86 Fed. 304; for usury: *State v. First Nat. Bank*, 2 S. D. 568, 51 N. W. 587.

III. Corporations in Hands of a Receiver.

An indictment does not, however, lie against a corporation when it is in the hands of a receiver: *State v. Wabash Ry. Co.*, 115 Ind. 466, 17 N. E. 909, 1 L. R. A. 179; *State v. Norfolk & S. Ry. Co. (N. C.)*, 67 S. E. 42; *State v. Vermont Cent. R. Co.*, 30 Vt. 108.

IV. The Mode and Measure of Punishment.

a. The Mode.—As a corporation cannot be brought into court in like manner to an individual, it follows that notice to it of the proceedings is all that is required to give the court—assuming its jurisdiction is established—the power to proceed with the case. It has been settled that where the defendant is a corporation, the finding of an indictment is the appropriate first step in the prosecution. The fact that there was no previous complaint or binding over is of no consequence: *State v. Western N. C. R. R.*, 89 N. C. 584; *Boston C. & M. R. R. v. State*, 32 N. H. 215; *Commonwealth v. Lehigh Valley R. R.*, 165 Pa. 162, 30 Atl. 836, 27 L. R. A. 231; *United States v. John Kelso Co.*, 86 Fed. 304; *United States v. Correspondence Inst. of America*, 125 Fed. 94.

After indictment the proper course is to issue and serve a summons to or notice on the corporation to appear and answer to the indictment, the summons or notice being served in the ordinary method provided for service of such documents on corporations: *State v. President etc. of Ohio and M. R. Co.*, 23 Ind. 362; *State v. Western N. C. R. Co.*, 89 N. C. 584; *State v. Norfolk & S. Ry. Co. (N. C.)*, 67 S. E. 42; *Boston C. & M. R. R. v. State*, 32 N. H. 215; *State v. Security Bank*, 2 S. D. 538, 51 N. W. 337. And in Alaska, service of the bench warrant is sufficient: *United States v. Yakutat & S. Ry. Co.*, 2 Alaska, 628. A corporation indicted for a statutable offense will not be permitted to escape punishment by showing that the act constituting the offense was ultra vires: *Louisville R. Co. v. Commonwealth*, 130 Ky. 738, 132 Am. St. Rep. 408, 113 S. W. 517.

b. The Measure.—The only punishment that can be inflicted on a corporation for a criminal offense is a fine which can be levied by an execution issued by the court: *Commonwealth v. Louisville & N. R. Co.* (Ky.), 32 S. W. 164; *Telegram Newspaper Co. v. Commonwealth*, 172 Mass. 294, 70 Am. St. Rep. 280, 52 N. E. 445, 44 L. R. A. 159; 1 Bishop's *New Criminal Procedure*, sec. 1303.

PEOPLE v. MORRISON.

[195 N. Y. 116, 88 N. E. 21.]

WITNESS—Examination of Party in His Own Behalf.—A party called in his own behalf is not sworn and does not testify as a party, but as a witness, and the general rules of evidence, both as to admissibility and methods of examination and cross-examination, apply to him precisely the same as to other witnesses. (p. 781.)

WITNESS—Impeachment by Showing Indictment.—A witness cannot be impeached or discredited by showing that he has been indicted; for an indictment is a mere accusation, raises no presumption of guilt, and is purely hearsay. This rule applies to criminal actions as well as civil, and to all witnesses whether parties or not. (p. 781.)

John F. Clarke, for motion for reargument.

Martin T. Manton, opposed to motion.

¹¹⁶ VANN, J. The defendants were convicted of the crime of petit larceny upon evidence tending to show that they stole clams and oysters which had been planted upon a plat of land, duly staked out, under the waters of Jamaica bay. A material issue on the trial was whether the plat had been staked or not and there was a decided conflict in the evidence upon that question. We reversed the judgment of conviction because a witness for the defendants, who had testified that the plat was not staked out and that there were no stakes surrounding it, was asked by the assistant district attorney on cross-examination, and, under objection and exception, was allowed to answer that he had been indicted for stealing clams ¹¹⁷ from the bed in question. The writer of this memorandum, who prepared the opinion of the court, in referring to said witness, designated him as the defendant Morrison, whereas he was not John Morrison, the defendant, but William Morrison, his brother, each having testified that the plat was not staked out. The statement in the opinion as to what the witness swore to both on his direct and cross-examination was given with entire accuracy, but for the mistake in referring to the witness by the wrong name the learned district attorney thinks he is entitled to a reargument of the appeal. His theory, appar-

ently, is that as William Morrison was not a party there was no error in allowing him to testify that he had been indicted.

The motion is founded on a misunderstanding of the rules of evidence governing the subject. A party called in his own behalf is simply a witness the same as any other witness. He is not sworn and does not testify as a party but as a witness, and the general rules of evidence, both as to admissibility and methods of examination and cross-examination, apply to him in precisely the same way as to a witness who is not a party. Thus in *Ryan v. People*, 79 N. Y. 593, Chief Judge Church, referring to *People v. Crapo*, 76 N. Y. 288, 32 Am. Rep. 302, said: "The rule [that a witness may not be asked if he has been indicted] was applied in that case to an accused person who was sworn as a witness in his own behalf, but on principle it seems equally incompetent when applied to any other witness."

It is well settled in this state, and it was the rule before parties were allowed to be witnesses, that a witness may not be impeached or discredited by showing on his cross-examination or in any other way that he has been indicted. An indictment is a mere accusation and raises no presumption of guilt. It is purely hearsay, for it is the conclusion or opinion of a body of men based on *ex parte* evidence. The rule applies to criminal actions as well as civil, and to all witnesses whether parties or not. As was said in a case decided as early as 1829: "The credibility of a witness is not to be impeached ¹¹⁸ by proof of a particular offense, but by evidence of general bad character. If it was not competent to prove that the witness had perpetrated the offenses for which he had been indicted (of which there could be no question), it follows, of necessity, that the fact of his having been indicted was inadmissible evidence": *Jackson v. Osborn*, 2 Wend. 555, 20 Am. Dec. 649.

The mistake was not material in any possible view of the case, and obviously could have had no influence upon the result.

The motion for a reargument should be denied.

Cullen, C. J., Gray, Edward T. Bartlett, Haight, Werner and Hiscock, JJ., concur.

Motion for reargument denied.

Impeaching Witnesses by Showing That They have Been Indicted for crimes is discussed in the note to *Lodge v. State*, 82 Am. St. Rep. 39.

MATTER OF HALLENBECK.

[195 N. Y. 143, 88 N. E. 16.]

ADMINISTRATION—Exemption for Widow.—The Undivided One-half Interest of a decedent in exempt articles may be set apart for the use of his widow, where he is not the owner in severalty of sufficient personalty to satisfy the statute. (pp. 782, 783.)

G. K. Daly, for the appellant.

L. Royce Tilden, for the respondent.

144 WERNER, J. Upon the accounting which resulted in the decree made by the surrogate and unanimously affirmed at the appellate division a number of questions were raised. These, with a single exception, were correctly decided. The exception alluded to lies in the disposition of certain articles of personal property which the appraisers appointed by the surrogate had set apart for the use of the widow of the intestate under section 2713 of the Code of Civil Procedure. The surrogate held that these articles were improperly set apart as exempt, and that they should have been included in the inventory as salable assets. The items in controversy are of extremely small value, and the matter is worthy of notice only because it involves a principle of importance in the settlement of decedents' estates.

It appears that the personal effects of the intestate consisted in part of a one-half interest in a kitchen range, in a parlor stove and pipe, in eight dining-room chairs, in a dining-room table, in two pairs of blankets and in a goat-skin robe, the value of which articles was thirty-three dollars and fifty cents. These were set apart to the widow as being exempt under section 2713 of the Code of Civil Procedure. It was conceded that they belonged in the category of personal effects which are ordinarily exempt under the statute referred to, but it was held by the surrogate and the appellate division that the usual rule did not apply because the intestate was not the sole owner of the chattels enumerated, and had only an undivided one-half interest therein. This conclusion was apparently based upon the dictum of Boeckes, J., in *Baucus v. Stover*, 24 Hun, 109, where the appraisers set apart for the widow the value of ten sheep and two swine, in which the testator owned a one-half interest. There the court thought that since the testator's ownership of the chattels was not sole, there could be no such
145 actual setting apart and delivery of the property as the statute contemplates, and thus the statute could have no application. We differ from what we regard as an extremely narrow construction of the statute. A dispute could hardly arise in a case where the intestate is the absolute owner of

personal property enough to enable the appraisers to set apart for the widow all that she is entitled to under the statute. In such a case the widow could, of course, insist upon property in which she would not need to divide the ownership and possession with another. But when the decedent has not the absolute ownership of enough personal property to satisfy the statute, there seems to be no good reason why the appraisers should not obey its commands so far as they can. And this should certainly be the rule when, as in the case at bar, the widow is satisfied with the action of the appraisers.

For these reasons we think the decree of the surrogate and order of affirmance made by the appellate division should be modified by deducting from the list of salable assets chargeable to the administrator the value of the articles set apart by the appraisers for the use of the widow, and as thus modified the decree and order are affirmed, without costs in this court to either party.

Cullen, C. J., Haight, Vann, Willard Bartlett, Hiscock and Chase, JJ., concur.

Ordered accordingly.

The Exemption from Execution of Property of Cotenants and partners is considered in the note to McCoy v. Brennan, 1 Am. St. Rep. 593. According to Heekle v. Grewe, 125 Ill. 58, 8 Am. St. Rep. 332, personal property of a tenant in common is equally exempt from levy and forced sale as like interests in other property, where the possession as well as the title is several.

CRAWFORD v. KROLLPFEIFFER.

[195 N. Y. 185, 88 N. E. 29.]

PARTY-WALL—Agreement for Payment not Running With Land.—Where an owner of land builds a party-wall under an agreement with the adjoining land owner that when he or his assigns shall use it he or they shall pay the value of the wall, the covenant of payment does not run with the land: there is a distinction, in respect to their running with the land, between agreements contemplating the present construction of a party-wall and those authorizing a construction by either party in the future. (p. 785.)

Joseph Fettretch, for the appellant.

Harold Swain, for the respondent.

¹⁸⁵ GRAY, J. The plaintiff and Francis Crawford were owners of adjoining parcels of land and, on February 28,

1899, entered into an agreement in writing, plaintiff being party of the first part, and Francis Crawford being party of the second part, which was duly recorded in the office of the register of the county of New York; in and by which it was provided that the plaintiff should forthwith construct a party-wall, the center line of which should be the line between the two lots. It was further provided that the entire cost of constructing the ¹⁸⁶ wall should be borne by the plaintiff, or his assigns, and that "the said party of the second part hereto, or his assigns, shall be at liberty at any time hereafter to use the said wall for all the purposes of a party-wall for any house which he, or his assigns, may erect on said land owned by the said party of the second part, upon payment by the said party of the second part, or his assigns, to the said party of the first part, his legal representatives or assigns, the sum of five hundred dollars in cash, such payment to be made when the wall is used." It was further provided that, should it become necessary to repair, or to rebuild, the wall after the same should be used by the party of the second part, or his assigns, the cost thereof should be borne equally by the parties, or their representatives, heirs, executors, administrators or assigns. The final clause of the agreement was as follows: "Fifth. That this agreement shall be binding on and inure to the benefit of the heirs, executors, administrators and assigns of the respective parties hereto, and shall be construed as a covenant running with the land," etc. The plaintiff built the wall contemplated, in connection with the construction of his building. Francis Crawford died seised of the premises adjoining and his executors conveyed them to another, subject to the party-wall agreement, who built upon the same, using the wall. The grantee of the executors conveyed the premises, so built upon, to the defendant, subject to the party-wall agreement. This action was brought to enforce a lien for the amount due under the agreement for the use of the party-wall. The complaint was dismissed upon the merits, at the special term, and the judgment recovered by the defendant was affirmed by the appellate division in the first department. The plaintiff further appeals to this court.

¹⁸⁷ The appellate division, in affirming the judgment for the defendant, based its determination upon the ground that the covenant in the party-wall agreement did not run with the land, within the authority of certain decisions of this court, inasmuch as it did not create any privity of estate. This distinction was pointed out that "where the agreement does not contemplate the present construction of a party-wall, but authorizes its construction by either party in the future, the rule is different and the covenant is said to cre-

ate a privity of estate and to run with the land." We think that this distinction ¹⁸⁸ is one, which has been established by our decisions, and that a rule of property has thereby been created, which should not be departed from: See *Mott v. Oppenheimer*, 135 N. Y. 312, 31 N. E. 1097, 17 L. R. A. 409, and *Sebald v. Mulholland*, 155 N. Y. 455, 50 N. E. 260.

Prior to the decision in *Mott v. Oppenheimer*, the rule had become firmly settled that, where an owner of land builds a party-wall, under an agreement with his adjoining land owner that, when he or his assigns shall use it, he or they should pay the value of the party-wall, the covenant of payment was not one which ran with the land: See *Cole v. Hughes*, 54 N. Y. 444, 13 Am. Rep. 611; *Scott v. McMillan*, 76 N. Y. 141; *Hart v. Lyon*, 90 N. Y. 663. In the case of *Cole v. Hughes*, upon which were rested the decisions in *Scott v. McMillan* and in *Hart v. Lyon*, it was held, in substance, that the party-wall agreement, which was entered into for the purpose of permitting one of the parties to erect the wall, created no privity of estate between the contracting parties, but merely a privity of contract; leaving the burden, or liability, of payment with the original covenantor. Those cases were actions at law to recover one-half of the value of the party-wall against subsequent adjoining owners, upon their using the wall, in which the plaintiffs failed to recover. In the last one, of *Hart v. Lyon*, the covenant for payment was accompanied, in the agreement, by a further covenant that the expense of repairing, or of rebuilding, the party-wall should be borne equally by the parties, their heirs and assigns. This gave occasion to the court to hold that the latter covenant "should be construed as perpetual and as a covenant running with the land, while the other, being personal, could not be so regarded"; thus, plainly intimating that there was a distinction to be observed, where the covenant was prospective in imposing a burden upon the land in the hands of its future owner. When the case of *Mott v. Oppenheimer*, 135 N. Y. 312, 31 N. E. 1097, 17 L. R. A. 409, was decided, the rule of the cases referred to was not sought to be disturbed and the decision proceeded upon the difference in the situation and in the agreement of the parties. There, neither of the parties to the agreement, apparently, was about to build and they made ¹⁸⁹ it with reference to the future. They were adjoining owners of unimproved lots and through the agreement obtained the necessary authority for the construction of a party-wall thereafter, by either, or by the successors in interest of either, and for the use of the same by the then adjoining owner upon his paying one-half of the then value of the portion used. Subsequently, and when the lands had come into other ownerships, such a party-wall was built and

the plaintiff, who had acquired the premises so improved, brought the action against the adjoining land owner and was given a lien upon the defendant's premises for the value of one-half of the wall. It was held that the covenant of the parties to the agreement was not personal, and that it concerned the land and became annexed to the estate. "The effect of the contract," it was said, "clearly was to grant, or to create, an interest in the premises described." Later, in the case of *Sebald v. Mulholland*, 155 N. Y. 455, 50 N. E. 260, the case of *Mott v. Oppenheimer* was considered and, adverting to the fact that it was not proposed, in its decision, to change the rule of the earlier cases, it was held that it was distinguishable in its facts. That distinction was pointed out as being in this, that "the provisions of the agreement in that case related to the future use of the property, and there was no intention to provide for any present or existing situation"; that it was "made with the view that such a contract would be beneficial to the land of both parties and would bind it when the conditions contemplated should subsequently arise. . . . But in the other cases, . . . as well as in the case at bar, the agreement was in effect a personal covenant between the parties." The agreement in *Sebald v. Mulholland* was made between one who was "about to erect a building upon his lot" and another, owning the adjoining land, who agreed for himself and "his personal representatives," whenever he, or they, might desire to use the wall, to pay the due proportionate expense of its construction. The agreement differed from that in *Mott v. Oppenheimer*, 135 N. Y. 312, 31 N. E. 1097, 17 L. R. A. 409, not only in the respect dwelt upon in the opinion, but also in the fact that the covenant of payment was made by the adjoining lot owner for himself and "his personal ¹⁹⁰ representatives." Though I had written the opinion for the court in *Mott v. Oppenheimer*, I expressed myself as concurring with Judge Martin, who wrote in *Sebald v. Mulholland*, upon the ground that the contract then in question required a different construction from that in *Mott v. Oppenheimer*. It was different in the respects noted. The result of this last decision was to establish a test, by which it should be ascertained when the covenant in a party-wall agreement ran with the land. The appellate division justices have correctly pronounced upon the rule, as it was left by the decisions mentioned, and, as I have said, it being a rule of property, it should stand.

The judgment appealed from should be affirmed.

Cullen, C. J., Edward T. Bartlett, Vann, Willard Bartlett and Chase, JJ., concur; Haight, J., not voting.

Judgment affirmed, with costs.

The Question Whether Covenants in Regard to a Party-wall run with the land is discussed in the notes to Dunsecomb v. Randolph, 89 Am. St. Rep. 941; Geiszler v. De Graaf, 82 Am. St. Rep. 679. According to Sandberg v. Rowland, 51 Wash. 7, 130 Am. St. Rep. 1077, covenants for the erection of a party-wall run with the land, so that when one of the parties thereto conveys his lot, the grantee may enforce against the other party to the original contract the provision therein for payment. And according to Southworth v. Perring, 71 Kan. 755, 114 Am. St. Rep. 527, if the respective owners of two adjoining lots enter into an agreement, expressly binding their heirs and assigns, which provides that the wall of a building one of them is about to erect shall be placed upon the dividing line, and that when the other builds he shall use it as a party-wall and pay the first party one-half its value, and after the building is erected both lots are conveyed, the grantee of the vacant lot who builds thereon and makes use of the wall must make payment therefor to the grantee of the improved lot. One who uses a wall erected on the dividing line by the owner of an adjacent lot should pay a reasonable price for the use estimated as of the time the user takes place, and this although neither he nor his vendor was a party to the erection of the wall, and made no agreement, express or implied, concerning it: Spaulding v. Grundy, 126 Ky. 510, 128 Am. St. Rep. 328.

ROSS v. McCALDIN.

[195 N. Y. 210, 88 N. E. 50.]

JURY TRIAL—**Question Whether Action is at Law or in Equity.**—In an action to recover a debt where the plaintiff alleges that he has accepted promissory notes from the defendant on account of the indebtedness which have never been paid, and that he has given the defendant a receipt in full which he asks to have vacated and annulled, and prays for a judgment for the amount of the debt with interest, the allegation in regard to the receipt does not turn the action into a case for the cognizance of a court of equity, but the action is a common-law action in which the defendant is entitled to a jury trial. (p. 788.)

James Troy and Thomas H. Troy, for the appellant.

J. Stewart Ross, for the respondent.

212 WILLARD BARTLETT, J. This is a common-law action to recover an indebtedness of one thousand dollars alleged to be due to the plaintiff from the defendant. The principal plea was payment. Evidently anticipating this plea the plaintiff in his complaint alleged that he had accepted two promissory notes from the defendant on account of his debt which had never been paid and that he had given to the defendant a receipt for one thousand dollars in full settlement of all liability, which receipt he asked to have vacated, annulled and rescinded. This prayer for relief was followed by a demand for judgment in the sum of one thousand dollars, with interest and costs.

The allegations of the complaint in regard to this receipt do not suffice to turn the action into a case for the cognizance of a court of equity. The receipt is not a contract: *Ryan v. Ward*, 48 N. Y. 204, 8 Am. Rep. 539. It is merely a declaration which the defendant might use as evidence in support of his plea of payment. The cases cited by the respondent in which equity has entertained jurisdiction of suits to cancel releases have, therefore, no application here. We are clearly of opinion that this action is a common-law action, in which the defendant was entitled to a jury trial, provided he made a seasonable demand therefor and did not waive his right thereto in any of the modes prescribed by the statute relating to that subject.

The action was moved for trial at a special term of the supreme court in Kings county. At the outset of the trial the following proceedings took place:

“Defendant’s Counsel: Your honor will see by reading the complaint that there is no equitable cause of action set out; under the former practice the proper course would have been, if there was no equitable cause of action set up, to ask for a dismissal of the complaint, but under the decisions since and the provisions of the code allowing different causes of action to be united, whether equitable or not, it has been held that the court must determine from the allegations of the complaint, not from the prayer for relief, what the character of the action is. Your honor will see, after looking at this complaint, that the relief demanded is a judgment for a sum ²¹³ of money, and I think, if your honor will read the complaint, you will see that there is no equitable cause of action set forth.

“The Court: I think I will hear the proofs and decide the question afterward.

“Motion denied. Defendant excepts.”

The motion thus made by the counsel for the defendant, to the denial of which he duly excepted, was a demand that the case be sent to a trial term to be tried by a jury. This clearly appears subsequently in the record by what occurred after the plaintiff had introduced his testimony and rested. “Defendant’s counsel renewed motion on the grounds already stated to dismiss the complaint or to send the same to trial term to be tried by a jury. Motion was denied. Defendant excepted.” This statement plainly shows that the learned judge at special term must distinctly have understood the defendant’s counsel to have demanded a jury trial unless the court was willing to dismiss the complaint on the ground that it did not state a cause of action cognizable by a court of equity. The course pursued by counsel for the defendant was that approved by this court in *Hand v. Kennedy*, 83 N. Y. 149, and an exception was duly taken

to the denial of the motion in each instance. These exceptions raise a question of law for the consideration of this court. We think that they were well taken and entitled the defendant to a reversal of the judgment on the ground that he had a right to have the case tried by a jury. He asserted that right in due time and did nothing which could fairly be construed into a waiver thereof.

The judgment should be reversed and a new trial granted, costs to abide the event.

Cullen, C. J., Gray, Edward T. Bartlett and Hiscock, JJ., concur; Werner, J., dissents; Chase, J., absent.

Judgment reversed, etc.

Right of Trial by Jury, considered as an absolute right, does not extend to cases of equitable jurisdiction: *Shedd v. Seefeld*, 230 Ill. 118, 120 Am. St. Rep. 269; *Brady v. Carteret Realty Co.*, 70 N. J. Eq. 748, 118 Am. St. Rep. 778; *Hathorne v. Panama Park Co.*, 44 Fla. 194, 103 Am. St. Rep. 138. In determining what suits are triable by jury, the court must look to the character of the questions to be decided, and if they are essentially of an equitable nature, or if some essentially equitable remedy is invoked, as contradistinguished from legal questions and remedies, the case should be tried by the court. Otherwise, the parties are entitled to a jury: *McCoy v. Oldham*, 1 Ind. App. 372, 50 Am. St. Rep. 208. If several issues are joined in a case, some triable by jury and some by the court, a demand for a jury to try all of the issues is properly refused: *Peden v. Cavins*, 134 Ind. 494, 39 Am. St. Rep. 276.

PEOPLE v. SCOTT.

[195 N. Y. 224, 88 N. E. 35.]

CRIMINAL LAW—**Mental Responsibility for Crime.**—Where the evidence shows that a person accused of crime is twenty-three years old and a man of low order of intellect and morality, that he has had defective vision from birth, that he attended school when a child and could read and write fairly well, that in his early teens he developed a propensity for stealing and on that account has been committed to reformatories on two occasions, and in the last case was released only a few months before the crime in question, the question of his responsibility for crime is properly submitted to the jury, and their verdict that he knew the nature and quality of his act and that it was wrong will not be disturbed. (p. 790.)

CRIMINAL LAW—**Confession Obtained by Deception.**—A confession obtained from a prisoner by a private citizen under a promise that he will aid the prisoner to escape, the district attorney and sheriff not entering into such agreement but having knowledge thereof, is not rendered inadmissible in evidence because thus obtained through deception. (pp. 792, 793.)

Hubert C. Stratton and William H. Sullivan, for the appellant.

James P. Hill, for the respondent.

226 HIAIGHT, J. On the eighteenth day of October, 1907, the defendant, William Scott, induced his stepmother, Delia Scott, to accompany him to Chenango lake for the purpose of inspecting a stove which he contemplated purchasing. His father, James C. Scott, resided at Norwich, a few miles from the lake, and he supplied them with a covered buggy and a mustang pony with which to make the trip. The defendant drove to a cottage, known as the Borland cottage, near the lake, where his parents formerly resided. He then led the horse back through the field, Mrs. Scott walking behind the buggy until they reached the heavy woods. Awhile afterward the defendant returned with the horse and buggy alone. Several persons saw him and Mrs. Scott going to the lake, and he was also observed by several returning alone. Thereafter and on the twenty-third day of October the body of Mrs. Scott was found in the woods, and upon the inquest it was determined that the cause of death was a pistol shot, the bullet penetrating the back of the neck, passing through the spinal column between the first and second vertebrae of the spine, severing the cord and passing out through the roof of the mouth on the left side of the face under the cheek bone or molar prominence.

No question is raised with reference to the fact that the defendant committed the act charged against him. The defense interposed was that he was a lunatic or an imbecile within the provisions of sections 20 and 21 of the Penal Code, in that he was laboring under such a defect of reason as not to know the nature and quality of the act he was doing, or not knowing that it was wrong. Upon this branch of the case many witnesses were sworn, disclosing the history of the defendant from infancy. At the time of the committing of the act he was twenty-three or twenty-four years of age. He had defective vision from birth. He attended school when a child and could read and write fairly well. In his early teens **227** he developed a passion for appropriating the property of others and was committed to the industrial school at Rochester, where he appears to have spent several years. After he was released therefrom he again indulged his propensity and was again convicted of larceny and sent to the Elmira Reformatory, from which place he was released only a few months before the commission of the crime in question. The evidence tends to show that he was a man of low order of intellect, somewhat brutal in the treatment of the animals under his charge, such as horses and cows, and that he possessed a great passion for women and to some extent had indulged in self-abuse. The question of his responsibility was submitted to the jury and the verdict rendered was to the effect that he knew the nature and quality of his act and that it was wrong. Our conclusion, after a careful examination of the case, is

that the verdict is amply sustained by the evidence and should be approved.

There is only one question of law presented for our consideration. It appears that a suspicion had arisen in the village that a crime had been committed by the defendant and he had been arrested and locked up in jail. There had, however, been no discovery of the body of Mrs. Scott. Searches had been made for it, but unsuccessfully. One Harrington, a neighbor and acquaintance of the family, had spent the day at the lake looking for the body and had then returned and gone to the jail to visit the defendant. He appears to have conceived a scheme to induce the defendant to disclose the whereabouts of the body. He, therefore, upon visiting the defendant, said to him, in substance, that he was sorry to see him there in jail and that if he was a boy of his he would like to see him get free; that they were going to get out a big party on the morrow and were going to hunt the woods and if they should find Mrs. Scott it would go hard with him. He then disclosed to him his scheme, which was, in substance, that he would get the sheriff to let the defendant go with him to the woods to look for the body, that he would have him handcuffed to himself and he would keep ²²⁸ the key so that when they found the body he, Harrington, could unlock the handcuffs and let the defendant run away. He promised to procure some provision and get him some money so that he could escape and avoid rearrest. The defendant asked Harrington to come in and see him the next morning. He did so and then the defendant agreed to go with him and point out the body. Harrington then went to see the sheriff to get the permit. The sheriff expressed a doubt as to whether he would be justified in letting him take the defendant out of the jail and suggested that they should go and see the district attorney in reference to it. Then Harrington and the sheriff went to the district attorney's office and had a talk with him and Harrington told him his scheme. The district attorney replied, saying: "I do not believe you can do any such thing. If you can it is all right." They then returned to the jail and the sheriff procured a conveyance, the defendant and Harrington were handcuffed together and taken by the sheriff and an assistant to the Borland cottage. In the meantime Harrington had procured some food which was shown to the defendant and fifty cents in money which was given to him. Before arriving at the cottage they had stopped the team and allowed the defendant and Harrington to get out, at which time Harrington took out his key and unlocked the handcuff and then relocked it again as they re-entered the carriage, so as to let the defendant understand that he had the key. The key, however, was transferred to the sheriff in exchange for another without its being observed

by the defendant. On arriving at the cottage Harrington and the defendant were allowed to leave the carriage and walk into the woods, the sheriff and his assistant going around in another direction so as not to be seen by the defendant but intending to keep them within call. The defendant conducted Harrington into the woods at the point where the body lay and pointed the same out to him, after which he demanded his release. Harrington produced a key, but the handcuffs could not be unlocked by it; whereupon the defendant charged Harrington with being a traitor. Shortly after, they were ²²⁹ joined by the sheriff and his companion. On their way into the woods Harrington drew from the defendant further details as to the manner in which the crime was committed, which it is not necessary here to rehearse. The defendant's counsel strongly insisted upon the trial that the confessions of the defendant were induced upon promise of freedom and that they were not admissible in evidence.

Section 395 of the Code of Criminal Procedure provides that "A confession of a defendant, whether in the course of judicial proceedings or to a private person, can be given in evidence against him, unless made under the influence of fear produced by threats, or unless made upon a stipulation of the district attorney, that he shall not be prosecuted therefor; but is not sufficient to warrant his conviction, without additional proof that the crime charged has been committed." The question here presented has reference to the provision of the code pertaining to a stipulation of the district attorney. It often occurs in the prosecution of criminals that the district attorney is compelled to allow one or more persons charged with crime to give evidence on behalf of the state. When this is done under a stipulation of the district attorney that the person so giving evidence shall not be prosecuted therefor, it becomes binding and the confession cannot thereafter be used against him; but that is not this case. The defendant was not informed that Harrington or the sheriff had had any conversation with the district attorney upon the subject or that he had entered into any stipulation or made any promise to the defendant; he had not, in fact. The most that possibly could be claimed from the interview with the district attorney is that he assented to the deception that was proposed to be practiced upon the defendant in order to induce him to point out the locality of the body. There was no agreement to discharge the defendant and not place him upon trial, nor did the defendant so understand, for he supposed that Harrington was going to unlock his handcuff upon his disclosing the location of the body and allow him to escape in the woods, thus deceiving the sheriff and preventing ²³⁰ the district attorney from placing him upon trial. Neither

the sheriff nor the district attorney, as public officers, had any right to consent to the defendant's discharge under such circumstances. Indeed, had they so agreed, they themselves would have violated their duties as officers. We are not now called upon to discuss the morality of the deception that was practiced upon the defendant in this case. We are merely called upon to determine whether the confessions made were properly received in evidence. Such deceptions have been indulged in from time to time in numerous cases, but our attention has been called to no case where the courts have gone to the extent of excluding them, unless they were procured by threats, were involuntary or made under promise of the district attorney that the statement should not be used against the defendant. Where, therefore, an under-sheriff, pretending to be a friend of the prisoner charged with murder, entered into a scheme with him to take the decedent's pocket-book and put it into the room of another person, and then by finding it there charge the crime onto that person, and in order to do so the defendant was induced to conduct the sheriff to the place where he had hidden the pocketbook, the evidence was held competent: *People v. White*, 176 N. Y. 331, 68 N. E. 630. In that case it was said by Vann, J., writing for the court, that "Confessions induced by the use of decoy letters, by the false assertion that some of the accomplices of the prisoner were in custody, or made to a detective disguised as a confederate, or upon the promise that they will not be disclosed, have been received in evidence with the sanction of courts of high authority": Citing authorities upon the subject. The question was carefully considered in that case, and we think the conclusion reached is controlling upon the question now presented. We are, therefore, of the opinion that no error was committed in admitting the evidence objected to.

The judgment of conviction should be affirmed.

Cullen, C. J., Gray, Edward T. Bartlett, Vann, Werner and Hiscock, JJ., concur.

Judgment of conviction affirmed.

A Confession, to be Admissible, must be free and voluntary; that is, it is said it must not be extracted by any sort of threat or violence, nor obtained by any direct or implied promise, however slight, nor under the exertion of any improper influence: *State v. Nagle*, 25 R. I. 105, 105 Am. St. Rep. 864. See, also, *State v. Sherman*, 35 Mont. 512, 119 Am. St. Rep. 869. To be voluntary, according to *Bullock v. State*, 65 N. J. L. 557, 86 Am. St. Rep. 668, a confession must not be exerted by threats nor obtained by any direct or implied promise relating to some benefit to be derived by the prisoner in the criminal prosecution. The ground on which an involuntary confession is excluded is that the accused may have been induced by the pressure of hope or fear to

admit facts unfavorable to him without regard to their truth: *Bullock v. State*, 65 N. J. L. 557, 86 Am. St. Rep. 669.

The Fact That a Confession is Induced by Artifice, Deception or fraud seems to be no ground for excluding it: *People v. Kennedy*, 159 N. Y. 346, 70 Am. St. Rep. 557; *Bullock v. State*, 65 N. J. L. 557, 86 Am. St. Rep. 668.

GOMBERT v. NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

[195 N. Y. 273, 88 N. E. 382.]

EVIDENCE—Instruction as to Weight or Credibility.—Where, in an action for personal injuries sustained at a railroad crossing from a collision with a train, the defendant calls the gateman, who is deaf, as a witness, and he and his wife testify that his hearing was good at the time of the accident but deafness came on suddenly about a month thereafter, the court, after charging that there is no direct evidence that he was not in complete possession of his hearing at the time of the accident, may properly refuse to charge that there is no "indirect evidence to the contrary"; and there is no impropriety in leaving it to the jury to decide whether his deafness within the time stated is consistent with the possession of unimpaired hearing when the accident happened. (pp. 795, 796.)

DAMAGES for Personal Injuries—Loss of Profits or Earnings. Profits are not earnings simply because a business is very small, and earnings are not necessarily considered as profits because they happen to be large, within the rule that in actions for personal injuries damages may be recovered for loss of personal earnings, but not for uncertain business profits proceeding from invested capital. (p. 798.)

DAMAGES for Personal Injuries—Loss of Profits or Earnings. In an action for personal injuries evidence is not admissible of an asserted loss consisting of profits which are essentially the uncertain fluctuating increment of invested capital, no matter how small it may be; but if a loss is due to the destruction or impairment of personal earning capacity, evidence thereof is not to be excluded simply because it may be large. (pp. 798, 799.)

DAMAGES for Personal Injuries—Loss of Profits to Contractor. A contractor engaged in the business of constructing buildings, in which he buys material, employs labor, oversees the work, and looks for his returns in the difference between what he gets and what he expends in performing his contracts, is not one who depends upon his personal earnings, but upon the profits of his business. Hence in an action by him for personal injuries evidence of his income from his business for three years preceding the action is incompetent. (p. 799.)

Daniel J. Kenefick, Alfred L. Becker and Maurice C. Spratt, for the appellants.

Clarence M. Bushnell and Charles J. Knoell, for the respondent.

275 WERNER, J. In the city of North Tonawanda there is a highway known as Wheatfield street, which runs sub-

stantially east and west, and crosses at grade the tracks of the New York Central and Hudson River Railroad Company, which run practically north and south. The Lehigh Valley railroad uses these tracks in its traffic between Buffalo and Niagara Falls. On the second day of October, 1905, the plaintiff was driving across these tracks on Wheatfield street, and collided with a south-bound Lehigh Valley train. The crossing was equipped with gates operated by compressed air from a tower maintained by the New York Central Railroad ²⁷⁶ Company, which was in charge of a gateman employed by that company. The plaintiff brought this action to recover for the injuries sustained in that collision, and both of the corporations above named were made parties defendant upon the theory that the one had been negligent in the operation of its gates and the supervision of its crossing, while the other had been negligent in the operation of its train. For the purposes of this appeal we may assume that the alleged negligence of the defendants and the plaintiff's alleged freedom from contributory negligence presented questions of fact for the jury. The plaintiff recovered a substantial verdict against both of the defendants, and the judgment entered upon it was affirmed at the appellate division by a divided court. Both of the defendants have appealed to this court upon two exceptions taken by them to rulings of the trial court. We shall first consider the exception to the refusal of the trial court to charge that there was "no indirect testimony" that Kumm, the gateman, "was in complete possession of his faculties of hearing at the time of this accident." The recital of a few additional facts will disclose the bearing of this request. The defendants called as a witness the gateman Kumm. He was so deaf that a speaking tube had to be used for the purpose of making him hear the questions of counsel. He testified that this deafness came upon him all at once on the tenth day of November, 1905, which was a little more than a month after the accident to the plaintiff, and that previous to the tenth day of November, 1905, his hearing had been good. His testimony in this behalf was corroborated by that of his wife, which was to the same effect. Upon this situation thus presented, counsel for the defendants requested the trial court to charge "that the evidence is that the gateman was in complete possession of his faculties of hearing at the time of this accident." To this the trial court assented by saying: "That is his evidence." Counsel for the defendants then said, "Also his wife," to which the court replied, "Surely. All the evidence on that subject is to that effect." Defendants' counsel, not content ²⁷⁷ with that unequivocal statement, further pressed the matter by suggesting, "There is no evidence to the contrary," and to this the court responded, "No direct evidence." Thus the case stood when

the defendants' counsel requested the court to charge that "there is no indirect testimony to the contrary." Thereupon the court replied, "I will not say that. In other words the testimony of the witness Kumm and his wife is for the jury to determine."

We think the exception to this statement and ruling was not well taken. The court had previously charged all that the defendants were fairly entitled to upon that subject. Counsel in their zeal then pursued the subject somewhat hypercritically and they really injected into the case the unnecessary colloquy as to "indirect testimony." Quite apart from this technical view of the matter, however, there was no error or impropriety in leaving it for the jury to decide whether the gateman's sudden and complete deafness within a month after the accident was consistent with his possession of an unimpaired sense of hearing at the time of the accident. Although he was not a party to the action he had testified to a fact which, if material to the issue, was so unusual in the natural course of events as to invite inquiry. The jury had the undoubted right to weigh the testimony of the witnesses in this behalf for the purpose of testing the truthfulness of the rest of the gateman's story: *Elwood v. West Un. Tel. Co.*, 45 N. Y. 549, 6 Am. Rep. 140.

There is another exception in the case, however, which presents a much more serious question. That is the exception taken to the ruling under which the court admitted evidence of the income, profit or earnings which the plaintiff had derived from his business during the three years preceding the accident. In the interrogatories of plaintiff's counsel, the plaintiff's revenue from this source was called "earnings," but that is mere nomenclature which cannot be permitted to determine the inquiry whether the plaintiff's income had in fact been of such a character as to make it a proper element of the damages which he claimed the right to recover. As bearing upon that branch ²⁷⁸ of the case, it appeared that for a number of years prior to the accident the plaintiff had been a "building carpenter contractor." He generally took entire contracts for certain amounts, although sometimes he furnished only the labor, at other times only the material, and again both material and labor. The extent of his business was not disclosed, but it appeared that he had a horse and wagon, and employed men. From these facts the inference was clearly permissible that he must have had invested in his business some capital with which to carry out his contracts. The circumstance that he occasionally did some work with his own hands simply emphasizes the fact that his principal occupation seems to have consisted in figuring on contracts, overseeing the work of his employes, and making such arrangements for materials and labor as the nature of

his undertakings required. Upon these meager facts we are to determine whether the income of the plaintiff for the three years preceding the accident falls within the category of personal earnings, the loss of which it was permissible to prove as an element of the damages suffered by him, or whether it must be classed, either wholly or substantially, as uncertain business profits proceeding from invested capital which may not be considered in the process of ascertaining his loss. The rule of law which governs this phase of actions of this character has long been settled as an abstract legal proposition, but, like many other legal rules, it sometimes encounters serious difficulties in the course of its application to particular facts. There are cases in which the facts are so definite and unequivocal as to necessarily relegate them to either one or the other of the two extremes of the rule. Between these extremes we find every degree and variety of fact and circumstance to which the rule must be applied, and occasionally these are so near the shadowy border line as to present troublesome questions. A few citations will serve as illustrations. In *Masterton v. Village of Mt. Vernon*, 58 N. Y. 391, the plaintiff was permitted to testify to his profits, year by year, in the business of buying and selling teas, in which the plaintiff had attended ²⁷⁹ to the buying, which required great skill. The business had been extensive and had fallen off considerably after the injury to the plaintiff. There it was held to be error to have received evidence of the past profits of the plaintiff, because they were necessarily uncertain and fluctuating, and in stating that conclusion this court said: "The plaintiff had the right to prove the business in which he was engaged, its extent, and the particular part transacted by him, and, if he could, the compensation usually paid to persons doing such business for others. These are circumstances the jury have a right to consider in fixing the value of his time. But they ought not to be permitted to speculate as to the uncertain profits of commercial ventures, in which the plaintiff, if uninjured, would have been engaged." This excerpt from the opinion in that case clearly discloses the reason of the rule. It is simply an adaptation to a special class of cases of that general rule of damages under which, at common law, the party injured may recover for any loss that is definitely fixed or is capable of ascertainment with reasonable certainty. The later decisions upon the subject were reviewed by this court in the comparatively recent case of *Kronold v. City of New York*, 186 N. Y. 40, 78 N. E. 572. There the plaintiff was engaged in selling Swiss embroideries, for which he took orders from sample designs or from drawings. He maintained an office, but its equipment and the expense of keeping it were so insignificant as compared with the amount which he earned as the

result of personal canvassing and solicitation that it was held to have been error to have excluded proof of his earnings previous to the personal injury upon which he based his action. In that case some of the earlier decisions were reviewed, and these clearly demonstrate that when a claim for damages arising out of personal injuries is based upon the destruction or impairment of one's ability to perform labor or render service which is essentially and fundamentally personal in character, evidence may be given as to the nature and extent of the loss. This rule has been applied to lawyers, physicians, dentists, teachers, midwives, gaugers, pilots, book²⁸⁰ agents and other professional or semi-professional occupations in which the element of personal earnings has been held to predominate over a small and purely incidental investment of capital: *Kronold v. City of New York*, 186 N. Y. 40, 78 N. E. 572; *Ehrgott v. Mayor etc. of N. Y.*, 96 N. Y. 264, 48 Am. Rep. 622; *Simonin v. New York, L. E. & W. R. R. Co.*, 36 Hun, 214; *Nash v. Sharpe*, 19 Hun, 365; *Lynch v. Brooklyn City R. R. Co.*, 123 N. Y. 657, 25 U. S. 955; *Waldie v. Brooklyn Heights R. R. Co.*, 78 App. Div. 557, 79 N. Y. Supp. 922.

The latest case in which this court has had occasion to apply this rule is that of *Weir v. Union Ry. Co.*, 188 N. Y. 416, 81 N. E. 168, 11 Ann. Cas. 43. That case may be fairly said to be the antithesis of the *Kronold* case (186 N. Y. 40, 78 N. E. 572), for it furnishes a very pointed illustration of the opposite extreme of the rule. There the plaintiff had rented a small place in which he established an oyster stand and lunch-room. The supplies purchased and sold by the plaintiff varied in amount to such an extent that occasional changes had to be made in the number of persons employed as waiters and assistants. Sometimes there were two or three, and at other times only one. The plaintiff's income consisted of the difference between the gross receipts and the running expenses of the establishment, and it fluctuated from week to week. There the trial court received evidence of the plaintiff's weekly profits, and the ruling was approved by the appellate division. When the case reached this court, however, the judgment was reversed upon the ground that the evidence was incompetent. That case is strikingly apposite to the discussion here, because it clearly shows that profits are not earnings simply because a business is very small, any more than earnings are necessarily to be considered as profits because they happen to be large. In other words, it is the character of the business or occupation and of the income derived therefrom that must determine the admissibility of such evidence in this class of actions. If the asserted loss consists of profits which are essentially the uncertain and fluctuating increment of invested capital, proof thereof is

inadmissible no matter how small it may be; and, conversely, if the loss is due to the ²⁸¹destruction or impairment of one's personal earning capacity, the evidence thereof is not to be excluded simply because it may be large.

In the light of these distinctions the case at bar is easily classified. We think the evidence of the plaintiff's income from his business for the three years preceding the accident in which he suffered his injuries was incompetent because it related to profits depending in considerable measure upon capital invested in business, as distinguished from personal earnings. We have said that the evidence upon this subject was somewhat meager, and so it was. That is, however, either the fault or the misfortune of the plaintiff. If there was in existence any further evidence in addition to that adduced which might have tended to show that the plaintiff's occupation was such as to place his loss of income in the category of personal earnings, it was in the plaintiff's possession and he should have produced it. If there was no such additional evidence he must abide by the usual and necessary inference that a contractor, engaged in the business of constructing buildings, in which he buys material, employs labor, oversees the work, and looks for his returns to the difference between what he gets and what he expends in performing his contracts, is not one who depends upon his personal earnings but upon the profits of his business. In either event the defendants are entitled to a new trial.

The judgment should be reversed and a new trial granted, with costs to abide the event.

Cullen, C. J., Gray, Edward T. Bartlett, Willard Bartlett, Hiscock and Chase, JJ., concur.

Judgment reversed, etc.

Loss of Business Profits as an Element of Damages for a breach of contract is discussed in *Kelley, Maus & Co. v. La Crosse Carriage Co.*, 120 Wis. 84, 102 Am. St. Rep. 971; *Emerson v. Pacific Coast etc. Co.*, 96 Minn. 1, 113 Am. St. Rep. 603; *Harper Furniture Co. v. Southern Express Co.*, 148 N. C. 87, 128 Am. St. Rep. 588. As to the loss of such profits as an element of damages in personal injury cases, see *Goodhart v. Pennsylvania R. R. Co.*, 177 Pa. 1, 55 Am. St. Rep. 705; *Alabama Great Southern R. R. Co. v. Yarbrough*, 83 Ala. 238, 3 Am. St. Rep. 715; *Alabama Great Southern R. R. Co. v. Frazier*, 93 Ala. 45, 30 Am. St. Rep. 28; *Treadwell v. Whittier*, 80 Cal. 575, 13 Am. St. Rep. 175; *Gulf etc. Ry. Co. v. Wilson*, 79 Tex. 371, 23 Am. St. Rep. 345.

MARK v. FRITSCH.

[195 N. Y. 282, 88 N. E. 380.]

AUTOMOBILES—Duty of Chauffeurs in Passing on Highway.—Where two automobiles are traveling in the same direction, the front one has the superior right and may maintain its position in the center of the highway, if there is sufficient space on its left (as prescribed by statute) to enable the approaching car safely and conveniently to pass. If there is not room for passage then it must, upon request or equivalent notice, if practicable and safe, so turn aside as to leave such room. If at the moment there is not sufficient room for this, it becomes the duty of the rear car to wait until a place is reached where it may be done. Under some circumstances it may be the duty of the first car to stop momentarily to permit the other to pass. (p. 801.)

AUTOMOBILE—Duty to Avoid Collision.—The Duty of a Traveler in an automobile is summed up in keeping on his way, avoiding collision with those whom he meets, and yielding way enough for those behind him to pass when it is needful and practicable so to do and he is thereunto so requested. (p. 801.)

Charles E. Snyder, for the appellant.

Hartwell Cabell, for the respondents.

283 HISCOCK, J. The plaintiff and defendants were traveling in the same direction on a country highway in two automobiles, the former being in front. Evidently the dust raised by the front car made it uncomfortable for whoever was in the rear, and the defendants apparently had the faster car and desired to pass. At least once and perhaps three times before the occurrence of the trouble complained of defendants asked the plaintiff to allow them to pass and finally they attempted to do this. In the doing of it, according to the defendants, plaintiff unnecessarily and intentionally crowded in toward them on the highway, and according to the plaintiff the defendants unnecessarily and intentionally crowded in toward him until, under the fear of collision, even though it did not actually occur, he was forced from the highway and his machine injured. Obviously, if either party did the things charged against him by the other he was guilty of gross misconduct which, if it was the plaintiff, would bar him from any right of recovery. In the controversy thus raised the jury accepted the view of the defendants and their verdict, of course, is decisive if reached under proper instructions. The plaintiff, however, insists that such instructions were not given and by this contention presents the only questions which are subject to our consideration.

The general rules governing the movement of automobiles, except as modified by statute, are the same as those which as the result of long usage have been formulated for the government of simpler vehicles such as wagons.

²⁸⁴ The fundamental principle of conduct is that of reasonable care and accommodation measured by the immediate circumstances of each case and exercised by each traveler for the purpose of affording to the other his just and reasonable rights in the highway. When two cars meet, it is the duty of each, so far as practicable, to yield to the other the space and opportunity necessary for its safe and convenient passage. In the case of two cars traveling in the same direction the front one has the superior right and may maintain its position in the center of the highway if there is sufficient space on its left as prescribed by statute (An act in relation to the registration and identification of motor vehicles and the use of the public highways by such vehicles: Laws of 1904, c. 538, sec. 4, subd. 1) to enable the approaching car safely and conveniently to pass. If the position of the forward car in the center of the highway does not leave such room for passage, then it must upon request or equivalent notice, if practicable and safe, so turn aside as to leave such room for passage. If at the moment there is not sufficient room in which it can do this, it is its right, and it is the duty of the rear car, to wait until a place is reached where this may be done. The obligations apply which in the case of a traveler by wagon have been expressed as follows: "His duty is summed up in keeping on his way, avoiding collision with those whom he meets, and in yielding way enough for those behind him to pass, when it is needful and practicable so to do, and he is thereunto requested": *Adolph v. Central Park, N. & E. R. R. Co.*, 76 N. Y. 530.

In the application of these rules it is manifest that what would be construed as reasonable care and safe conduct in the case of a light and slow moving wagon oftentimes would not amount to such conduct in the case of heavy and rapidly moving cars.

The trial judge in his main charge, as we think, fully and carefully explained to the jury the principles which were to govern them in passing on the conduct of the present litigants. The counsel for the appellant does not dispute this, ²⁸⁵ but insists that the court erred in refusing to charge specific requests made by him. It is so manifest that the court ruled correctly in all of the instances called to our attention, save one, that we do not regard it necessary to discuss them. One request, however, is especially pressed on our attention and may be briefly noticed. The court was requested and declined to charge, "That there was no legal duty on the part of the plaintiff to stop his machine so as to enable the defendants to pass."

We think that several answers may be made to the allegation of error in this refusal.

In the first place, the request does not seem to have any practical application to the actual controversy here presented. The defendants claimed not that plaintiff was at fault by reason of not stopping his car, but because he deliberately crowded them on the highway. In the second place, we do not think that it could be said as a matter of law that the plaintiff was under no obligation to stop his car for the purpose of allowing defendants to pass when it became apparent that there might be a collision, if such threatened collision was accidental and unexpected. And, lastly, as a general proposition, we are not willing to say that reasonable respect for the rights of another in a highway might not under some circumstances require an automobile temporarily to stop in order to let the other pass. As we have already suggested, such cars present risks and require care in their movement such as would not be incidental to the proper management of lighter vehicles. Under ordinary circumstances, the forward car would not be compelled to stop in order to let the rear one pass, but might wait until a space was reached where such passage might be accomplished in safety without any stop. But, on the other hand, a country highway might be such that for miles there would be no proper opportunity for one car to pass another while both were in motion, but plenty of opportunity for such passage if the forward car pulled aside and stopped for a few seconds. Under such circumstances, we think a jury might very well ²⁸⁶ find that it was extremely unreasonable for a slow moving car to hold up one in the rear desiring to pass it by refusing upon reasonable request to give such an opportunity as has been suggested for passage. The statute upon this subject provides: "Any such person so operating a motor vehicle shall, on overtaking any such . . . other vehicle, pass on the left side thereof, and the . . . driver of such . . . other vehicle shall, as soon as practicable, turn to the right so as to allow free passage on the left." This statute is to be construed reasonably with reference to the rights of all parties. It certainly does not contemplate or permit reckless driving of a fast motor vehicle whereby slower ones are wrongfully crowded or frightened out of the road. Neither should it be so construed as to encourage aggravating conduct upon the part of the slower going machine in front whereby the faster one is necessarily and unreasonably held back and annoyed.

The judgment should be affirmed, with costs.

Cullen, C. J., Gray, Edward T. Bartlett, Werner, Willard Bartlett and Chase, JJ., concur.

Judgment affirmed

The Law of the Automobile is the subject of a note to *Christy v. Elliott*, 108 Am. St. Rep. 212.

The Law of the Road is the subject of a note to *Riepe v. Elting*, 48 Am. St. Rep. 366. If the driver of a team observing the law of the road discovers a team approaching in an opposite direction in time to prevent a collision, by stopping or otherwise, it is his duty to do so, although the driver of the other team is guilty of negligence in violating the law of the road: *Angell v. Lewis*, 20 R. I. 391, 78 Am. St. Rep. 881.

MATTER OF FRANKENHEIMER.

[195 N. Y. 346, 88 N. E. 374.]

WILLS—Construction. Where a Testator Makes a Number of general bequests, aggregating one hundred and twenty seven thousand dollars, and gives all the residue of his estate, including lapsed legacies, to his executors in trust for designated life tenants and remaindermen, and then declares that the general legacies shall be paid in full only in case the total estate amounts to three hundred thousand dollars, it is his intention to prefer the residuary legatees over the general legatees, and the "total estate" means the amount available for distribution after the payment of debts and expenses of administration. Hence, if the estate, after such deduction, amounts to less than three hundred thousand dollars, the general legacies abate proportionately. (pp. 805, 806.)

WILLS—Interest on Legacies.—Where a Testator Makes a Number of general bequests, aggregating one hundred and twenty seven thousand dollars, and gives the residue of his estate to his executors in trust for designated life tenants and remaindermen, and then declares that the general legacies shall be paid in full only in case the total estate amounts to three hundred thousand dollars, and upon administration the estate proves to be worth less than that sum so that only eighty six per cent of the amount of the general legacies can be paid, the general legatees are entitled to interest after one year provided there are funds available to pay it; but as the testator has preferred the residuary legatees over the general legatees, the residuary estate should not be diminished to pay such interest; yet if an income has accrued from the estate during administration, this should be distributed pro rata between the general and residuary legatees, and applied upon the interest and income that has accrued upon their respective legacies, and the interest remaining unpaid after such distribution must be deemed abated for want of a fund out of which to pay it. (pp. 805, 806.)

E. V. Abbott, M. H. Cane, Benj. Tuska, C. S. Stern, S. M. Stroock, H. L. Moses, Gherardie Davis and H. G. Hecht, for the appellants.

E. D. Hawkins, Alfred Gregory, John Frankenheimer and Ferdinand Kurzman for the respondents.

351 HAIGHT, J. The decedent left a last will and testament, which was duly admitted to probate, by which he made a number of charitable and individual bequests of legacies amounting in the aggregate to \$127,000, and then provided that all the rest, residue and remainder of his estate, should

ing the lapsed legacies and legacies that shall, for any reason, have failed to take effect, be given to his executors in trust to invest, etc., for the benefit of life tenants, specifically named, and upon their decease bequeathed the principal to remaindermen, also specifically designated. By the tenth clause of his will he expressly declared that the charitable and individual legacies already referred to "shall be paid in full only in case my total estate, as valued by my executors, shall amount to \$300,000, and in case my estate shall be valued at less than \$300,000 then the legacies hereinbefore mentioned shall abate proportionately."

It will be noted that the chief objects of his bounty were the life tenants and the remaindermen. For, having made general bequests amounting to \$127,000, he then reserves at least the sum of \$173,000 for the purpose of making up the trust estates for the benefit of the life tenants by the provision referred to in the tenth clause of his will. It is contended on behalf of the general legatees that the estate must be valued before administration and without deducting the expenses thereof or the commissions of the executors, while on behalf of the life tenants it is insisted that by the term "total estate," as used by the testator, he meant the total estate available for distribution under the provisions of the will, and that ³⁵² the cost of administration, together with the debts, funeral expenses and commissions, should be deducted before the valuation should be made for distribution. We think that the contention of the life tenants should be sustained. As we have already pointed out, they were the chief objects of the testator's bounty and he had carefully guarded the amount that he had designed for them by the provision that in case his estate did not amount to the sum of \$300,000 the general legacies should abate proportionately, thereby leaving the residuary fund unimpaired.

It appears in this case that the expenses of administration amounted to \$21,411.73, and that the commissions were \$6,810.72; that after deducting and paying these expenses and allowing the commissions of the executors the total value of the estate left for distribution was the sum of \$253,698.60. It is, therefore, apparent that if these items are not deducted in making the valuation, the general legatees will receive their legacies nearly in full or at least ninety-five per cent thereof and that the residuary legatees will have to bear the entire burden of the administration of the estate and have the amount designed by the testator for their benefit reduced by upward of \$28,000. This result would reverse the apparent intent of the testator by casting the rebate upon the residuary legatees rather than the general legatees. We are aware that, ordinarily, these expenses are chargeable upon the residuary estate and are paid by

it, but in this case we think the testator has expressly provided otherwise by making the life tenants his preferred legatees and providing that the rebate shall be taken out of the general legacies. We, therefore, are fully in accord with the views expressed upon this subject by the learned appellate division, and we here indorse and approve the opinion of Laughlin, J., upon that subject. We also concur in the construction given by him to the provisions of the third codicil and as to the subsequent bequests made by the testator.

One subject only remains for consideration by us and that pertains to the question of interest upon the general legacies. ³⁵³ The learned surrogate allowed interest from the expiration of a year after letters testamentary were issued. The learned appellate division, by a divided court, modified the decree of the surrogate in this particular, disallowing interest but allowing the general legatees to participate proportionately in the income that had been derived by the executors during their administration of the estate.

It is contended in this case that these legacies were unliquidated and consequently would not draw interest. We think this contention cannot be upheld. The testator has specifically mentioned the amount that he intended to give to each of the general legatees. The claim of each was, therefore, known and liquidated as fully and completely as if it had been fixed by a judgment or a promissory note. The only question open was as to whether the estate had property from which the legacies could be paid in full. In this case the assets available for the payment of these legacies were not sufficient to pay in full. They would only pay eighty-six per cent thereof, and consequently the situation presented is analogous to that of the distribution of the assets of an insolvent estate among its creditors. We think, therefore, that the general legatees had the right to have interest allowed, provided there were funds available out of which interest could be paid: *People v. Merchants' Trust Co.*, 187 N. Y. 293, 79 N. E. 1004. The question, therefore, is presented as to whether there is a fund available for that purpose. Ordinarily, expenses are chargeable to the residuary estate, and the income from the estate goes to the residuary legatees, and, ordinarily, legacies under the statute become due and payable one year after the issuing of letters testamentary, and if not paid, interest is allowable thereon from that date payable out of the residuary estate; but in this case, as we have seen, the rule has been changed by the testator, and the residuary legatees are preferred over the general legatees. The life tenants are entitled to the interest or income derived from the residuary estate, and, having been preferred over the general lega-

tees, should not be compelled to have their estate diminished for the purpose ³⁵⁴ of paying interest to the general legatees. There is a fund, however, reported by the executors, amounting to the sum of \$28,294.15, income derived from the estate during the time it was in their hands in the process of administration. This income consists of interest on bonds, notes, deposits and dividends on stocks, and is, therefore, derived from the assets of the estate, which would have gone to the general and residuary legatees had administration been completed within the year allowed by the statute. We, therefore, entertain the view that equity requires that this income should be distributed pro rata between the general and the residuary legatees, and applied upon the interest and income that has accrued upon their respective legacies. As to the interest remaining unpaid after such distribution it must be deemed abated for the reason that there is no fund out of which the same can be paid.

The contention is made that the appellate division had no jurisdiction to review the determination of the surrogate made with reference to the income, for the reason that no appeal had been taken therefrom. The appeal taken, however, did bring up for review the question of the allowance of interest, and the determination of this question involved also the determination of the fund out of which the same should be paid. We think, therefore, the determination made by the appellate division was just and equitable, and was within its powers.

Motion to dismiss appeals denied, without costs.

The order of the appellate division should be affirmed, with costs only to the executors and to the special guardian of the Hoefner children, payable out of the residuary estate.

Gray, Edward T. Bartlett, Vann, Werner and Hiscock, JJ., concur; Willard Bartlett, J., absent.

Order affirmed, etc.

In the Construction of Wills a cardinal principle is to arrive at and carry out the intention of the testator: *Gilchrist v. Corliss*, 155 Mich. 126, 130 Am. St. Rep. 568; *Allen v. Herlinger*, 219 Pa. 56, 123 Am. St. Rep. 617; *Wardner v. Seventh Day etc. Board*, 232 Ill. 606, 122 Am. St. Rep. 138; *Mueller v. Buenger*, 184 Mo. 458, 105 Am. St. Rep. 541. And in getting at his intention and giving effect to his intendment a court puts itself as nearly as may be in his environment, stands in his shoes, and looks with his perspective through his eyes: *Stewart v. Jones*, 219 Mo. 614, 131 Am. St. Rep. 595.

Legacies Bear Interest at the legal rate after they become due and payable: *Sloan's Appeal*, 168 Pa. 422, 47 Am. St. Rep. 889. In some states the statutes declare that they are payable one year after the decease of the testator, after which time they draw interest: *In re Williams*, 112 Cal. 521, 53 Am. St. Rep. 224; *Ogden v. Pattee*, 149

Mass. 82, 14 Am. St. Rep. 401. A bequest of legacies to beneficiaries named, "who may live to reach the age of twenty-one years," creates contingent legacies, which do not begin to draw interest until the happening of the condition upon which they are predicated: *Webb v. Webb*, 92 Md. 101, 84 Am. St. Rep. 499.

PEOPLE'S TRUST COMPANY v. SCHENCK.

[195 N. Y. 398, 88 N. E. 647.]

RAILWAY MORTGAGE — To What After-acquired Property Attaches.—Where a railroad company mortgages certain property and "all other property which may hereafter be acquired in connection with the construction and operation of the railroad, or as convenient or necessary for the uses or purposes thereof," the mortgage attaches (taking precedence over the lien of a subsequent judgment) to land thereafter acquired by grant from the state which lies under the water of a great bay adjacent to the company's upland, it appearing that the railroad runs only during the summer, and then mainly to reach the waters of the bay and an ocean beach, that to attract travel it has developed its terminal properties on the bay by the erection of hotels and places of amusement, that the acquired land is to be used for like purposes, and that it is necessary or convenient therefor and for the profitable maintenance of the railroad. (p. 810.)

Rufus O. Catlin, for the appellant.

George W. Wingate, for the respondent.

399 GRAY, J. This action was brought to foreclose a mortgage, which was executed and delivered by the Brooklyn and Rockaway Beach Railroad Company to the plaintiff, as trustee, to secure the payment of an issue of bonds. The appellant here is the defendant Schenck, who claims that the lien of a judgment recovered by him against the company is superior to that of the mortgage, as to certain land subsequently acquired by the latter. The Brooklyn and Rockaway Beach Railroad Company was organized in 1863 and, within the authority of its articles of association, was maintaining and operating, at the time, a railroad from the city of Brooklyn to a terminus on Jamaica bay and a ferry from that terminus to Rockaway Beach. The mortgage was made in 1891. In the years 1894 and 1897, by grants from the land commissioners of the state, the company acquired certain lands under the waters of Jamaica bay in front of and adjacent to its upland. In 1899 the defendant Schenck recovered his judgment against the company. The court, at special term, held the lien of the judgment to be inferior to that of the mortgage and its decree has been unanimously affirmed by the appellate division, in

the second department. The defendant Schenck appealed to this court.

The grant in the mortgage to the plaintiff included, with the railroad and ferry properties and franchises, and lands now owned and appropriated for the purposes of the railroad, "all other property, real, personal or mixed which may hereafter be acquired in connection with the construction, operation, maintenance of the said railroad or as convenient or necessary for the uses or purposes thereof. . . . Together with all improvements or additions made, or to be made, to any or all of said property and, also, all and every other estate, interest, property, or thing, which the said party of the first part owns or holds, or may and shall hereafter acquire and hold, necessary or convenient for the use, occupation, operation and enjoyment of said railroad and rights, privileges and franchises, or any part or portion thereof." The ⁴⁰⁰ referee, to whom it had been referred to ascertain, among other things, the property covered by the mortgage and the situation of the mortgaged property, found that "said railroad is only operated during the summer months; the land, which it owns at Canarsie (on Jamaica bay) is at the terminus of its railroad; it has erected thereon hotels and various places of amusement and for attraction for summer and other visitors, such as shooting galleries, merry-go-rounds, picture galleries and other places of amusement of the kind found at summer seaside resorts. . . . All these structures were erected and maintained for the business of said railroad to attract custom and as a necessary source of income. That the land upon which these stand and all adjacent property are needed for their purposes and as its necessary terminals. Said railroad has also obtained several grants for the land under water adjoining the upland which it owns. That it uses all this land in connection with its terminal." He further finds "that all the real estate which, also, includes the said grants of lands under water acquired after the execution of the mortgage, are all necessary, proper and convenient for the maintenance and operation of the railroad and the business of said Brooklyn and Rockaway Beach Railroad Company."

⁴⁰¹ I think the determination made below of the question of priority of liens, as between the appellant's judgment and the corporate mortgage to the plaintiff, is correct. There is no question but that subsequently acquired property may be subjected to the lien of a mortgage (Bear Lake etc. Irr. Co. v. Garland, 164 U. S. 1, 17 Sup. Ct. Rep. 7, 41 L. ed. 327), and whether the land under the waters of Jamaica bay, which was subsequently acquired by the railroad company, was comprehended within its mortgage is a matter to

be determined from the language of the instrument and by the appropriateness, or the necessity to the company, of the subsequent acquisition. Was the land within the purview of the mortgage, and was it something which, when acquired, would, in connection with the operation of the railroad, be necessary to the full enjoyment ⁴⁰² of the corporate franchises and add to the legitimate earning power of the corporation? The company operated its franchises under peculiar conditions and circumstances; for, as the fact is found, its railroad ran only during the summer months and then mainly to reach the waters of a great bay of the ocean and, through a connecting ferry, an ocean beach. To attract travel upon the road, it had developed its terminal properties upon the bay by the erection of hotels and of places for the amusement of visitors. The land under water was acquired and is to be used for the same purpose to which the upland was put. The corporate project and purpose, perhaps, differed in these respects from those usually associated with the operation of railroads; but that is not the test. It may be quite true that neither the land in question, nor the upland, was necessary for the mere operation of the railroad. If they were, however, prospectively necessary, or convenient, for the uses or purposes of the railroad and to the enjoyment of the corporate rights and franchises, they would come within the terms of the mortgage. It is not necessary that there should be an immediate connection with the operation of the road. It is sufficient if, for the promotion of travel and the increase of the business sought to be created, the land acquired is legitimately convenient or necessary. The right to promote the comfort, convenience and pleasure of the public, who might patronize the railroad, and thus to augment its business, has been recognized as one not foreign to a railroad purpose: See Prospect Park etc. R. R. Co. v. Williamson, 91 N. Y. 552.

When we come to consider the question of convenience, or necessity, we reach a question of fact which has been conclusively determined by the unanimous affirmance of the findings of the referee. He has found as facts that the hotel and other structures were "maintained for the business of the railroad to attract custom"; that "the land upon which these stand, and all adjacent property, are needed for their purposes"; and that the company uses its upland and the land under water granted by the state "in connection with its terminal." He finds that ⁴⁰³ the "grants of land under water, acquired after the execution of the mortgage, are all necessary, proper and convenient for the maintenance" of the railroad and business of the company. The claim that the location of these findings in the referee's report made them legal conclusions is without force. If, in formulating

his report, the referee commingled facts and legal conclusions, it is immaterial. A finding of fact cannot be made a conclusion of law by labelling it as such. What the referee was to do was to report the facts upon the question with his opinion.

It is settled, therefore, that the acquisition of the land under water was convenient and necessary for the profitable maintenance of the railroad, and, in view of the peculiar character of the business sought to be built up, it is evident that the control of the land is important, if not essential, to the company; in order, not only that the facilities or terminal attractions may be augmented, but that the land shall not come into the hands of those who might be unfriendly, or whose management might affect unfavorably the character of the place.

There is a further consideration which militates in favor of the plaintiff's contention, and that is that the right to acquire the land under the waters of the bay was appurtenant to the ownership of the upland. The land was not appurtenant to the upland, and it would be incorrect to say that it passed with it as belonging to it under the term used of "appurtenance" (see *Woodhull v. Rosenthal*, 61 N. Y. 382; *Ogden v. Jennings*, 62 N. Y. 526); but the right to acquire it was appurtenant to the upland. This has been expressly decided. It was held that "the power conferred on the commissioners of the land office only authorizes a conveyance of lands under water to be made to the owners of the upland": *E. G. Blakslee Mfg. Co. v. E. G. Blakslee's Sons Iron Works*, 129 N. Y. 155, 29 N. E. 2; *New York etc. R. R. Co. v. Aldridge*, 135 N. Y. 83, 32 N. E. 50, 17 L. R. A. 516. In them, alone, is vested the right, or privilege, to apply for such a conveyance. While the state was the owner of the lands in Jamaica bay, ⁴⁰⁴ the railroad company, as the owner of the uplands, exclusively possessed the right to acquire them by a grant, and that right would pass as appurtenance to the upland (see above cases) which was included in the mortgage to the plaintiff; subject, only, perhaps, to its being, in fact, "convenient, or necessary, for the use, or for the purposes, of the railroad."

For these reasons, I advise the affirmance of the judgment appealed from.

Vann, Werner, Willard Bartlett, Hiscock and Chase, JJ., concur; Cullen, C. J., absent.

Judgment affirmed, with costs.

The Question as to What After-acquired Property Passes by a Railway Mortgage is the subject of a note to *Chicago etc. Ry. Co. v. McGuire*, 99 Am. St. Rep. 252. Property acquired by a railroad company adjacent to a depot, which it leases for a store, barber-shop, postoffice, and

other purposes foreign to the operation of the road, does not pass under a prior mortgage given by the company covering property thereafter acquired for purposes connected with or appertaining to the railroad: *Chicago etc. Ry. Co. v. McGuire*, 31 Ind. App. 110, 99 Am. St. Rep. 249.

A Corporation Empowered by Its Charter to Construct a Railway between specified points, together with all buildings, stations and other works and accommodations necessary and convenient, and to aid any other company in the construction of its road by means of subscriptions to its capital stock or otherwise, and to consolidate with any corporation owning a railroad or railroads and other property, has no power to engage directly in the construction and operation of a summer hotel, or to lend its credit to any corporation engaged therein: West Maryland R. R. Co. v. Blue Ridge Hotel Co., 102 Md. 307, 111 Am. St. Rep. 362.

SCOTT v. CURTIS.

[155 N. Y. 425, 88 N. E. 794.]

PUBLIC STREET—Persons Liable for Open or Unguarded Coal-hole.—Where the owner of property gives permission to persons delivering him coal to remove the cover of a coal-hole in the sidewalk, and a person falls therein by reason of failure properly to replace the cover, the owner is liable for the injury. But his liability does not relieve the active wrongdoers from the consequences of their acts; the liability is joint, and as between themselves the active wrongdoer stands in the relation of indemnitor to the owner when he has been held liable, and the rule that courts should not interfere as between joint tort-feasors is not applicable. (pp. 812, 813.)

PUBLIC STREETS—Persons Liable for Open or Unguarded Coal-hole.—In an action by the owner of premises against persons alleged to have left a coal-hole in the sidewalk in a dangerous condition, to recover from them the amount of a judgment that has been recovered against him by a person who fell into the hole, he must show that their active negligence caused the injury, and this is not sufficiently done by introducing in evidence the judgment-roll in the action against him, if it does not appear therefrom how the accident happened nor upon what specific acts he bases liability. (p. 814.)

Frank Verner Johnson, for the appellants.

William Arrowsmith, for the respondent.

426 CHASE, J. The plaintiff is the owner of certain real property in the city of New York on which is a house, and under the sidewalk in front of the house are coal bins used in connection with said house and through the sidewalk is an opening or coal-hole and a chute leading into said coal bins. The plaintiff purchased of the defendants fifteen tons of coal to be delivered in said bins. The defendants' employés came with a load of said coal, and the plaintiff showed them where to remove the fastenings to the cover

over said coal-hole and saw them remove said cover and the load of coal was delivered in the bins through said hole and chute leading therefrom. The plaintiff left his house, but returned before all of said coal had been delivered, and as he passed over the sidewalk into his house noticed that the cover was on the coal-hole. A few minutes afterward and before the defendants' employés had returned he heard an outcry, and ascertained that a woman, passing the house on the sidewalk, had fallen into the hole. The woman who fell into the hole brought an action against this plaintiff for damages. In her complaint she alleged that "the defendant wrongfully and negligently permitted said coal-hole to be and continue, and the same then and there was so badly, insufficiently and defectively covered and protected that by means thereof plaintiff . . . fell into said coal-hole."

The plaintiff herein, as the defendant in said action, denied the allegations of negligence on his part. He thereupon gave notice in writing to the defendants in this action of the commencement of said action, and that the same was coming on for trial, and requested the defendants to come in and defend said action, and also notified them that they would be held liable by him for the verdict and judgment rendered in the action so brought against him, but the defendants did not intervene in said action. When said action came on for trial the defendant conceded his liability. The court thereupon directed the jury to assess the amount of damage suffered by the plaintiff, and they found a verdict in favor of the plaintiff therein in the sum of two thousand five hundred dollars, and judgment was thereafter ⁴²⁷ entered against the plaintiff in this action for the amount of such verdict and costs.

The plaintiff in this action subsequently paid the judgment. This action was then brought against the defendants, and the plaintiff alleges that while the defendants were in the control of said coal-hole and chute they "negligently and carelessly left the cover of the said hole or chute improperly, insufficiently and defectively covered and unguarded and unprotected, and that by reason of the said carelessness and negligence of the said defendants" the plaintiff in the action previously brought against him was injured, without any fault or negligence on his part, but that such injury "was wholly caused by the negligence and carelessness of the defendants."

The complaint further alleges the bringing of said action against him, and the recovery and payment of said judgment. It demands judgment against the defendants for the amount paid by the plaintiff in satisfaction of said judgment and for certain expenses incurred in defending said action.

On the trial in this action the judgment-roll in said action was received in evidence, and the plaintiff rested without showing in detail how the accident occurred, or the specific act or acts of the defendants upon which he bases their liability to him.

An owner of real property who maintains a coal-hole in the sidewalk in front of his property is liable to a passer-by who is injured by falling into such hole when open and unguarded or when negligently and carelessly covered, although the person or persons primarily negligent in omitting to cover the hole or in negligently and carelessly covering it are the employés of a coal dealer who was at the time engaged in delivering coal to the owner through said coal-hole: *Downey v. Low*, 22 App. Div. 460, 48 N. Y. Supp. 207; *Campion v. Rollwagen*, 43 App. Div. 117, 59 N. Y. Supp. 308; *Anderson v. Caulfield*, 60 App. Div. 560, 69 N. Y. Supp. 1027; *Hart v. McKenna*, 106 App. Div. 219, 94 N. Y. Supp. 216.

When the removal of a cover from a coal-hole by the owner's permission creates danger to persons passing along a sidewalk, the owner is liable for any negligence in failing to see ⁴²⁸ that proper safeguards or warnings are provided to reasonably protect the public from such danger: *Weber v. Buffalo Ry. Co.*, 20 App. Div. 292, 47 N. Y. Supp. 7; *Mullins v. Siegel-Cooper Co.*, 183 N. Y. 129, 75 N. E. 112.

The liability of the owner of real property for injury to a passer-by for negligence in covering, or in failing to cover or guard, such a hole in a sidewalk does not relieve the active or actual wrongdoers from the consequences of their acts. The liability to the passer-by is joint. As between themselves, the active wrongdoer stands in the relation of an indemnitor to the person who has been held legally liable therefor: *Phoenix Bridge Co. v. Creem*, 102 App. Div. 354, 92 N. Y. Supp. 855; affirmed, 185 N. Y. 580, 78 N. E. 1110.

Where the liability rests upon two or more persons who are as against the person injured jointly liable for the injury, the rule invoked by the defendants that the court should not interfere as between joint tort-feasors is not applicable, where one of the two or more persons chargeable with negligence is primarily liable therefor and the others are only liable by reason of their ownership of the property, and not by reason of any negligence occurring by their active interposition or with their affirmative knowledge and assent. When an employé or independent contractor assumes the duty of performing an act which is dependent upon his personal care and attention, and an injury arises by reason of lack of such care and attention, such person is liable to the owner of the property if he is called upon to pay and does pay the damages arising from such negli-

gence: Phoenix Bridge Co. v. Creem, 102 App. Div. 354, 92 N. Y. Supp. 855; affirmed, 185 N. Y. 580, 78 N. E. 1110; Dunn v. Uvalde Asphalt Paving Co., 175 N. Y. 214, 67 N. E. 439.

The plaintiff in this action cannot recover unless he shows that the active negligence and wrong which caused the injury to the person falling into the hole was the negligence and wrong of the defendants. As we have stated, it does not appear from the record how the accident occurred. If it occurred by the negligent and careless manner in which the defendants temporarily covered or guarded the coal-hole it ⁴²⁹ may be assumed that this action will lie. If, however, the injuries occurred by reason of the cover of the hole breaking without any negligence or carelessness on the part of the defendants, or by reason of some carelessness of the plaintiff in this action, or by reason of some defect in the construction of the cover to such coal-hole wholly independent of the temporary use thereof, the defendants are not liable.

It may be assumed for the purpose of this opinion that notwithstanding the plaintiff's admission that he was liable in the action brought by the person who fell into the coal-hole, nevertheless the judgment-roll establishes as against the defendants herein that the plaintiff therein was injured by reason of negligence in connection with the covering of said hole and that no negligence of hers contributed to such injury, and that it also establishes the amount of her damages, but it was also incumbent upon the plaintiff to give evidence in addition to the judgment-roll in that action to show that the accident occurred by negligence for which the defendants were primarily liable. This he wholly failed to do and the judgment must, therefore, be reversed, with costs, and a new trial granted.

Gray, Vann, Werner, Willard Bartlett and Iliscock, JJ., concur; Cullen, C. J., absent.

Judgment reversed, etc.

It is the Duty of the Owner of Premises to See That a Coal-hole in the sidewalk is properly guarded and protected, so that persons passing along, and in the exercise of due care, will not fall into it, and he is not relieved of this duty by the fact that a coal company is using the hole for the purpose of putting in coal which is ordered of it; and the company owes a like duty to persons passing along the street, of which it is not relieved by the duty resting on the owner of the property and his servants and agents: French v. Boston Coal Co., 155 Mass. 334, 122 Am. St. Rep. 257.

If a Trapdoor is Negligently Maintained in a Sidewalk by a lot owner in a city for his sole use and benefit, and a person passing along the sidewalk is injured thereby, the city and the lot owner are not joint tort-feasors as between each other; and if damages are recovered

against the city for such injury, it has its remedy over against the lot owner, with notice to defend the original suit to recover the amount paid: *City of Seattle v. Puget Sound Imp. Co.*, 47 Wash. 22, 125 Am. St. Rep. 884, and see cases cited in the cross-reference note thereto.

SCHMIDT v. JEWETT.

[195 N. Y. 486, 88 N. E. 1110.]

WILLS.—The Words “Legal Issue,” When Used in a Will and unexplained by the context, have the meaning of descendants. (p. 816.)

WILLS.—Meaning of “Legal Issue.”—Where a Testator Gives the Income of a certain fund to his daughter for life, and the principal sum, on her death, “to her legal issue in equal portions after they severally reach the full age of twenty-one,” the words “legal issue” mean descendants, and upon the death of the daughter the fund held for her life vests absolutely in all her descendants then living in equal portions per capita. (pp. 816, 818.)

WILLS.—Action to Construe—Persons Bound by Judgment.—Where a testator gives the income of a certain fund to his daughter for life, and the principal sum, on her death, “to her legal issue in equal portions after they severally reach the full age of twenty-one years”; and a few years after his death a suit is brought to construe the will, wherein it is adjudged that he intended the principal fund should become vested in the legal issue of the daughter who should be living at her death, to be paid when they each reached the age of twenty-one years, the judgment does not conclude her after-born grandchildren. (pp. 816, 818.)

Howard Thayer Kingsbury and Frederic R. Coudert, for the appellant.

Barclay E. V. McCarty, Henry W. Showers, John M. Harrington and Frederick C. McLaughlin, for the respondents.

488 EDWARD T. BARTLETT, J. The testator, George Parbury Pollen, died on August 14, 1877, leaving a will dated April 15, 1875, which contained the following provision: “To **489** my daughter, Melinda, I also give the interest or income as it accrues on two hundred thousand (\$200,000) dollars during her natural life. The said amount to be set apart in such good dividend paying stocks and bonds as may stand in my name at the time of my decease, and at the then market value of the same. And at her death, I will that the said amount of two hundred thousand dollars go to her legal issue in equal portions after they severally reach the full age of twenty-one years.”

The testator left him surviving two daughters, Melinda P. Schmidt and Ann Eliza Leggett. The will contains a similar provision for Mrs. Leggett and her legal issue.

The executors named in the will brought an action for its construction, which was tried before Mr. Justice Van Vorst under the title of *Colgate v. Schmidt*, and judgment duly entered upon his decision June 1, 1880. The learned court made, among other findings, the following:

"Eighth. That, by the provisions of the said will wherein it is directed that at the death of each of the daughters respectively of the testator, the amount of two hundred thousand dollars should go to the legal issue of each of his said daughters, respectively, in equal portions, after they severally reach the full age of twenty-one years, it was intended by the testator that the said legacy of two hundred thousand dollars should become vested in the legal issue of each of the daughters of the said testator who should be living at the death of their respective mothers, and that such issue should become entitled in equal portions to such several sums of two hundred thousand dollars respectively, and that the same should be payable to them after they severally reach the full age of twenty-one years."

After other litigation, not important to notice at this time, the present action was instituted and the trial begun before Mr. Justice Carr in March, 1907. Findings were duly made, the learned judge holding, in substance, that the established rule of law is that issue must be deemed to mean descendants, unless there is something in the context of the will or in the extrinsic circumstances to indicate a contrary ⁴⁹⁰ intention. He also stated that he could find nothing in the context of the will which indicates that the testator used the words "lawful issue" in any sense other than in their strict legal meaning. The findings covered these views.

This case comes here by permission on appeal from an interlocutory judgment, upon which final judgment has not been entered, and we are confined to answering four certified questions.

Fritz L. Schmidt, Jr., the appellant, son of Melinda P. Schmidt, raises the question whether the nine infant grandchildren of Melinda P. Schmidt, the life tenant, who were not in being at the time of the testator's death, are to be regarded as remaindermen in the trust fund, he claiming that the testator in using the term "legal issue" meant his grandchildren, while the guardians ad litem of said grandchildren of the life tenant urge that the testator meant descendants. The appellant also contends that these nine grandchildren of the life tenant are bound by the judgment in *Colgate v. Schmidt*, for the reason that they take, if at all, by representation under the parties to that action.

It is well settled in this state that the words "legal issue," when used in a will and unexplained by the context, have the meaning of descendants. In *Soper v. Brown*, 136 N. Y.

244, 32 Am. St. Rep. 731, 32 N. E. 768, Andrews, J., said: "But I am of opinion that the word 'issue' in a deed or will, when used as a word of purchase and where its meaning is not otherwise defined by the context, and there are no indications that it was used in any other than its legal sense, comprehends all persons in the line of descent from the ancestor and has the same meaning as 'descendants,' and that while it embraces the children of the ancestor, it is because they are descendants in common with all other persons who can trace direct descent from a common source." The learned judge goes on to distinguish the cases where the word "issue" has been used in its restricted sense of meaning "children": See, also, *Drake v. Drake*, 134 N. Y. 220, 32 N. E. 114, 17 L. R. A. 664; *New York Life Ins. & Trust Co. v. Viele*, 161 N. Y. 11, 76 Am. St. Rep. 238, 55 N. E. 311; *Chwatal v. Schreiner*, 148 N. Y. 683, 43 N. E. 1066.⁴⁹¹ This is also the rule as stated by Mr. Jarman (2 Jarman on Wills, 98).

The nine after-born grandchildren of the life tenant do not take by representation, but directly as descendants of the testator.

In Black on Judgments, section 549, it is stated: "If a person is bound by a judgment, as a privy to one of the parties, it is because he has succeeded to some right, title, or interest of that party in the subject matter of the litigation, and not because there is privity of blood, law, or representation between them, although privity of the latter sort may also exist": See, also, *Downey v. Seib*, 185 N. Y. 427, 113 Am. St. Rep. 926, 78 N. E. 66, 8 L. R. A., N. S., 49, where the above quotation is cited with approval.

In the case before us the facts disclose only privity of blood; no right, title or interest was litigated as between the parties—each takes as a descendant of testator.

In *Rudd v. Cornell*, 171 N. Y. 114, 63 N. E. 823, it was held that the statement in an interlocutory judgment rendered in a partition suit, that a certain beneficiary under a testamentary trust is entitled to a specified portion of the proceeds of sale, is not binding upon the other beneficiaries where their rights as between themselves were not drawn in issue and the final judgment merely determined that one-half of the proceeds of such sale should be paid to the executrices under the will for the purpose of the trust created by it.

It is further insisted by the appellant that even if the will be construed so as to hold that the words "legal issue" mean descendants generally, that nevertheless the distribution should be not per capita, but per stirpes.

It was expressly held in *Soper v. Brown*, 136 N. Y. 244, 250, 32 Am. St. Rep. 731, 32 N. E. 768, already cited, as fol-

lows: "It is settled that under a gift to 'issue,' where the word is used without any terms in the context to qualify its meaning, the children of the ancestor and the issue of such children, although the parent is living, as well as the issue of deceased children, take in equal shares per capita and not per stirpes, as primary objects of the disposition."

⁴⁹² The four questions certified are answered as follows:

1. Is the judgment of June 1, 1880, in the suit of Colgate v. Schmidt, referred to in the decision herein, conclusive upon the parties to this action in regard to the construction of the will of George Parbury Pollen, deceased?

Answered in the negative.

2. Is it the true construction of the will of George Parbury Pollen, deceased, that on the death of the defendant Melinda P. Schmidt the trust fund now held for her life will vest absolutely in interest in all her descendants, then living, in equal portions per capita?

Answered in the affirmative.

3. Is it the true construction of the will of said George Parbury Pollen, deceased, that on the death of the defendant Melinda P. Schmidt the trust fund now held for her life will vest absolutely in interest in her children then living, in equal portions per capita?

Answered in the negative.

4. Is it the true construction of the will of said George Parbury Pollen, deceased, that on the death of the defendant Melinda P. Schmidt the trust fund now held for her life will vest absolutely in interest in her children then living, and the descendants of children then deceased, in equal portions per stirpes?

Answered in the negative.

The order of the appellate division affirming the interlocutory judgment herein, entered upon the decision of the special term, is hereby affirmed, with one bill of costs to each of the guardians ad litem who filed briefs in this court, and one bill of costs to the other respondents, payable out of the funds which will be created from the sale of the property directed in the judgment.

The motions made to dismiss the appeal herein, submitted on the argument in this court, are denied, without costs.

Cullen, C. J., Gray, Haight, Vann, Werner and Hiscock, JJ., concur.

Order affirmed, etc.

The Word "Issue," When Used in a Will, without any qualifying words or circumstances, comprehends all persons in the line of descent from the ancestor, and has the same meaning as "descendants": *Soper v. Brown*, 136 N. Y. 244, 32 Am. St. Rep. 731; *New York Life Ins. etc. Co. v. Viele*, 161 N. Y. 11, 76 Am. St. Rep. 238.

CASES

IN THE

SUPREME COURT

OF

OREGON.

AYRE v. HIXSON.

[53 Or. 19, 98 Pac. 515.]

PLEADING—Answer to Amended Complaint.—Where at the time of the amendment to a complaint in a suit to foreclose a chattel mortgage, and prior to the taking of any evidence, the defendants, who all joined in the original answer, reserve by consent of court the right to move against or to answer the amended complaint at a subsequent time, they are not bound, in filing their answer to the amended complaint after the testimony is taken, to adhere to the defenses set up in the original answer, nor are they precluded from filing separate answers making any defense otherwise available. (p. 822.)

CHATTEL MORTGAGE—Proof of Registration.—A Certificate on the Back of a chattel mortgage of the time and place of its registration is not a part of the mortgage, but an independent instrument which must itself be identified and offered in evidence in order to be evidence of the recording of the mortgage; it is not enough that the mortgage is identified and offered in evidence. (p. 823.)

CHATTEL MORTGAGE—Record of Mortgage of Realty and Personalty.—Under the Oregon statute providing that a mortgage covering both real and personal property shall be recorded in the book of mortgages of real estate and indexed in the general index of mortgages of personal property, the indexing of such a mortgage as thus prescribed is an essential part of its recording, without which it is not constructive notice. (pp. 823, 824.)

CHATTEL MORTGAGE—Pleading Want of Notice by Purchasers.—Defendants in a suit to foreclose a chattel mortgage who claim as innocent purchasers must affirmatively allege in their answer that at the time of their purchase they had no actual or constructive notice of the mortgage. (p. 824.)

CHATTEL MORTGAGE—Burden of Proof to Show Want of Notice.—Persons claiming to be purchasers without notice of a prior chattel mortgage have the burden to prove want of notice, either actual or constructive. (p. 824.)

CHATTEL MORTGAGE—Actual Notice to Purchaser.—A person about to purchase sheep, who is told in a conversation that there is a mortgage on the animals, is put upon inquiry and cannot afterward claim to be an innocent purchaser. (p. 825.)

CHATTEL MORTGAGE—Whether a Lien or a Transfer.—In Oregon a chattel mortgage does not transfer the title to the property, but is only a lien thereon. (p. 826.)

CHATTEL MORTGAGE—Whether Includes Increase of Animals.—If a chattel mortgage of sheep does not transfer the title, but creates only a lien on the property, it does not cover the increase of the animals unless made to do so in terms. (p. 826.)

CHATTEL MORTGAGE—Identification of Property.—To create a lien by chattel mortgage, the property must be identified at the time of the execution of the instrument. (p. 827.)

CONFUSION OF GOODS—Right of Parties to Assert Ownership.—Where through mistake or accident, or by consent of the owners, goods are commingled, neither party will lose his property but each will be treated as a tenant in common in proportion to his interest; but where the commingling is wrongful or willful, the commingler or wrongdoer forfeits his interest unless he can identify his goods. (p. 827.)

CHATTEL MORTGAGE—Intermingling Mortgaged Sheep With Others.—A mortgagor of sheep in possession who, through his own fault, commingles them with his other sheep, so that it is impossible to ascertain the relative proportion of mortgaged and unmortgaged animals, must suffer the loss, but the mortgagee can take only sufficient property to pay the mortgaged debt. (p. 827.)

CHATTEL MORTGAGE—Confusion of Properties—Rights of Purchaser.—Where the mortgagor of sheep through his own fault mingles them with other sheep not mortgaged, so that the mortgaged ones cannot be identified, he must bear the loss, and purchasers from him, with notice of the mortgage, stand in no better position. (p. 828.)

Hart & Nichols, for the appellants.

Orville B. Mount and Butcher, Clifford & Correll, for the respondent.

22 EAKIN, J. This is a suit to foreclose four mortgages, which include both real and personal property. It appears from the record that about November 26, 1901, plaintiff sold to the defendants, Hixson & Ames, about five hundred and thirty ewes, and lent to them \$1,572, evidenced by a promissory note due three years after date, with interest at ten per cent per annum after November 26, 1902. For the purpose of securing the payment of the loan Hixson & Ames executed to plaintiff a mortgage upon "all our sheep described as follows: Five hundred thirty (530) ewes, part of said ewes being marked with an underbit in each ear, and part of them marked with an underbit in left ear, and the increase of said sheep"; also upon certain real property. Thereafter, on July 18, 1903, plaintiff leased to Hixson & Ames one thousand yearling ewes for the period of three years from October 14, 1903, at an annual rent of \$750. Hixson & Ames were to pay all expenses of running the sheep, and were to keep them free from liens or encumbrances, and to deliver the wool clip to Ayre, who was to sell it, and upon the receipt of the selling price was to retain therefrom sufficient to pay any

balance due on the notes given for the rent; and, in case of failure of Hixson & Ames to keep the covenants of this agreement, Ayre was to take possession of the sheep and their increase, and to hold such increase until the amount of damages caused by any breach of the terms of the lease should have been adjusted. As evidence of the annual rent of \$750, Hixson & Ames executed to Ayre three promissory notes, due July 1, 1904, July 1, 1905, and July 1, 1906, respectively, and secured the payment thereof by a mortgage on certain real estate.

²³ On October 14, 1905, plaintiff leased to Hixson & Ames one thousand and thirty-two yearling ewes for the term of three years at an annual rent of \$1 per head, evidenced by three promissory notes: One for \$1,249, due on demand; one for \$1,032, due one year after date; and one for \$1,032, due two years after date—with interest at ten per cent per annum. The terms as to the running expense, wool clip, etc., were the same in every respect in this lease as in the lease of the one thousand head of ewes above mentioned. From the price of the wool Ayre was to retain sufficient to pay any balance due on the notes mentioned, together with any advances made by himself or expenses incurred on account of the lease; and on the same date, as security for the payment of the notes above mentioned, Hixson & Ames executed to Ayre a mortgage upon certain real property, and also “together with the increase from all the sheep rented to the said mortgagors by a lease, hereinafter mentioned, of even date herewith; also fourteen head of bucks turned over with said sheep; and also all sheep belonging to said mortgagors upon which said mortgagee has no mortgage or lien.” There was included in the mortgage also the further sum of \$500, as indemnity against loss or damage caused by failure of Hixson & Ames to keep the covenants of this lease. It was provided that after the payment of any of the three notes the mortgage should remain in full force and effect as indemnity in the sum of \$3,813 to the mortgagee until all covenants of the lease should have been fulfilled; and if the mortgagors should fail to pay the sums due, or fail to comply with any of the covenants set forth in the lease, the mortgagee might at the time of such failure to pay, or breach of the covenants in this mortgage or lease, compel payment for the rent, and any damages which he might suffer by reason of such breach; and, if Hixson & Ames should suffer any lien to be placed upon this band of ewes, the mortgagee might at his option ²⁴ make payment thereof, and the same should become a part of the debts secured thereby.

The fourth mortgage was given February 12, 1907, by Hixson & Ames to Ayre to secure a note of \$1,000, dated October 14, 1906, due one year after date, upon “all our

sheep, or sheep in which we have any interest, consisting of about four thousand head thereof, together with the increase therefrom, and the wool therefrom and thereon during the life of this mortgage, or any sheep we may hereinafter acquire during said time"; also upon the same lands described in the first, second, and third mortgages. During the time of these dealings between plaintiff and defendants, Hixson & Ames, plaintiff received from them the wool clip each year, beginning with the year 1904, and purchased from them about seven hundred and seventy-nine sheep, some hay, and a few other small items, the proceeds of which he applied at first as credits on an open account and to the cancellation of notes for advances and expenses. The remainder was applied to the payment of the notes especially secured by the mortgages.

On June 15, 1905, plaintiff and defendants, Hixson & Ames, had a settlement, in which all the credits up to that time were adjusted and applied, leaving the face of the note of the mortgage of 1901 and the notes of the mortgage of 1903 unpaid, and canceling all other prior obligations.

The defendants Brasfield Brothers were made defendants in this suit because they were in possession of sheep which plaintiff contends are included in the mortgages. All the defendants joined in an answer to the complaint, and at the time of the commencement of the trial plaintiff amended his complaint by inserting pages 4 and 4½, which concerned only the second cause of suit, and the defendants reserved the right at that time thereafter to move against or answer the amended complaint. The testimony was all taken before the answers were filed, and at the time for the argument defendants Brasfield ²⁵ Brothers filed a separate answer, to which no objection was taken at the time, and plaintiff replied thereto on the same day. The cause was tried, findings were made in favor of the plaintiff, and a decree was rendered thereon; and defendants Brasfield Brothers alone appeal.

1. At the outset plaintiff contends that because the defendants Brasfield Brothers joined with Hixson & Ames in the original answer, and therefore could make no defense not common to all the defendants so answering, they cannot now by their several answers avail themselves of the defense that they were innocent purchasers. At the time the complaint was amended, defendants, by consent of the court, reserved the right to move against or to answer the same at a subsequent time. This was prior to the taking of any evidence; and in filing their answer to the amended complaint they were not bound to adhere to the defenses of the original answer, nor were they precluded by the several answers from making any defense otherwise available to them.

2. The first contention of the defendants Brasfield Brothers is that there is no evidence before the court that any of the

mortgages were recorded, and that the burden is upon plaintiff to prove notice thereof. At the trial the original mortgages were identified and offered in evidence. On the back of these is certified the time when they were received, and a reference to the book and page ²⁶ in which they were recorded, but such certificate was not identified or offered in evidence. Section 5357, B. & C. Comp., is expressly made applicable to chattel mortgages by section 5634, B. & C. Comp., and provides that the county clerk shall certify on every conveyance recorded the time when received and the place of record; and every conveyance shall be considered recorded at that time. Such a certificate would be evidence of the time and place of record, if offered in evidence; but not being identified or offered, it is not before the court. This certificate is no part of the mortgage identified by the witness nor is it part of the "conveyance duly acknowledged," which is made competent evidence without further proof by section 5355, B. & C. Comp., but is an independent instrument executed at a different time and by a different person. In *Drexel v. Murphy*, 59 Neb. 210, 80 N. W. 813, it was held that a certified copy of a chattel mortgage offered in evidence was not an offer of the indorsement thereon of the filing. To the same effect is *Fuller v. Brownell*, 48 Neb. 145, 67 N. W. 6. Therefore, the certificate of record indorsed on the mortgage is not before the court as evidence of such record.

3. The defendants also objected to the mortgage of February 12, 1907, for the reason that it is not recorded as provided by section 5631, B. & C. Comp., viz., that it is recorded in the record of mortgages of real property, but not indexed in the general index of chattel mortgages. That section provides that chattel mortgages shall be recorded in a book kept exclusively for that purpose, and a general index thereof kept by the recorder; but if the instrument is "intended to operate as a mortgage of real property, as well as a mortgage of personal property, such instrument may be recorded in the records of mortgages of real property, and such county clerk or recorder of conveyances in whose office the same is recorded, shall index the same in the general index of ²⁷ mortgages of personal property or chattel mortgages as well as in the general index of mortgages of real property, and the same need not be recorded in the records of mortgages of personal property." Section 5633, B. & C. Comp., provides that every mortgage of personal property alone or with real property, if not accompanied by immediate delivery and continued change of possession, or which shall not be recorded as provided in section 5631, shall be void against subsequent purchasers in good faith for a valuable consideration. When a mortgage is intended as a mortgage of both real and personal property, only when it is recorded in the record of mort-

gages of real property and indexed in the general index of chattel mortgages is the mortgagee excused from having it recorded in the book of chattel mortgages. The general index of chattel mortgages is the only means provided by section 5631 by which third parties may find a chattel mortgage recorded only in the record of mortgages of real property. Therefore, by the terms of the statute the indexing in such a case is a part of the recording, and that mortgage was not at the time of the purchase by Brasfield Brothers so recorded as to be constructive notice thereof.

4. However, defendants Brasfield Brothers, as a defense to the mortgages set out in the complaint, which are prior to their purchase, affirmatively allege in their answer that at the time of their purchase they "had no knowledge or notice, either actual or constructive, that plaintiff had or claimed any mortgage or other claim or lien upon or against said sheep, or any thereof, and that said defendants were and are innocent purchasers for value of said sheep." This is a necessary allegation under the provisions of section 5633, B. & C. Comp., above mentioned, and the burden is upon defendants to prove it.

5. It is said in *Haines v. Connell*, 48 Or. 469, 120 Am. St. Rep. 835, 87 Pac. 265, 88 Pac. 872, that the denial of the averments of the complaint did not entitle ²⁸ defendants to make the defense of a bona fide purchaser. That was affirmative matter which they were required to plead in their answer, notwithstanding the allegations of the complaint. It is also so held in *Rhodes v. McGarry*, 19 Or. 222, 23 Pac. 971, *Jennings v. Lentz*, 50 Or. 483, 93 Pac. 327, and in many other cases in this court. In *Laurent v. Lanning*, 32 Or. 11, 51 Pac. 80, it is held necessary for the attaching creditor to show that plaintiffs' "mortgage was unrecorded at the time he in good faith acquired the judgment; that is to say, in order to advance his equity above that of the plaintiffs, he must show plaintiffs' laches in not complying with the terms of the statute under which he claims superior right, and this imposes upon him the duty of showing the want of record." Among the decisions of other states there is a want of uniformity upon this point. The following, however, support this view: *Wyse v. Dandridge*, 35 Miss. 672, 72 Am. Dec. 149; *Fowler v. Merrill*, 11 How. 375, 13 L. ed. 736; *Diemer v. Guernsey*, 112 Iowa, 393, 83 N. W. 1047; *Wright v. Larson*, 51 Minn. 321, 38 Am. St. Rep. 504, 53 N. W. 712; *Ransom v. Schmela*, 13 Neb. 73, 12 N. Y. 926. Therefore, the burden is upon the defendants claiming to be purchasers without notice of the prior liens of plaintiff to prove such want of notice, either actual or constructive. The answer alleges want of notice, and there is some evidence tending to show that the purchase was made without actual notice, but not

that it was without constructive notice. The defendant George Brasfield testified that the 1905 mortgage was recorded, and there is no evidence that it or the two prior ones were not duly recorded.

6. As to the question of actual notice to defendants Brasfield Brothers, Oxman testified that he had had a conversation with the defendant George Brasfield, sometime in September, before the delivery of the sheep, near the Stockman's Saloon down on Front street, in which conversation George Brasfield, referring to the purchase of the ²⁹ sheep, said that he had a written contract for such purchase, on which money had been paid, saying, "I says to him, 'Mr. Ayre has this stuff mortgaged for more than it is worth.''" Oxman further testified that he had a second conversation with him after the delivery of the sheep, in the fore part of October at the corner of Maine street on Washington, across from the Geyser Grand Hotel, when he again called George Brasfield's attention to the mortgage, and the latter said that he had hired an attorney to look it up, and that there was no mortgage given on the property he bought; and George Brasfield admits that he had such a conversation with Oxman near Griswold's store on the 23d of October, after the delivery of the sheep and payment therefor.

7. Defendant Ames says that at the time Brasfield Brothers bought the sheep he told the defendant Jim Brasfield that Ayre had some mortgages on the yearlings. We think the conclusion is unavoidable that Brasfield Brothers had notice when they purchased the sheep, and before they paid for them, that Ayre had mortgages upon all or upon some of them. This was sufficient to have put them on inquiry, which would have led to a disclosure of all the facts in relation thereto. Therefore the defendants Brasfield Brothers are not purchasers in good faith within the provisions of section 5633, B. & C. Comp.

8. The mortgage of 1901 was upon the sheep described and their increase. The mortgage of 1903 does not include any sheep. The mortgage of October 14, 1905, includes the increase of one thousand and thirty-three yearling ewes, described in the lease of that date, also all sheep belonging to the mortgagors upon which the mortgagee has no lien. This recognizes that there were other sheep mortgaged to Ayre. It does not in terms include the increase of the sheep mentioned in the last description; that is, it includes all sheep then in defendants' possession, and the increase thereof, except the increase of those accumulated from the one thousand head leased in 1903. The mortgage of ³⁰ 1907 covers all sheep owned by the defendants, and the increase thereof, and includes all the sheep purchased by the defendants Brasfield Brothers. Ames, in his testimony, says that none of the

sheep described in the 1901 mortgage were included in the sale to Brasfield Brothers. But this cannot be true, as the increase of the sheep included in the mortgage of 1901 for the year 1902 was four hundred lambs, and for 1903, five hundred lambs, and it is reasonable to suppose that this increase prospered as well as the others. He says that they sheared two thousand two hundred or two thousand three hundred sheep in the spring of 1904, which included one thousand head leased in October, 1903. Therefore, more than half of the sheep in defendants' possession in the spring of 1904 were owned by defendants and were included in the mortgage of 1901; and the conclusion is unavoidable that a large proportion of the sheep sold to Brasfield Brothers must have been the increase of the original stock of 1901 and of the one thousand and thirty-two sheep leased in October, 1905, and, therefore, included in the mortgages of 1901 and 1905, and that all were included in the mortgage of 1907.

9. Plaintiffs contend that the mortgage of 1905 includes the increase of all sheep mentioned therein, on the theory that the offspring of female animals belongs to the owner of the mother. This is true in most states where the chattel mortgage transfers the title to the mortgagee: *Northwestern Nat. Bank v. Freeman*, 171 U. S. 620, 19 Sup. Ct. Rep. 36, 43 L. ed. 307; *Jones on Chattel Mortgages*, 5th ed., 149. With the exception of the state of Texas, we believe that all the courts so holding do so on the theory that the mortgagee holds the title to the mortgaged property. In Texas the mortgage does not transfer the title, but is only a lien upon the property. The court in that state holds that, as between the parties at least, the lien will also include the increase, even when not especially mentioned: *First Nat. Bank v. Mortgage Co.*, 86 Tex. 636, 26 S. W. 488. But, under the rule that the offspring belongs to the owner of the mother, the increase ³¹ in Oregon belongs to the mortgagor, unless the increase is also mortgaged, as he is the owner of the mother. This is the holding in *Shoobert v. De Motta*, 112 Cal. 215, 53 Am. St. Rep. 207, 44 Pac. 487, *First Nat. Bank v. Erreca*, 116 Cal. 81, 58 Am. St. Rep. 133, 47 Pac. 926, and *Battle Creek Bank v. First Nat. Bank*, 62 Neb. 825, 88 N. W. 145, 56 L. R. A. 124, where the mortgage is only a lien.

10. In Oregon a chattel mortgage does not transfer the title to the mortgaged property, but is only a lien thereon (*Chapman v. State*, 5 Or. 432; *Knowles v. Herbert*, 11 Or. 54, 240, 4 Pac. 126), and unless the mortgage in terms includes the increase it is not subject to the mortgage lien.

11. These mortgages are security not only for the payment of the notes therein mentioned, but also for the fulfillment of the covenants of the respective leases, which would include the care of the sheep for which the advances were made. The

wool of some of the sheep was probably not covered by the mortgage or by the terms of the lease; that is, the wool from such of the increase as was not included in the mortgage. The wool from all the sheep owned by the defendants having been delivered to Ayre, the proceeds of the unencumbered portion thereof and the price of the sheep sold to him could well be applied by Ayre to the payment of advances regardless of the terms of the mortgages or leases, and Brasfield Brothers have no ground for complaint.

12. Defendants urge that to enable plaintiff to foreclose his mortgages he must identify the property included therein. The rule is that to create a lien on personal property by chattel mortgage, the property must be identified at the time of the execution of the instrument. This is the point involved in *Gregory & Co. v. Northern Pac. L. Co.*, 15 Or. 447, 17 Pac. 143, and *Lee v. Cole*, 17 Or. 559, 21 Pac. 819, relied upon by defendants, but not the difficulty here.

³² 13. The property when mortgaged was identified; and the question now is, whether plaintiff can or is required to identify sheep properly mortgaged with which the mortgagor in possession has commingled some of his own sheep. It is a question of confusion of goods. The remedies of the parties owning portions of the property so commingled depend upon the circumstances of the commingling; namely, whether by consent of the owners, by mistake or accident, or whether it was the result of willful, careless, or fraudulent conduct. In the first two cases, as between the owners, neither of them will lose his property, but each will be treated as a tenant in common in proportion to his interest.

14. But where willful or wrongful, the commingler or wrongdoer forfeits his interests unless he can identify his goods: *Jones on Chattel Mortgages*, 5th ed., sec. 481; 6 Am. & Eng. Ency. of Law, 2d ed., 592; *Ilfeld v. Ziegler*, 40 Colo. 401, 91 Pac. 825; *Fuller v. Paige*, 26 Ill. 358, 79 Am. Dec. 379; *Kreuzer v. Gooney*, 45 Md. 582; *Horne v. Hanson*, 68 N. H. 201, 44 Atl. 292; *Root v. Bonnema*, 22 Wis. 539; *Hentz v. The Idaho*, 93 U. S. 575, 23 L. ed. 978; *Alley v. Adams*, 44 Ala. 609; *Willard v. Rice*, 11 Met. (Mass.) 493, 45 Am. Dec. 226. See, also, extended note to *Pulcifer v. Page*, 54 Am. Dec., at page 591.

15. If it were possible to ascertain the relative proportion of the sheep which belonged to the mortgagor and mortgagee, respectively, each might take his proportionate share of the whole; but from the testimony of the mortgagors this is not possible, as they could not even approximate the number of sheep not covered by the mortgage, and it is their fault that there is confusion, and they must suffer the loss: *Jones on Chattel Mortgages*, sec. 481.

16. This works no hardship on Hixson & Ames, as only sufficient property can be taken to pay their debts to Ayre.

³³ 17. As we have found that Brasfield Brothers purchased with notice of the mortgages, they are in no better position than the mortgagors, and the mortgagee may take the entire property from such purchasers: Jones on Chattel Mortgages, sec. 484; Ilfeld v. Ziegler, 40 Colo. 401, 91 Pac. 825; Adams v. Wildes, 107 Mass. 123; Kreuzer v. Cooney, 45 Md. 582; Horne v. Hanson, 68 N. H. 201, 44 Atl. 292; Fuller v. Paige, 26 Ill. 358, 79 Am. Dec. 379.

Therefore, the decree of the lower court is affirmed.

Affirmed.

A Chattel Mortgage on Domestic Animals which in terms covers the increase thereof, and which is executed during the period of gestation and duly filed for record, creates a lien upon the increase when the same are born, which will continue so long as the mortgage lasts, not only as between the mortgagor and mortgagee, but as against creditors and bona fide purchasers of the mortgagor: Holt v. Lucas, 77 Kan. 710, 127 Am. St. Rep. 459. It is held, however, that a mortgage of animals without any express agreement as to their increase does not cover increase in gestation at the time of the execution of the mortgage; as to such increase born before foreclosure, the mortgagor in possession may deal with it as his own, and dispose of it as he sees fit: Demers v. Graham, 36 Mont. 402, 122 Am. St. Rep. 384.

A Chattel Mortgage on Sheep Does not Include the Wool Thereon nor Their Increase in gestation at the date of the mortgage, where neither the wool nor increase was specially mentioned in the instrument, though the statute authorizes the execution of such mortgages upon sheep and the increase thereof: First Nat. Bank v. Erreca, 116 Cal. 81, 58 Am. St. Rep. 133. See, also, Shoovert v. De Motta, 112 Cal. 215, 53 Am. St. Rep. 207; Willard v. Ostrander, 51 Kan. 481, 37 Am. St. Rep. 294.

The Doctrine of Confusion of Goods is the subject of a note to Stone v. Marshall Oil Co., 101 Am. St. Rep. 913; title by accession is considered in the notes to Gaskins v. Davis, 44 Am. St. Rep. 444; Pulcifer v. Page, 54 Am. Dec. 583. If a lessee of sheep causes them to be mingled with sheep of his own, he and his lessor become tenants in common of the whole flock thus rendered incapable of identification and segregation: Manti City Savings Bank v. Peterson, 33 Utah, 209, 126 Am. St. Rep. 817.

MATTISON v. MATTISON.

[53 Or. 254, 100 Pac. 4.]

WILL—Restriction on Alienation of Life Estate.—If a will passes the legal title to a life estate, an attempt to limit the enjoyment or power of alienation thereof by the same instrument is void. (p. 830.)

WILL—Validity of Spendthrift Trust.—A Testator may, by appropriate language, create an equitable estate for the life of a devisee, of which he shall be entitled to the possession and profits, but which shall be inalienable by him and beyond the reach of his creditors. (p. 831.)

WILL—Spendthrift Trust—Necessity of Express Terms.—A provision in a will against alienation or liability to creditors of an equitable life estate created for the benefit of a devisee need not be in express terms, but may be implied from the general intention of the donor, to be gathered from the terms of the trust in the light of all the circumstances. (p. 832.)

WILL.—A Will is to be Construed in Accordance With the Intention of the testator, gathered from the whole instrument rather than from the language of any particular clause. (p. 832.)

TRUST—Effect of Death of One Trustee.—Under the Oregon statutes trustees in real estate hold as joint tenants, unless otherwise provided in the devise or deed, and therefore upon the death of one the trust survives in the other. (p. 833.)

Claire M. Inman, for the appellant.

Oscar Hayter and George G. Bingham, for the respondent.

255 EAKIN, J. This is a suit to quiet title. Isaac Mattison, father of the plaintiff and defendant, now deceased, by his will made provision for plaintiff in the following language, namely:

“2nd. It is my will in order to provide for the comfort of my son Alanson Mattison and to secure to him a home during his life, I give, grant, and bequeath to said Alanson Mattison, during his life, the occupancy, use, rents and profits of the west half of my farm situated and being in the county of Marion and State of Oregon, being a part of section No. 35, in township 8 south of range 4 west of the Willamette Meridian. In order to protect my said son in the full enjoyment for life of the said gift and bequest, I constitute and appoint my sons, Henry N. Mattison and Charles A. Mattison, trustees of said bequest with full authority to conduct and control said bequest in such manner as to my said trustees may be proper to secure to said Alanson Mattison the full and free enjoyment and benefits of said bequest.”

“4th. It is my will that at the termination of the life estate hereinbefore given to my son Alanson Mattison by his death, that said tract of land covered by said life estate

be sold and that proceeds thereof be divided equally among my children," etc.

²⁵⁶ The said Charles A. Mattison, trustee named in said will, died in 1906, and this defendant, as such trustee, has been, and is now, claiming the right to take possession of said lands and the crop raised thereon; to rent the lands as he may see fit and pay the proceeds thereof to the plaintiff at such times and in such amounts as he may deem proper; and is withholding rents and profits of said lands from plaintiff and depriving him of the occupancy thereof.

Plaintiff contends that, by terms of the will above quoted, he is the legal owner of a life estate in and entitled to the occupancy, use, and control of said lands without interference from defendant, and he brings this suit to quiet his title thereto, and to enjoin defendant from interfering with his occupancy and control thereof.

Defendant answered the complaint, admitting the terms of the will and asserting thereunder his right as trustee to lease portions of said land as he may see proper, collect the rents, repair, maintain, and improve said premises, pay the taxes thereon, and pay over to plaintiff the rents, issues, and profits in such sums and at such times as he may think best. To the new matter of the answer plaintiff filed a demurrer, which was overruled by the court, and a decree was rendered upon the pleadings in favor of defendant, from which plaintiff appeals.

1. Plaintiff seeks by this suit to have the court declare that the effect of the clause of the will above quoted is to pass to him the legal title to the life estate in the property mentioned, and defendant's contention is that ²⁵⁷ the will transfers to him the legal title in trust, with full power and authority to possess and control the property, with absolute discretion to pay the rents and profits of it to plaintiff as he may deem best, or to expend the same in repairs or improvements upon said lands. If the effect of the will is to pass to plaintiff the legal title to the life estate, then the attempt to limit the enjoyment or power of alienation thereof by the same instrument is void: *Mason v. Rhode Island I. T. Co.*, 78 Conn. 81, 61 Atl. 57, 3 Ann. Cas. 588; *Bennett v. Trustees of the Methodist Episcopal Church*, 66 Md. 36, 5 Atl. 291.

2. But a testator may create for the benefit and enjoyment of the devisee a trust estate, and such a provision may, if so intended by the testator, limit the right of alienation by the devisee and its liability for his debts. The English rule on this subject is that the grantor cannot put any restraint upon the right of alienation of an equitable life estate or place it beyond the reach of creditors, but, if the estate be granted to trustees for the benefit of the cestui

que trust until alienation or insolvency, then the happening of that event will terminate the estate, or where the trustees are given full power and discretion to apply or not to apply the income for the benefit of the cestui que trust it is beyond his power to alienate it, and is not liable for his debts. This English doctrine has been followed in some states of the United States, in some the subject is governed by statute, while in many others a much broader policy has been adopted and is quite generally recognized, to the effect that an equitable life estate may be created by appropriate language, whereby the life tenant may have a legal right to the income therefrom, and which shall be inalienable by the life tenant and beyond the reach of creditors. This rule is stated in 26 American and English Encyclopedia of Law, second edition, 139, where it is said that the English doctrine is largely extended by the majority of the states, ²⁵⁸ and is called the "American doctrine," namely: "This doctrine is that it is lawful for a testator or grantor to create a trust estate for the life of the cestui que trust with the provision that the latter shall receive and enjoy the avails at times and in amounts, either fixed by the instrument or left to the discretion of the trustee, and that such avails shall not be subject to alienation by the beneficiary nor liable for his debts." In *Mason v. Rhode Island I. T. Co.*, 78 Conn. 81, 61 Atl. 57, this question was directly before the court, and Mr. Justice Prentice makes a similar statement of the rule, namely: "The great current of modern authority in this country is to the effect that an equitable life estate, under which the life tenant may have absolute rights, may, by appropriate language, be created by one for the benefit of another, which shall be inalienable by the cestui que trust, and beyond the reach of creditors." There is an exhaustive note to this case in 3 Ann. Cas. 588, in which the cases are collated and classified, sustaining the text above quoted, and in 54 Cent. L. J. 382, is a leading article to the same effect.

The following states sustain the doctrine that the legal right of a cestui que trust to the possession and profits of the life estate to the extent provided by the deed or device may be valid and inalienable by the life tenant, if such intention of the grantor or testator appears from the instrument: *Mannerback's Estate*, 133 Pa. 342, 19 Atl. 552; *Broadway Nat. Bank v. Adams*, 133 Mass. 170, 43 Am. Rep. 504; *Steib v. Whitehead*, 111 Ill. 247; *Roberts v. Stevens*, 84 Me. 325, 24 Atl. 873, 17 L. R. A. 266; *Leigh v. Harrison*, 69 Miss. 923, 11 South. 604, 18 L. R. A. 49; *Smith v. Towers*, 69 Md. 77, 9 Am. St. Rep. 398, 14 Atl. 497, 15 Atl. 92; *Patten v. Herring*, 9 Tex. Civ. App. 640, 29 S. W. 388; *Weller v. Noffsinger*, 57 Neb. 455, 77 N. W. 1075; *Lampert v. Haydel*, 96

Mo. 439, 9 Am. St. Rep. 358, 9 S. W. 780, 2 L. R. A. 113; Randall v. Josselyn, 59 Vt. 557, 10 Atl. 577; ²⁵⁹ Garland v. Garland, 87 Va. 758, 24 Am. St. Rep. 682, 13 S. E. 478, 13 L. R. A. 212; Mason v. Rhode Island H. T. Co., 78 Conn. 81, 61 Atl. 57, 3 Ann. Cas. 588.

3. This deviation from the common-law doctrine follows the opinion of Mr. Justice Miller in the case of Nichols v. Eaton, 91 U. S. 716, 23 L. ed. 254, in which it is said: "We do not see, as implied in the remark of Lord Eldon (Brandon v. Robinson, 18 Ves. 429), that the power of alienation is a necessary incident to a life estate in real property, or that the rents and profits of real property and the interest and dividends of personal property may not be enjoyed by an individual without liability for his debts being attached as a necessary incident to such enjoyment. . . . Nor do we see any reason . . . why a testator . . . may not attach to that gift the incident of continued use, of uninterrupted benefit of the gift during the life of the donee. Why a parent or one who loves another, and wishes to use his own property in securing the object of his affection, as far as property can do it, from the ills of life, the vicissitudes of fortune, and even his own improvidence, or incapacity for self-protection, should not be permitted to do so, is not readily perceived." In Leigh v. Harrison, 69 Miss. 923, 11 South. 604, 18 L. R. A. 49, the same idea is stated: "The ordinary doctrine that a restraint upon alienation is inconsistent with an estate in lands has no application to an equitable estate." In this case if it was the intention of the testator to create an equitable estate in plaintiff, whereby he should have the occupancy, rents, and profits of the property mentioned during his life, and sought to accomplish this end by placing the property in the hands of trustees with the purpose that plaintiff should be deprived of the right of alienation, and this purpose is disclosed by the terms of the will, that intention must prevail. In an equitable life estate a provision against alienation or liability to creditors need not be in express terms, but may be implied from ²⁶⁰ the general intention of the donor, to be gathered from the terms of the trust in the light of all the circumstances. The will is to be construed in accordance with the intention of the testator, gathered from the whole instrument, rather than from the language used in any particular clause of it: Seymour v. McAvoy, 121 Cal. 438, 53 Pac. 946, 41 L. R. A. 544; Baker v. Brown, 146 Mass. 369, 15 N. E. 783; Smith v. Towers, 69 Md. 77, 9 Am. St. Rep. 398, 14 Atl. 497, 15 Atl. 92; Partridge v. Cavender, 96 Mo. 452, 9 S. W. 785; Patten v. Herring, 9 Tex. Civ. App. 649, 29 S. W. 388.

4. In Patten v. Herring, the testatrix directed the executors to control the property so her brothers should have

the sole right to occupy the homestead, together with such personalty as was necessary to maintain the home, and that the executors should control the estate in such a manner as might tend to promote its interest and pay the brother the net proceeds each year during his life, and it was held that none of the property or income was liable for the brother's debts. In *Garland v. Garland*, 87 Va. 758, 24 Am. St. Rep. 682, 13 S. E. 478, 13 L. R. A. 212, it was held that, although the life tenant was to have the use and superintendency of the plantation, it was not subject to his debts. In the case before us it appears that the testator intended that Alanson Mattison should have the occupancy, use, rents, and profits of the property mentioned, and it equally appears that he did not intend to pass to him the legal title to the life estate or the power of alienation; but in order to protect the son in the enjoyment of the bequest during his life he placed the legal title in the trustees named, with authority to conduct and control said bequest in such manner as to secure to Alanson Mattison the full and free enjoyment and benefits of the bequest, thus clearly intending that it should be beyond his power of alienation. The terms "give, grant and bequeath" to the wife in the previous clause of the will is a devise of ²⁶¹ the legal life estate, and is distinguished from that to the son which is an equitable estate. It is plain that it was the purpose of the testator to insure to Alanson Mattison the full benefit of the life estate during his life by putting the title thereto beyond his power of alienation, and the language of the will creating the trust does not curtail or limit the benefits bequeathed to plaintiff.

5. The point further raised by plaintiff, that the power being conferred upon two, and one of the donees of the power has died, it cannot be exercised by the survivor, is not involved here as the terms of the will create a trust—not a mere power—and by the legislative act of 1905 (Laws 1905, p. 253) it is declared that trustees holding a trust in real estate hold as joint tenants, unless otherwise provided in the devise or deed, and therefore upon the death of one, the trust survives in the other. Plaintiff is entitled to occupy and use the property, if he so desires, and defendant may not detain from him such occupancy or the rents or profits, except so far as may be necessary to preserve the property. But, if the property or any part thereof is not occupied by plaintiff, or he commits or permits waste thereon, then the defendant should conduct and control said property in such manner as he may see fit to secure to Alanson Mattison the benefits thereof by renting the same, or

otherwise, and collect and pay to him the rents and profits, less expenses incurred in relation thereto.

The decree of the lower court will be modified to this extent.

Modified.

Spendthrift Trusts are discussed in the notes to *Garland v. Garland*, 24 Am. St. Rep. 686; *Smith v. Towers*, 9 Am. St. Rep. 405. The validity and effect of such trusts are further considered in the recent cases of *Merchants' Nat. Bank v. Crist*, 140 Iowa, 308, 132 Am. St. Rep. 267; *Huntress v. Allen*, 195 Mass. 226, 122 Am. St. Rep. 243; *Wenzel v. Powder*, 100 Md. 36, 108 Am. St. Rep. 380. *Cujus est dare, ejus est disponere*, is the fundamental principle on which the law rests its protection of what is known as the spendthrift trust. It allows the donor, within the law, to condition his bounty as suits himself. Spendthrift trusts have no other justification than is to be found in considerations affecting the donor alone. They allow the donor so to control his bounty, through the creation of the trust, that it may be exempt from liability for the donor's debts, not because of any monitory care for the donee, but because it is concerned to protect the donor's right of property, but when he substitutes the pleasure of the donee for his own absolute right of disposition, the gift is absolute: *Morgan's Estate*, 223 Pa. 228, 132 Am. St. Rep. 732.

To Create a Spendthrift Trust, the gift to the donee must be of the income only; the legal title must be vested in the trustee; and the trust must be an active one, not a mere dry trust which may be executed under the statute of frauds: *Kessner v. Phillips*, 189 Mo. 515, 107 Am. St. Rep. 368.

JOHNSON v. CROOK COUNTY.

[53 Or. 329, 100 Pac. 294.]

TAXATION—Unperfected Claim in Public Land.—An application to surrender to the United States an unperfected claim within a forest reservation, or to reconvey to the government patented land therein, and to select in lieu thereof unoccupied nonmineral land, is an offer to exchange an interest in real property for other lands, to which latter premises neither an equitable estate attaches nor a legal title vests until the proposal is accepted by the commissioner of the general land office; and while both the equitable and legal titles thus remain in the United States, the premises selected are not subject to taxation. (p. 836.)

TAXATION—Interest in Public Land—Relation of Title.—The doctrine of title by relation cannot be invoked to uphold a tax, levied upon land before the ownership had passed from the United States to an applicant therefor, by carrying the interest of the applicant back to the time when he made application. (p. 837.)

THE DOCTRINE OF RELATION is a Fiction of Law which courts, upon broad rules of equity, apply in furtherance of justice but never employ except when necessary to give effect to an instrument the operation of which would otherwise be defeated. (p. 837.)

TAXATION—Right to Recover Taxes Illegally Exacted.—When a tax has been paid without compulsion, but with comprehension of

its invalidity or with means of knowledge of its illegality, the liquidation is voluntary and prevents a recovery of the money disbursed, although the payment may have been under protest. (p. 838.)

TAXATION—Right to Recover Taxes Illegally Exacted.—When a person whose property is charged with an illegal tax has been apprehended, or his goods seized, or the collector with a warrant threatens immediately to make the arrest to coerce payment, or to levy upon and sell property to satisfy the demand, or to begin a criminal prosecution for nonpayment, thereby inducing the belief that the menace will be put into execution, in consequence of which the invalid tax is paid, the payment is involuntary and the money may be recovered. (p. 839.)

TAXATION—Recovery of Taxes Involuntarily Paid.—A Complaint is Demurrable, in an action to recover an illegal tax alleged to have been paid under compulsion, which avers that the sheriff, obeying the command of the warrant attached to the roll, notified the plaintiff that his land was taxed for a specified amount, informed him that the exaction was just and due and that unless the same was paid he would in due time collect it by a sale of the property, but which did not allege that the sheriff was either in the act of selling the land or threatened immediately to do so, or that the plaintiff, believing the menace would be instantly executed, was by the abrupt urgency ensnared into meeting the payment, or that he had no other expedient of freeing his property. (p. 839.)

Frank Schlegel and Oliver P. M. Jamison, for the appellant.

Frank Menefee, district attorney, and Andrew M. Crawford, attorney general, for the respondent.

330 MOORE. C. J. This is an action to recover taxes alleged to have been paid under compulsion. The complaint states, in effect: That the defendant is a municipal corporation and one of the political divisions of Oregon. That the plaintiff, being the owner of patented land included within the limits of public forest reservations, undertook, on July 16, 1902, to exchange the premises with the United States for unoccupied nonmineral land in Crook county, by filing in the proper local land office his application therefor, and on July 18, 1902, made a similar application for other lieu land in that county. That in the year 1903 the premises so chosen were assessed, and a tax of \$364.57 was imposed thereon, which exaction cast a cloud upon plaintiff's title to the property. That the tax-roll of the defendant for that year, with a warrant attached, was delivered to the sheriff, who, pursuant to the command, notified plaintiff of the amount of such tax, asserting that it was just and due, and that unless it was paid he would in due time collect it by a sale of the property. That the land so selected was not liable to the assessment placed upon it that year, but notwithstanding that fact, in order to remove such cloud, the plaintiff was compelled to pay the tax, and did so, as follows: March 25, 1904, \$177.24; and December 15,

1904, the remainder. That the sheriff issued receipts therefor, having noted thereon, "Paid under protest," which sums of money were ³³¹ received by the defendant for its use and benefit. That the application of July 16, 1902, was not approved by the commissioner of the general land office until June, 1904, when a patent for the land so chosen was issued, but the selection of July 18, 1902, has never been confirmed. That the plaintiff demanded of the defendant the return of the money so received, but no part thereof has been paid. A demurrer to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, was sustained. The plaintiff declined further to plead, whereupon the action was dismissed, and he appeals.

1. Two questions are presented for consideration: Was the tax void? If so, was it paid under such circumstances as to authorize a recovery thereof? These inquiries will be treated in the order stated. An application, under act of Congress of June 4, 1897, chapter 2, 30 Stat. 36 (U. S. Comp. Stats. 1901, p. 1541), in conformity to rule 18 of the Interior Department, as set forth in the circular of June 30, 1897 (24 Land Dec. Dept. Int. 593), to surrender to the United States an unperfected bona fide claim to land within a public forest reservation, or to reconvey to the government patented land therein, and to select in lieu thereof unoccupied nonmineral land of equal area, is an offer to exchange real property or an interest therein for other lands, to which latter premises neither an equitable estate attaches nor in which a legal title vests until the proposal is accepted by the commissioner of the general land office: *Pacific Live Stock Co. v. Isaacs*, 52 Or. 54, 96 Pac. 461; *Cosmos Exploration Co. v. Gray Eagle Co.*, 190 U. S. 301, 23 Sup. Ct. Rep. 692, 24 Sup. Ct. Rep. 860, 47 L. ed. 1064. While both the equitable and the legal titles thus remain in the United States, the premises selected are not subject to taxation: *State v. Itasca Lbr. Co.*, 100 Minn. 355, 41 N. W. 276; *Wisconsin C. R. Co. v. Price County*, 133 U. S. 496, 10 Sup. Ct. Rep. 341, 33 L. ed. 687.

2. It is generally held that when payment of the full consideration for public land has been made, and the receiver of the local land office, to evidence that fact, issues a final receipt, it operates to transfer such an equitable estate in the premises as immediately to render them liable to taxation, though the legal title is held by the United States until a patent is executed: *Kansas Pac. Ry. Co. v. Prescott*, 16 Wall. 603, 21 L. ed. 373; *Hussman v. Durham*, 165 U. S. 144, 17 Sup. Ct. Rep. 253, 41 L. ed. 664. This rule, however, does not apply to the case at bar, for, under the act mentioned, the receiver has no duty to perform respecting land selected, except to transmit the application and accom-

panying evidence to the commissioner of the general land office for consideration, upon whose approval a patent is issued. Prior to such confirmation the applicant has no interest in the land that is subject to taxation.

3. The law in force when the tax herein is alleged to have been levied required all real property to be assessed on March 1st of each year, at the hour of 1 o'clock A. M.: B. & C. Comp., sec. 3057. It will be remembered that the complaint states that the land selected July 16, 1902, was not approved until June, 1904, and that the selection of July 18, 1902, was never confirmed. Treating as true the averments of the complaint, which is required to be done when the sufficiency of that pleading is challenged by a demurrer, it is manifest that on March 1, 1903, the year when the plaintiff's land was assessed, the equitable estate in, and the legal title to, the premises were held by the United States.

³³³ 4. Nor can the doctrine of title by relation be invoked to uphold the tax, by carrying the plaintiff's interest in the selected land back to July 16, 1902, when he made the application, for that principle is a fiction of the law which the courts, upon broad rules of equity, apply in furtherance of justice, but never employ except when necessary to give effect to an instrument, the operation of which would otherwise be defeated: *Jackson v. Ramsey*, 3 Cow. 75, 15 Am. Dec. 242; *Gilbert v. McDonald*, 94 Minn. 289, 110 Am. St. Rep. 368, 102 N. W. 712; *State v. Itasca Lbr. Co.*, 100 Minn. 355, 111 N. W. 276.

5. Since the plaintiff, in the year 1903, had no equitable interest in the land alleged to have been assessed, the tax levied thereon is void. A diversity of judicial utterance is to be found respecting the manner of paying an alleged illegal tax, so as to authorize a recovery thereof in an action instituted for that purpose. In *Brown v. School Dist.*, 12 Or. 347, 7 Pac. 357, which was a suit to enjoin the collection of a tax, a part of which was levied to pay interest on bonds that were claimed to be invalid, it was ruled that in order to obtain the desired relief it was incumbent upon the plaintiffs to pay or tender the part of the tax that they admitted to be due; but, not having done so, the suit was dismissed. In deciding that case Mr. Justice Thayer said: "If the appellants are obliged to pay the portion of the tax they claim to be illegal, they will not necessarily lose the amount paid. They can pay it under protest, in order to relieve their property, and, if it be illegal, can recover it back." As the advice thus given was not based on any question involved in the suit, the language quoted is not controlling herein.

6. We believe that reason supports the rule that when a tax has been paid without compulsion, but with comprehension of its invalidity, or with means of knowledge of its illegality, the liquidation is voluntary and prevents ³³⁴ a recovery of the money disbursed, although the payment may have been made under protest. In an exhaustive note to the case of *Mayor of Baltimore v. Lefferman*, 45 Am. Dec. 145, 153, it is said: "The rule allowing a party to recover money which he has once paid, on the ground that it was paid under compulsion, is intended only for the relief of those who are entrapped by sudden pressure into making such payments, and who have no other means of escaping an existing or imminent infringement of their rights of person or property. Where a party has time and opportunity to relieve himself from his predicament without making such a payment, by a resort to ordinary legal methods, but nevertheless pays the money, the payment will be deemed voluntary, and he cannot recover it. This is clearly shown in all the cases on the subject." Thus in *Detroit v. Martin*, 34 Mich. 170, 22 Am. Rep. 512, the plaintiff's lot was assessed for a street improvement, and he was notified by the city attorney that unless, within a stated time, he paid the burden imposed, his property would be sold to satisfy the demand. At the expiration of the time limited the plaintiff paid, under protest, the sum claimed. The assessment was thereafter decreed to be invalid, and in an action to recover the amount so disbursed it was ruled that the payment was voluntary and the money could not be obtained. In a note to the case of *Phelps v. Mayor of New York*, 2 L. R. A. 626, it is said: "A payment is voluntary if made by a party informed of all the facts connected with the subject matter of the payment, and under the influence of no distress or coercion, even though accompanied with a protest"—citing many cases in support of the text. To the same effect, see the notes to the case of *Phoebus v. Manhattan Social Club*, 8 Ann. Cas. 667, 669, where it is said: "In accordance with the well-established principle of law that money paid voluntarily and with knowledge of the facts cannot be recovered, it is held that taxes voluntarily paid cannot ³³⁵ be recovered, and, in the absence of statute, that the payment of illegal taxes 'under protest' does not make the payment involuntary so as to authorize the taxpayer to recover the taxes so paid." In the very interesting notes to that case are collated decisions from courts of last resort in many states which sustain the legal principle thus epitomized. So, too, when a person engaged in any enterprise reasonably apprehends that the operation of his business will be suspended, or that, by reason of his failure fully to comply with the demands prescribed by some public service corporation,

the enjoyment of his property will be seriously interfered with unless an illegal exaction is liquidated, the discharge thereof under such circumstances is involuntary, and the excessive amount so paid can be recovered in an action of assumpsit instituted for that purpose: *American Brewery Co. v. St. Louis*, 187 Mo. 367, 86 S. W. 129, 2 Ann. Cas. 821.

7. It is impossible to reconcile the many conflicting decisions that have been rendered on the subject under consideration. The rule is settled, however, that when a person whose property is charged with an illegal tax has been apprehended, or his goods seized, or the tax collector with a warrant threatens immediately to make the arrest to coerce payment, or to levy upon and sell property to satisfy the demand, or to begin a criminal prosecution for nonpayment of the tax, thereby inducing the belief that the menace will be put into execution, in consequence of which the invalid exaction is discharged, the payment thus made is involuntary, and the money so disbursed may be recovered: 22 Am. & Eng. Ency. of Law, 2d ed., 613; *Southern Ry. Co. v. Florence*, 141 Ala. 493, 37 South. 844, 3 Ann. Cas. 106.

8. It will be remembered that the complaint herein avers that the sheriff of Crook county, obeying the command of the warrant attached to the roll, notified the ³³⁶ plaintiff that his land was taxed to the extent of \$364.57, informed him that the exaction was just and due, and that unless the sum was paid he would "in due time" collect it by a sale of the property. It is nowhere alleged that the sheriff was either in the act of selling the land, or that he threatened immediately to do so; or that the plaintiff, believing that the menace would be instantly executed, was by the abrupt urgency ensnared into meeting the payment, or that he had no other expedient of freeing his property from the lien which the levy of the tax created.

In the case at bar, the complaint fails to allege such a state of facts as to bring the action within any of the recognized rules adverted to, and no error was committed in sustaining the demurrer.

It follows from these considerations that the judgment should be affirmed, and it is so ordered.

Affirmed.

The Taration of Lands Before the United States Government has finally parted with title thereto is discussed in the note to *Herrick v. Sargent*, 132 Am. St. Rep. 291.

The Right to Recover Taxes on the ground that they are illegal and have been exacted under compulsion is discussed at length in the note to *New Orleans etc. R. R. Co. v. Louisiana C. & I. Co.*, 94 Am. St. Rep. 425. As a general rule, to warrant a recovery of taxes paid under protest, the element of coercion must be found; in the absence of actual, present and potential compulsion, payment under protest is not sufficient: *Oakland Cemetery Assn. v. County of Ramsey*, 98 Minn. 404, 116 Am. St. Rep. 377.

KOLLOCK v. BENNETT.

[53 Or. 395, 100 Pac. 940.]

TRUSTS—Parol Agreement in Regard to Land.—The objection that a trust in land cannot be established by parol is overcome by showing that the grantee has platted and sold parts of the land under an oral agreement to sell the property, apply the proceeds to an indebtedness thereon, and account to the grantors for any sum remaining. (p. 843.)

MORTGAGE—Whether Grantee is a Mortgagee or a Trustee.—A grantee under an agreement to sell the land, apply the proceeds to an indebtedness thereon, and account to the grantors for the sum remaining, is not a mortgagee, but a holder of the legal title, liable only to account as trustee for the proceeds of sales when made, and entitled to maintain a suit in his own name with reference thereto. (p. 844.)

QUIETING TITLE—Who may Maintain Action.—One having title to land, whether legal or equitable, may maintain a suit to determine adverse claims. (p. 844.)

VENDOR AND VENDEE—Notice of Prior Deed.—A grantee takes subject to a prior deed of which he has full knowledge. (p. 844.)

J. M. Blake, Francis H. Clarke and L. A. Liljequist, for the appellant.

Kollock & Zollinger, John S. Coke, A. J. Sherwood and Charles A. Sehlbrede, for the respondent.

396 KING, J. This suit was brought under section 516, B. & C. Comp., to quiet title to the west half of the southeast quarter of section 15, and the west half of the east half of section 22, all in township 25 south, range 13 west, in Coos county.

The complaint is in the usual form. Service of summons was had by publication, and default taken as to the Belt Line Railway Company. J. H. Bennett and C. F. Humphrey answered denying plaintiff's ownership and possession, and set up an affirmative defense, the essential averments of which are:

That on or about August 26, 1902, the Great Central Land Company, a corporation, herein referred to as the "Central Company," became the owner and holder of a written contract to purchase the property described from C. H. Merchant, by the terms of which, in consideration of a cash payment of \$3,750, there was placed in escrow with the Flanagan & Bennett Bank in Marshfield, Oregon, a deed conveying a good and sufficient title to the Central Company in and to the real property in question, with the understanding that the deed should be delivered to the company, or its assigns, upon the payment to Merchant's credit, within one year from the date of the agreement, the further sum of \$8,250, with inter-

est at ³⁹⁷ six per cent per annum. That the Belt Line Company succeeded to all the rights in and to the real and personal property held under the Merchant contracts. That on August 26, 1903, the balance of the purchase money due under the Merchant contract being due and unpaid, Merchant brought a suit foreclosing the contract of sale, wherein the circuit court decreed that he be paid \$8,200 as the balance found due on the contract, and on the receipt thereof that he execute to the Central Company a deed to the property. That on February 26, 1904, Merchant and wife, having received the balance due on the contract, executed to the Central Company a deed conveying the fee simple title in and to the realty involved, whereupon deeds thereto were also executed by both the Central and Belt Line companies to John K. Kollock, the plaintiff, which deeds were in form an absolute transfer of the title to the lands described, but were intended only as a mortgage to secure the payment of the balance of the purchase price paid Merchant by the Central Company, which plaintiff had loaned, or caused to be loaned, to the company, for such purpose, and that plaintiff agreed, upon receipt thereof, to reconvey the property to the Central Company and its assigns. That the deed to Kollock from the Belt Line Company was not executed in the corporate name of the company, and accordingly not the deed of such company. That on April 4, 1904, the Central and Belt Line companies, respectively, in each of their corporate names, through their president, L. D. Kinney, in good faith, for a valuable consideration, by separate deeds, granted, bargained, sold, conveyed, and confirmed to the defendants Humphrey and Bennett all of the real estate involved. That Kinney, at the time of the execution thereof, was the owner and holder in law, or equity, or in control, of nearly all of the subscribed and issued capital stock of such companies and in position to have caused the previous authorization, as well as the subsequent ³⁹⁸ ratification of the conveyances mentioned. That immediately upon the execution of the last-mentioned deeds the companies named abandoned their corporate franchises, charters, and privileges by failing to comply with the statute respecting the payment of the annual license fees for the years beginning July 1, 1904, and 1905, resulting in their dissolution. That by virtue of the deeds last mentioned defendants Humphrey and Bennett are the owners of all the right, title, interest, and estate of such companies in and to the property involved, including their right of redemption from the mortgages held thereon by plaintiff under his deeds. That the realty in question is in the actual possession of L. D. Kinney under a contract with one F. B. Waite, therein recited to be the owner, under and by virtue of the terms of which Kinney is offering, in open market, lots, pieces, and parcels of the land for sale.

That the defendants are not advised of the exact amount of indebtedness, or of the facts as to whether any payments have been made to, and accepted by, plaintiff in discharge, in whole, or in part, of the indebtedness occasioned by the transactions mentioned, and for which the deed to Kollock was intended to secure, by reason of which the amount necessary to a redemption of the real estate therefrom is unknown to defendants; but that they have offered to pay plaintiff the amount due thereon, requesting of him a full and complete discharge of the lands and premises from such lien. That plaintiff denies the right of defendants to redeem, and has refused to render them a statement of the amount necessary for such purpose, which amount, whatever it may be, they are ready, willing, and able to pay as soon as the sum necessary therefore may be determined, and are ready, willing, and able in all things to do equity in making redemption of the premises in controversy. These averments are followed by a prayer for appropriate relief, including the right to redeem, etc.

³⁹⁹ Plaintiff replied admitting the affirmative allegations of the answer, except the averments to the effect that the deeds to him were understood, or intended to be held, as mortgages, or executed for any other purpose than of conveying to him all interest such company had in the land, or that either of the companies, through Kinney, as president, in good faith, or for a valuable consideration, conveyed the property to Humphrey and Bennett, and avers: That the plaintiff's deeds are bona fide absolute conveyances to him of the property in question; that the pretended deeds to Humphrey and Bennett were executed wholly without authority from the corporations, or either of them; that in signing the companies' corporate names to the instruments of writing, through which defendants assert title, Kinney acted without authority; that such instruments were wholly without consideration and were delivered to Bennett under an express understanding, and on condition, that they were not intended to be and should not have the force or effect of deeds, or conveyances of the land therein described.

From the evidence taken before it, the trial court found, in effect: That plaintiff, by deeds duly and regularly executed to him, prior to and inclusive of February 24, 1904, became the owner of the lands described in the complaint, and is in possession thereof, holding the legal title thereto as trustee, with power to sell the same to satisfy the outstanding indebtedness against the property, amounting to \$54,091.70, due the Title Guarantee and Trust Company of Portland, Oregon; that on April 4, 1904, the Central and Belt Line Companies, by L. D. Kinney and Ralph Green, as president and director, respectively, of each, executed to defendants

Humphrey and Bennett, deeds purporting to convey to them the realty involved, which deeds appear to have been regularly executed, except that no corporate seal appears thereon; and that the pretended conveyances were delivered to Bennett ⁴⁰⁰ and Humphrey with an express understanding that they were to advance a sum of money to pay the indebtedness, or a portion thereof, owing the Title Guarantee and Trust Company, the instruments to be returned to Kinney if such moneys should not be paid, none of which indebtedness have defendants at any time paid, or pretended to pay, by reason of which they, and each of them, are in default, entitling plaintiff to a decree as demanded. A decree was entered accordingly, from which defendants Humphrey and Bennett appeal.

From the synopsis of the issues, it will be observed that the points in controversy are narrowed to the contention on the part of appellants, controverted by respondent, that the deeds to Kollock were intended as mortgages only; while, with reference to appellants' deeds, respondent asserts, but appellants deny, that they were executed without consideration, were not delivered, and are void. After a careful examination of the record, including the testimony adduced, we fully concur in the findings and conclusions of the trial court. It is conceded that each of the parties deraigned title through a common grantor, and undisputed that appellants' deeds were accepted with full knowledge of the previous transfers to Kollock. Since the execution of the Kollock deeds, the realty in dispute has not been in the possession of anyone, except such possession as has been exercised by ⁴⁰¹ respondent's agents, who platted the land, selling parts thereof for the purposes contemplated.

1. It is first maintained that the Kollock deeds are, in legal effect, mortgages only, and that the property described therein, by reason of the alleged transfers thereof to appellants, is held subject to their right of redemption, in support of which it is argued that while oral testimony is admissible for the purpose of proving the conveyances mortgages, verbal testimony under section 797, B. & C. Comp., is inadmissible to establish any trust relationship in connection therewith. This objection, however, is overcome by a showing that Kollock received the deeds, and, acting under the oral agreement made in connection therewith, has, through his agents, platted and sold parts and parcels of the land in controversy: *Cooper v. Thomason*, 30 Or. 161, 45 Pac. 296; *Starr v. Kaiser*, 41 Or. 170, 68 Pac. 521.

2. The proof satisfactorily discloses that the deeds to Kollock were intended to transfer a complete title, and that it was fully understood at the time of the execution thereof that he should have full power to sell the property, execute

deeds to purchasers, and apply the proceeds in cancellation of the Title Guarantee and Trust Company's claims, and account to his grantors for any sum remaining. By virtue of these transactions, respondent became, not a mortgagee, but a holder of the legal title, and liable only to account as trustee for the proceeds of sales from the property when made, and entitled to maintain a suit in his own name with reference thereto: *Ladd v. Johnson*, 32 Or. 195, 49 Pac. 756; *Title Guarantee & Trust Co. v. Northern Counties Inv. Co. (C. C.)*, 73 Fed. 931; *Wright v. Conservative Inv. Co.*, 49 Or. 177, 89 Pac. 387; *King v. Miller*, 53 Or. 53, 97 Pac. 542.

3. Moreover, since section 516, B. & C. Comp., provides that "any person claiming an interest or estate ⁴⁰² in real estate not in the actual possession of another may maintain a suit in equity against another who claims an interest or estate therein adverse to him, for the purpose of determining such conflicting or adverse claims, interests, or estate," it would seem that, whether respondent's title be deemed legal or equitable, there could be no question as to his right to maintain a suit to determine all adverse claims affecting such titles (*White v. McSorley*, 47 Wash. 18, 91 Pac. 243); but all doubts on the subject, if any, are completely set at rest by the decisions of this court in *Ladd v. Mills*, 44 Or. 224, 75 Pac. 141, and *Holmes v. Wolfard*, 47 Or. 93, 81 Pac. 819.

4. Whatever may have been the conditions under which the deeds to appellants were given, or the manner and form of their execution, having been executed subsequent to and with full knowledge of respondent's deeds, they were accepted subject to his rights, making a determination herein of the sufficiency of their execution unnecessary.

The decree of the court below is affirmed.

The Creation of Trusts in Land by Parol is the subject of a note to *Insurance Co. of Tennessee v. Waller*, 115 Am. St. Rep. 774.

YOUNG v. COLUMBIA LAND AND INVESTMENT COMPANY.

[53 Or. 438, 99 Pac. 926, 101 Pac. 212.]

CORPORATION.—Where the Trust Duty of Directors Conflicts with their personal interest, the latter must give way. (p. 846.)

CORPORATION—Stockholders Purchasing Outstanding Notes of Company.—A corporation is entitled to the benefit of the transaction where majority stockholders personally purchase, at a discount, mortgage notes outstanding against the company, the offer to sell, which it was well able to accept, having been originally made to the

company and then so changed at the request of one of the purchasing stockholders as to make it a personal offer, and the acting directors being either parties to the purchase or acquiescing in the transaction. (pp. 846, 849.)

CORPORATION—Directors' Purchase of Outstanding Notes of Company.—When outstanding mortgage notes against a corporation are offered to it at a discount, it is the duty of the directors to take care of the notes and mortgage for the benefit of the corporation, and they may not purchase them for their own benefit. (pp. 849, 850.)

A CORPORATION cannot be Charged With Laches in not Questioning the Purchase, by certain directors, of notes outstanding against the company, where such directors have constituted a majority of the board and are chargeable with the delay. (p. 850.)

Edward B. Watson and John F. Hamilton, for the appellants.

George C. Fulton, for the respondent.

439 **EAKIN, J.** The defendant company was organized in the year 1891 for the purpose of dealing in real estate, with a capital stock of one thousand shares, each of the par value of \$100, and soon thereafter purchased some land at Tongues Point, Clatsop county, including some waterfront, for the consideration of \$75,000; that on March 17 and 27, 1896, respectively, the defendant corporation became indebted to Hiram Brown in the sum of \$7,583.15 and in the sum of \$1,050, evidenced by two promissory notes, due one year after date, the payment of which was secured by a mortgage on the property of the company; that prior to June 22, 1901, said Hiram Brown died, and at the time of the acts herein complained of, his son and daughter—Charles S. Brown and Mrs. Anna Wilkinson—were the owners of said notes and mortgage. On June 22, 1901, the plaintiffs herein purchased said notes and mortgage, and in April, 1904, commenced this suit to foreclose the mortgage. At the time of such purchase the stock of defendant corporation was owned by the following persons: A. B. Hammond, one share; the Astoria Company, ninety-nine shares (represented by Hammond); C. S. Brown, fifty shares; J. F. Hamilton, fifty shares; Dr. Alfred Kinney, D. K. Warren, Benjamin Young, M. J. Kinney, C. S. Wright, W. C. Smith, and H. F. Prael, each one hundred shares—there being but nine hundred shares issued. Dr. Alfred Kinney, D. K. Warren, Young, Wright, and Page were the directors of the company. It seems that Page **440** did not own any stock; that prior to this litigation D. K. Warren died, and his executors represent his estate in this suit.

By leave of the court, the Astoria Company and Hammond, owners of one hundred shares, answered the complaint, on behalf of themselves and such other stockholders as may be benefited thereby, alleging that Young, Hamilton, M. J. Kin-

ney, plaintiffs, and D. K. Warren and A. Kinney, were directors of defendant company at the time of the transaction complained of, and are still such directors; that plaintiffs are the owners of the majority of the capital stock of defendant company; and that plaintiffs refused to answer and defend the complaint on behalf of the company, and all the other directors and stockholders are acting in concert with plaintiffs. After certain denials, these defendants allege that plaintiffs purchased said mortgage notes for \$5,000, and that after such purchase, and prior to the commencement of this suit, there was paid on said notes and mortgage about \$4,000; that at the time of the purchase by plaintiffs these defendants offered to advance to the company the money to take up and pay said notes, but that plaintiffs refused to do so, and purchased the same for their individual advantage in violation of their duties as directors and stockholders of defendant corporation, and asked that the amount paid therefor, and the credits thereon, be ascertained, that the defendant be permitted to pay the balance due, and that the suit be dismissed.

Replies were filed and the cause tried by the court and findings made in favor of these defendants, to the effect that the plaintiffs purchased said notes and mortgages for \$5,000, and have received payments thereon—July 28, 1902, \$1,896.-35, and August 3, 1903, \$1,750—leaving due \$1,800.40, including interest to August 3, 1903, and decreed that these defendants pay to plaintiffs within sixty days one-ninth thereof, and Dr. A. Kinney one-ninth, being their proportion thereof, and that thereupon ⁴⁴¹ the notes and mortgage be canceled and discharged; otherwise, that the mortgage be foreclosed for the amount unpaid, together with \$100 attorney fees and costs. From this decree the plaintiffs appeal.

1. The first question of importance is as to the right of plaintiffs, under the facts, to purchase the liabilities of defendant corporation at a discount for their own personal advantage. We conclude that their purchase of defendant's mortgage notes was made under such circumstances that the stockholders have a right to the advantage of it as made for the benefit of the company. An offer was made by W. C. Brown to sell to defendant company these mortgage notes at a discount, and the change in the offer, making it a personal one to the plaintiffs, was made at the suggestion of one of the plaintiffs. The company was well able to take advantage of this offer, and the acting directors of defendant company were either parties to the purchase or acquiescing in the transaction, notwithstanding it was their duty to use their best endeavor to advance the interests of the corporation. Where the trust duty of directors of a corporation and personal interest conflicts, the latter must give way. W. G.

Gosline, in the interest of Hammond, and W. C. Smith, a stockholder, were active in attempting to procure some settlement of the notes and mortgage and in securing an offer of discount thereon for the benefit of the company. One witness testifies that there was some strife between the Hammond interest and that of the other stockholders, and in giving his reasons for desiring to get hold of the mortgage, stated ⁴⁴² that some of the stockholders thought it about time to wind up the company, thus indicating that the purchase was made in opposition to the company's interest.

2. In *Higgins v. Lansingh*, 154 Ill. 301, 40 N. E. 362, it appears that Higgins owned such a large interest in the company that he practically controlled it. He also owned the secured debts of the company that were overdue, and purchased at a discount pledged stock of the company. It was held to be the duty of the managers, of which he was one, to make provision for their payment out of the resources of the company, if possible. He knew it was for the interest of the company to do so, but did not inform the other managers of the proposed sale, nor give the company any opportunity to receive the benefit of the transaction. The court said: "We have also held that a director may purchase outstanding obligations of the company and enforce their collection. But the question, so far as we know, has not before been presented whether or not he may purchase such claims at a discount, and enforce them in full. If he acts fairly and for the interest of the corporation, we think he may. He certainly would be doing the corporation no injury in case his management were in the interest of the corporation, and it were given a fair opportunity to itself become the purchaser, and could not or would not embrace such opportunity. We are of the opinion, however, from the evidence in this case, that Higgins could not, under the circumstances attending the transaction, purchase these securities, as he did, at a discount, and hold them against the company for payment in full, but that the company and its stockholders have the right to treat the purchase as made for their benefit." We think the principle here announced applied to the case before us, and that it was the duty of its board to take up these notes to protect the interests of the stockholders, and not in their own right against the interest of the company. This principle in ⁴⁴³ no way conflicts with the case of *Seymour v. Spring Forest C. Assn.*, 144 N. Y. 333, 39 N. E. 365, 26 L. R. A. 859, relied upon by plaintiffs. The transaction in that case related to unmatured obligations of the company that it did not desire to take up, and it was upon that circumstance that the case rested. It is said in the opinion there are "other cases in which the duties flowing from a liquidation conducted by the trustee, and to which he owes a specific

trust duty, forbid a purchase by the trustee for his own benefit at a discount. But in every class of cases the rule is founded upon the unwillingness of the law to uphold contracts which bring into collision the trust duty and the personal interest." And, if plaintiffs obtained these notes at a discount, still the purchase must be treated as for the benefit of the company, and they cannot enforce the mortgage for more than the amount paid for it.

It is also important to ascertain the amount paid for the mortgage for the purpose of determining the amount for which the company is chargeable. There is some conflict in the evidence upon this question. Plaintiffs contend that they paid \$11,000 for the notes, while defendant contends that plaintiffs paid but \$5,000. The sum paid by plaintiffs in the whole transaction was \$27,500 in payment of the individual notes of plaintiffs, amounting to \$16,002, and the notes of Wright, Smith, and Prael, each \$7,000, and the two notes of the company \$11,000, together with fifty shares of stock of defendant company, held by Brown, at the price of \$500. Plaintiffs contend that the mortgage notes were taken at their full value and all the discount was on the three notes of Smith, Wright, and Prael upon the theory that the makers of these three notes were insolvent, and that their three hundred shares of stock, in defendant company, held by Brown as collateral security for the payment of their notes, were worth only \$10 per share, Brown having offered his fifty shares at that value. But Brown was ⁴⁴⁴ anxious to close out his interest in the company and was making a sacrifice for that purpose. The evidence shows that plaintiffs put a much higher value on the stock than \$10 a share. This appears from their testimony, as well as from the offer of the company to sell to Hammond, as shown by plaintiffs' exhibit "D," namely, \$16,000, for the waterfront, and he to pay the mortgage notes and surrender his one hundred shares of stock, and the people to be benefited by proposed improvements to pay defendant company a bonus of \$10,000, leaving one hundred acres of the land, probably worth \$5,000, to defendant company. This would make the waterfront cost Hammond \$30,000 and leave clear to plaintiffs the \$16,000 to be paid by Hammond, and the one hundred acres at \$5,000, with the \$10,000 bonus, making \$31,000 to be divided among eight hundred shares, a valuation of over \$36 per share, or, without the bonus, worth \$26 a share at the lowest estimate. Other witnesses placed the value of the property much higher.

It was conceded that Brown made no discount to plaintiffs on their individual notes. Therefore the mortgage notes and the Wright, Smith, and Prael notes were purchased for \$11,000, while the stock of those three men was at these fig-

ures worth \$7,800, and was turned over to plaintiffs without other expense or trouble, showing that, if the full value had been paid for the mortgage notes, plaintiffs received the notes and stock of Wright, Smith, and Prael without consideration. These figures, together with the fact that Brown, shortly before this time, had been offering the mortgage notes for \$5,000, tends strongly to corroborate the testimony of defendant's witnesses, and fully justifies the conclusion that the purchase price of the mortgage notes was \$5,000.

We find no error in the decree of the lower court, and it is affirmed.

Affirmed.

445 ON PETITION FOR REHEARING.

EAKIN, J. Three points are suggested by the motion for reversal of the decree: (1) That plaintiffs were not disqualified from purchasing the notes in their individual capacity; (2) that the notes were purchased at their face value, and not at a discount; (3) that defendants have, by their delay, lost their right to question the transaction.

3. As to the first proposition, we have no controversy with counsel as to the law stated in the motion and in the authorities in support thereof. As stated in Cook on Corporations, section 660:

"Directors may buy corporate bonds from third parties at a discount and enforce them at par, where there are no special equities against such a purchase, and no present duty in regard to them from him as a director."

Similar language is used in *McIntyre v. Ajax Min. Co.*, 28 Utah, 163. 77 Pac. 613. and this principle is recognized in every case cited in the motion, and also in the opinion in this case. But the conclusion reached in the opinion is based on the duty of plaintiffs, as disclosed by the facts, to take care of the notes and mortgage for the benefit of the corporation, and therefore comes within the exception to the rule that a director may purchase at a discount for his own benefit. Two of the plaintiffs were directors of defendant corporation at the time of this transaction, and the other three connived at and consented to the purchase, and were the only persons by whom the corporation could act, and it was their fault that provision was not made by the corporation to take care of the notes, which it was well able to do. Therefore there was a present duty devolving upon plaintiffs to take up said notes and mortgage in the interest of the corporation, and consequently they are 446 precluded from purchasing at a discount for their own benefit.

As to the second point, it is true that the evidence does not disclose that at the time the transaction was consummated, anything was said as to the value at which any item

was taken over. But it appears that all through the negotiations leading up to this transaction, both with agents of Hammond and with plaintiffs, these two notes of the corporation were offered at \$5,000; and from all the evidence we are justified in the conclusion that that was the value at which they were taken over.

4. Defendants cannot be charged with laches in this transaction, as plaintiffs constituted the majority of the board, and were alone chargeable with the delay.

Motion is denied.

Affirmed; rehearing denied.

The Directors of a Corporation are Trustees for the stockholders to whom they owe perfect fidelity in the discharge of their duties, and ordinarily they cannot be permitted to have or acquire any personal or pecuniary interests antagonistic to their duties as trustees: Marr v. Marr, 73 N. J. Eq. 643, ante, p. 742, and cases cited in the cross-reference note thereto. This rule, however, does not preclude a director from dealing in good faith with the corporation: Illinois Steel Co. v. O'Donnell, 156 Ill. 624, 47 Am. St. Rep. 245; New Memphis Gas-light Co. Cases, 105 Tenn. 268, 80 Am. St. Rep. 880.

ELWERT v. MARLEY.

[53 Or. 591, 99 Pac. 887, 101 Pac. 671.]

APPEAL—Waiver of Right to Prosecute.—A party to an action may, by his acts subsequent to a judgment or order against him, waive his right to have the same reviewed by an appellate court. (p. 852.)

APPEAL—Waiver of Right by Taking Lease of Premises.—Where judgment is recovered against the defendant in an action in the nature of equitable ejectment, and thereafter he leases the premises from the plaintiff's grantee and continues in possession, an appeal by him from the judgment will be dismissed. (pp. 851, 852, 854, 855.)

LESSOR AND LESSEE—Estoppel to Deny Lessor's Title.—Where judgment is recovered against the defendant in an action in the nature of equitable ejectment, and thereafter he leases the premises from the plaintiff's grantees and continues in the enjoyment thereof, he becomes the tenant of such grantees and estops himself from further disputing their title. (p. 853.)

EQUITABLE EJECTMENT—Satisfaction of Judgment by Taking Lease.—Where, in an action in the nature of an equitable ejectment, a decree is rendered requiring the defendant to vacate the premises, but he, failing to comply therewith, is charged with contempt and granted five days in which to observe the decree, but within that time takes a lease of the premises in dispute from the plaintiff's grantee, the effect of the lease is to satisfy the decree, which deprives such grantee of the right to invoke the aid of the court under the decree to recover possession. (pp. 854, 855.)

Ephraim B. Seabrook, for the motion.

George S. Shepherd and William H. Fowler, contra.

592 SLATER, C. This suit was brought by Carrie M. Elwert against P. H. Marley, H. E. Noble, and J. Olsen to restrain them from interfering with, or making use of, certain alleged wharfage rights on the Willamette river, alleged to be appurtenant to and abutting upon lot 5, block 2, East Portland, Multnomah county, Oregon, and to belong to the plaintiff as owner of said lot, and to adjudicate and determine any claim of title thereto asserted by the defendants adversely to plaintiff's alleged rights.

The answer denies that the wharfage rights in dispute are appurtenant to lot 5, block 2, and therefore defendants deny plaintiff's alleged rights. The ownership of lot 5 is admitted to be in plaintiff, and for an affirmative defense a fee simple title is alleged to be in defendant Noble to a fractional lot 4 of block 2, alleged to exist and to be situate between the west line of lot 5 and ordinary high-water line, and therefore it is claimed that the wharfage rights in dispute are appurtenant to such fractional lot 4, and not to lot 5, and belong to Noble, who acquired his title from Marley. It is further alleged that Noble's title is "subject only to a right to purchase in the defendant J. Olsen," and that:

"Under and by virtue of the aforesaid contract with the defendant H. E. Noble, the defendant J. Olsen is, and at the commencement of this suit, and for a long time prior thereto was, in the actual physical possession of said real property, and of the whole thereof."

This constitutes the only right claimed by Olsen. Other defenses, not material to be stated, were also included.

The reply put at issue the new matter of the answer, and upon a trial thereof the court found for the plaintiff, and enjoined the defendants from obstructing, disturbing, or interfering with plaintiff's rights of wharfage adjudged to be appurtenant to said lot 5.

593 Marley and Noble were requested by Olsen to join with him in an appeal from the decree, but they refused, and the latter, claiming that his rights were joint with, and subject to, the rights of his codefendants, appealed, joining in the notice with himself Marley and Noble as appellants over their protest, all of which facts he has recited in his notice.

1. Plaintiff moves to dismiss the appeal on the ground that, subsequent to the rendition of the decree, and before the appeal, Olsen took from M. W. Parelus, who is plaintiff's grantee, a lease of the premises in dispute, thereby recognizing and acknowledging the validity of the decree, and estopping himself from further contesting the title and right to the enjoyment of the premises by plaintiff and those in privity with her. It appears from the affidavits of Parelus in support of the motion, and from Olsen's in answer

thereto and the former's reply, that on August 21, 1906, which was after the cause had been submitted, Parelius received from plaintiff a conveyance of lot 5 and the wharfage rights claimed to be appurtenant thereto, in pursuance of a contract of purchase entered into between them prior to the origin of the suit; that the deed was recorded, of which Olsen had knowledge; that on April 26, 1907, and after the entry of decree, Olsen entered into a written contract of lease with Parelius respecting the property rights in dispute. The contract is mutual in its covenants, and was executed by both parties under seal. By its terms Parelius, for the consideration of two dollars per month, to be paid by Olsen, leased to the latter the right and privilege of mooring and keeping for two months a certain scow or houseboat owned by him upon certain premises, ⁵⁹⁴ described as being "between ordinary high-water mark in the Willamette river and the established harbor line of said river and abutting upon lot 5 in block 2 in East Portland," etc., being the identical property and rights in litigation herein. In consideration of the lease Olsen therein agreed to pay the monthly rent in advance, beginning on May 1, 1907, and that at "the expiration of said term he will quit, vacate, and surrender up said premises to Parelius." It is stated in the latter's affidavit that one month's rent was paid. This is denied by Olsen; but it appears to be uncontroverted by him that he continued in the possession of the leased premises, and has never at any time offered to surrender them to Parelius.

A party to an action may, by his acts subsequent to a judgment or order against him, waive his right to have such right or order reviewed by an appellate court, as by acquiescing therein by payment or part payment, or by accepting the benefits thereof: *Moore v. Floyd*, 4 Or. 260; *Portland Const. Co. v. O'Neil*, 24 Or. 54, 32 Pac. 764.

2. In *Ehrman v. Astoria Ry. Co.*, 26 Or. 377, 38 Pac. 300, it was held that the right to appeal from a decree refusing to foreclose a mechanic's lien is waived by bringing an attachment action after the entry of the decree, when the right of attachment is conditioned upon the fact that the claim is not secured by any lien or mortgage: *Kansas City etc. Ry. Co. v. Murray*, 57 Kan. 697, 47 Pac. 835; *Fidelity & Deposit Co. v. Kepley*, 66 Kan. 343, 71 Pac. 818. So any act on the part of a defendant, by which he impliedly recognizes the validity of a judgment against him, operates as a waiver of his right of appeal therefrom or to bring error to reverse it: 2 Cyc. 656. The case of *Sheldon v. Motter*, 59 Kan. 776, 53 Pac. 127, was a proceeding brought to review an order confirming a sale of real estate at which the defendant Motter was the purchaser. Since the petition ⁵⁹⁵ in error was

filed, plaintiff and her husband accepted a lease from Motter for the land sold, and attorned and paid rent for the same. It was held that this was a recognition of the defendant's title which was inconsistent with the prosecution of the writ of error, and the same was dismissed. In *Stauffner v. Salimonie Min. & Gas Co.*, 147 Ind. 71, 46 N. E. 342, plaintiffs had sued to have canceled a lease made by them upon certain lands. A demurrer to the complaint was sustained, and, refusing to plead over, judgment went against them, from which they appealed. After perfecting their appeal they sold and conveyed the leased premises to one Dudding, and also transferred to him their interest in the lease. Afterward they received from the lessees the rent due them to the date of the transfer. It was held, on motion to dismiss the appeal, that by assigning the lease to Dudding after the rendition of the judgment, and by accepting rent due thereunder accruing subsequently to the judgment from which the appeal was taken, they recognized the lease as still of binding force, and thereby waived their objection urged for its cancellation. And to the same effect is *Ewing v. Ewing*, 161 Ind. 484, 69 N. E. 156.

3. As to whether or not appellant paid one month's rent under the lease is not so material here, for he agreed to pay for, and he occupied and enjoyed, the use of the premises as a consideration of his promise. By the execution of this contract, and the continued enjoyment of the premises thereunder, appellant became by his own voluntary act the tenant of Parelius, and thereby effectually estopped himself from further disputing the latter's title: *Jones v. Dove*, 7 Or. 467. Plaintiff has sought to avoid the effect of the lease by claiming that the lease was fraudulently obtained from him by Parelius, with an intent to cheat and defraud him out of any rights he might have on this appeal, that the lease was signed by him at the special instance and request of Parelius ⁵⁹⁶ at a time when he (Olsen) was on the east side of the river, and had no opportunity of consulting an attorney, and that Parelius at the time informed him that it could not, and would not, in any way affect his rights on appeal. The facts disclosed show, however, that two or three days intervened between the time when the agreement to lease was first orally made, with an understanding that Parelius was to have the same thereafter reduced to writing and to present it to Olsen for execution, during which time the latter had opportunity to consult his attorney if he deemed it necessary; and, as to the representations which Olsen says were made to him by Parelius as an inducement to secure the execution of the instrument, and on which he says he relied, even if uncontroverted, which is not the case, they amount to no more than an expression of an opinion

by Parelius as to the law applicable to the contract when executed, and of that matter one party was as able to judge as the other. Each party must be presumed to have known the law, and a mistake in respect thereto furnishes no ground for setting aside the instrument executed under such circumstances, or for disregarding its legal effect. But the facts are disputed by Parelius, who says he had no such conversation with Olsen. The effect of the decree was to require Olsen to vacate the premises, but he failed to comply therewith, and was charged with contempt of court. He says that he was preparing to appeal. Had he done so promptly, and given the necessary undertaking provided by statute, he could have stayed further proceedings against himself. In answer to the charge he disclaimed any intentional disobedience of the decree, and promised to comply with it. He was then given five days in which to purge himself of contempt by vacating the premises, whereupon he applied to Parelius to lease the privilege of keeping his scow where it was, which resulted in the agreement stated. He afterward perfected this appeal.

⁵⁹⁷ In our judgment there are not sufficient facts stated by Olsen to avoid the estoppel set up, and it follows that the motion to dismiss should be allowed.

Dismissed.

ON PETITION FOR REHEARING.

SLATER, J. 4. The defendant Olsen urges that one who is in possession of property and takes a lease is not estopped to deny a landlord's title, that the estoppel of the tenant to deny the landlord's title does not exist after the expiration of the lease, and that the lease in question is for a part only of the premises, and therefore the estoppel would not run at all. None of these contentions has any merit as applied to the facts of this case. In support of the first of these contentions, *Pearce v. Nix*, 34 Ala. 183, *Franklin v. Merida*, 35 Cal. 567, 95 Am. Dec. 129, and *Crocket v. Althouse*, 35 Mo. App. 404, together with some other cases from the same states, are cited; but none of them are applicable to the facts of this case, and, so far as they refer to the general rule, first above contended for, they appear to be in conflict with the great weight of authority as stated by 18 American and English Encyclopedia of Law, second edition, 415.

In the main opinion we sustained the motion to dismiss upon the grounds of estoppel, but we are now satisfied that it may be put upon a broader ground, to wit, that the legal effect of the giving and the taking of the lease amounted to a satisfaction of the decree. The suit is in the nature of an equitable action of ejectment, and the effect of the decree was to require Olsen to vacate the premises, but he

failed to comply therewith, and, upon the petition of Parelius, was charged with contempt of court. The court then had power to compel him to observe and conform to the decree, and granted him five ⁵⁹⁸ days to do so; but within that time the lease in question was entered into, and thereupon a new relation was created between the parties, which deprived Parelius of the right further to invoke the aid of the court under the decree to recover possession, and this would be so although the term of the lease had expired. To obtain possession he would be compelled to resort to a new and independent proceeding.

It was held in *Hough's Lessee v. Norton*, 9 Ohio, 45, 48, that if, after a recovery in ejectment, the lessor of the plaintiff contracts to sell or leases the premises to the defendant, the tenant in possession, he cannot subsequently revive the judgment by scire facias. It is there said: "When the tenant takes the lease, he admits the right of the landlord, and for the recovery of rent the landlord must look to the covenants of the lease. From the time of the execution of the lease, the relative situation of the parties is changed. The possession of the tenant is not adverse to, but in accordance with, the rights of the landlord. His possession for many purposes will be considered as the possession of the landlord, and the latter has, in fact, derived all the advantage from his judgment which that judgment was intended to secure." The principle there enunciated is applicable here.

The petition for rehearing will therefore be denied.

Dismissed, rehearing denied.

A Party Entitled to Appeal may so deal with the subject matter of the action as to preclude him from asserting his right of appeal. Thus when the plaintiff in a suit to enjoin the defendants from maintaining a dam which caused damage to his lands failed in such suit and appealed from the dismissal of it, and subsequently sold the land to the defendants without reserving any rights therein, such deed operated as a release of his claim to injunctive relief as against the entire land, including any injury thereto, and the appeal should be dismissed: *Thomas v. Booth-Kelly Co.*, 52 Or. 534, 132 Am. St. Rep. 713.

If, After an Appeal is Taken, the Parties Thereto Settle the matter in litigation between themselves, the appeal will be dismissed, although the case has been argued and submitted to the supreme court: *Wedekind v. Bell*, 26 Nev. 395, 99 Am. St. Rep. 704.

As to Whether One Loses His Right to Appeal by accepting benefits under the judgment, see *Fiedler v. Howard*, 99 Wis. 388, 67 Am. St. Rep. 865; *Tyler v. Shea*, 4 N. D. 377, 50 Am. St. Rep. 660; as to whether he loses the right by paying the judgment, see *Nashville etc. Ry. Co. v. Bean*, 128 Ky. 758, 129 Am. St. Rep. 333. Where the defendant replevies a money judgment by executing a bond, and thereby stays it for three months, this merges the judgment in the replevin bond but it does not affect his right of appeal: *Nashville etc. Ry. Co. v. Bean*, 128 Ky. 758, 129 Am. St. Rep. 333.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

GOTTLIEB v. MUTUAL LIFE INSURANCE COMPANY.
[225 Pa. 102, 73 Atl. 1057.]

LIFE INSURANCE — Nonpayment of Premiums — Days of Grace.—Where a policy of life insurance provides that “after the first premium shall have been paid a grace of thirty days, during which the contract shall remain in force, will be allowed in the payment of premiums,” and the insured pays the first premium promptly, but dies twenty-three days after the second payment is due without paying it, the policy is in force at the time of the death and the company is bound to pay it. (p. 857.)

T. Elliott Patterson, for the appellant.

Bernard Harris, for the appellee.

104 ELKIN, J. This is an action in assumpsit on a policy of insurance. The suit was brought by the administrator of the estate of the deceased insured person. The only question raised by the pleadings is whether the insurance contract was in force at the time of the death of the insured. The contract of insurance was what is known as a twenty payment life policy. One of the conditions or privileges written into the contract is the following: “After the first premium shall have been paid a grace of thirty days, during which the contract shall remain in force, will be allowed in the payment of premiums by the insured or by anyone for him.” The first annual premium was paid and the second was due August 5, 1908, but was not paid upon that date, nor at the time of the death of the insured, August 28, 1908. Under these circumstances appellant contends that failure to pay the annual premium when due, or at least prior to the death of the insured, relieves the company from liability on the insurance contract. The theory is, that failure to pay the premium on the date specified worked a forfeiture of the right to recover, and that the thirty days of grace in which to pay only constituted a privilege by which

the insured could reinstate his forfeited insurance, but that the delay was at the risk of the insured, and no liability attached to the company until the premium was paid and accepted. Some cases are cited in support of ¹⁰⁵ this contention, but they are easily distinguished on their facts from the case at bar. The line of cases referred to had to deal with policies of fire insurance for definite fixed periods, or with life insurance contracts in which no provision had been made that the policy should remain in force during the period, called days of grace, in which the insured could pay the overdue premium. In no case called to our attention, and indeed it seems impossible to believe there could be any such case, has it ever been held that when the policy in express terms provides that it shall remain in force during the thirty day period, it would be construed to mean that it did not remain in force. Such a construction would do violence to the rights of contracting parties. When the contract shall begin and end, how long and under what conditions it shall remain in force, and when it shall be forfeited all depend upon the terms of the contract itself. When the terms and conditions are plain and unambiguous there is nothing requiring judicial interpretation. In the case at bar the contract provides that the policy shall remain in force during the thirty day period and there is no room for construction. When the person insured died the policy by its own terms was in force, and the appellant company is bound thereby.

Judgment affirmed.

The Failure to Pay a Premium on an Insurance Policy when due ordinarily works a forfeiture of the insurance: *Thompson v. Fidelity etc. Ins. Co.*, 116 Tenn. 557, 115 Am. St. Rep. 823; *Pacific etc. Ins. Co. v. Galbraith*, 115 Tenn. 471, 112 Am. St. Rep. 862. Where a premium falls due on October 1st, which is Sunday, the "thirty days' grace" allowed by the policy commences to run at midnight of that day and expires at midnight on October 31st: *Aetna Life Ins. Co. v. Wimberly*, 102 Tex. 46, 132 Am. St. Rep. 852.

SANDERS v. PENNSYLVANIA RAILROAD COMPANY.

[225 Pa. 105, 73 Atl. 1010.]

RAILROAD—Liability of One Company for Negligence of Another.—Where a traveler in the highway is negligently injured by collision with a train at a crossing, the corporation owning and controlling the railroad is primarily liable; and if it alleges that the accident was due to the negligence of another company operating a train upon the tracks under a traffic arrangement, it has the burden to establish the facts necessary to shift its responsibility. (p. 859.)

RAILROADS—Liability of One Company for Acts of Another.

Where a railroad company simply permits another company to run cars upon its tracks, it is liable for damages caused by the negligence of the company enjoying the permissive use; the arrangement for trackage rights is in the nature of a license, and the company enjoying the same is a licensee. But the application of this rule depends largely upon the nature of the contract between the companies. (p. 859.)

RAILROADS—Liability of One Company for Acts of Another.

Where a traveler in the highway is injured at a crossing by a train of a corporation not owning nor controlling the railroad, but running on it by the orders and subject to the rules and regulations of the owners of the railroad, an action for such injury is properly brought against the company owning the road. (p. 860.)

RAILROAD—Injury at Crossing—Contributory Negligence.—

Where the evidence tends to show that a traveler in an automobile, as he approached a grade crossing, found the safety gates open, stopped or nearly stopped, but on a signal from trainmen started over the crossing and was struck by coal-cars being backed on one of the tracks, of the approach of which no warning was given, it cannot be held as a matter of law that he was guilty of contributory negligence. (p. 860.)

Action for personal injuries. The plaintiff, riding in an automobile, approached a grade crossing of the Pennsylvania Railroad Company, and found the safety gates raised and no watchman in attendance. The plaintiff's testimony tended to show that he stopped, or nearly stopped, as he approached the crossing, but on a signal from a trainman started over the crossing and was struck by coal-cars being backed on one of the tracks. There was evidence that no warning of the approach of the cars was given. From a judgment for the plaintiff the defendants appeal.

F. W. Wheaton, John McGahren and Henry W. Palmer, for the appellant.

John M. Garman and W. Alfred Valentine, for the appellee.

108 ELKIN, J. The first assignment seeks to convict the learned court below of error in not giving binding instructions for the defendant at the trial; and the second challenges the correctness of the ruling in refusing to enter judgment non obstante veredicto. The appellant contends that this case presents a question of law for the court and not of fact for the jury. This contention is predicated upon two grounds: First, that the injuries complained of resulted from collision with a train of cars moved by and belonging to another railroad company whose employes were in charge of the train, and that if there was any negligence in the case, the company owning the train of cars and employing the servants in charge of the same is alone responsible; and second, that under the facts proven at the trial appellee was

so clearly guilty of contributory negligence as to warrant the court in holding, as a matter of law, that there can be no recovery of damages. As to the first proposition the testimony is meager and unsatisfactory. It does not clearly show what the traffic arrangement between the two companies was. The letter of the superintendent of the appellant company dated September 10, 1902, refers to a former letter dated July 9, 1902, which contained the terms and conditions upon which trackage rights would be given, but this letter is not in evidence, and therefore the court is not in position to determine what the contractual trackage rights of the other company are. The testimony does show that the right of way, roadbed and railroad tracks belong to and are under the control and management of the appellant company. The accident occurred at a grade crossing on the tracks of the Pennsylvania Railroad Company, and this makes out a case of primary responsibility if negligence be shown. If for any sufficient reason this primary responsibility may be avoided, the burden is upon the company denying it to establish ¹⁰⁹ the facts necessary to shift it. In the present case the evidence is not sufficient to shift the burden. The statement in the letter of September 10, 1902, relating to the assumption of and indemnity against all claims for personal injuries may very properly be considered in determining the ultimate responsibility between the contracting railroad companies, but cannot be used to defeat the right of the appellee to recover for injuries against the company primarily liable for the same.

Again, the general rule is, that where a railroad company simply permits another railroad company to run cars upon its tracks, it is liable for damages caused by the negligence of the company enjoying the permissive use. Under such circumstances the arrangement for trackage rights is in the nature of a license, and the company enjoying the same is a licensee. Of course, the application of the rule depends largely upon the nature of the contract between the companies. The lessor company may, and often does, transfer to the lessee company for a term of years all of its property under a contract which gives the lessee exclusive control and management of the whole system. In such a case, depending upon the facts and circumstances, it may be that an action for personal injuries should be brought against the operating company. Then, too, there may be such a joint construction and use of tracks, under joint rules and regulations, as to make each company enjoying the joint use liable for its own negligence. These are exceptional cases, and depend upon their own peculiar facts. No such question arises under the facts of the case at bar. The safety gates at the crossing were under the control of the appellant

company. While the train which caused the injuries belonged to another railroad company, it came upon the tracks of the appellant company only after orders so to do had been given by the employes of the latter company, the rules and regulations of which the employes of the former company were subject to at the time of the accident. We therefore hold under these facts that the action can be maintained against the appellant company. It may be that the plaintiff might have elected to have brought his suit against the Delaware and Hudson Company, but we are not dealing ¹¹⁰ with that question now, and it is not necessary to pass upon it.

As to the second proposition, we do not agree with the contention of the learned counsel for appellant that the evidence showed such a clear failure on the part of the appellee to perform his duty on approaching the crossing as to justify the court in holding, as a matter of law, that there could be no recovery on the ground of contributory negligence. No useful purpose can be served by reviewing the testimony on this branch of the case. We are all of opinion that it was sufficient to go to the jury, and that the learned trial judge committed no error in its submission.

Judgment affirmed.

The Liability of Railway Companies for Accidents where the road belongs to one company and the cars of another company are being operated thereon by permission is discussed in *Nugent v. Boston etc. R. R.*, 80 Me. 62, 6 Am. St. Rep. 151; *Killian v. Augusta etc. R. R. Co.*, 79 Ga. 234, 11 Am. St. Rep. 410; *Wisconsin Central R. R. Co. v. Ross*, 142 Ill. 9, 34 Am. St. Rep. 49; *Clere v. Morgan's etc. Steamship Co.*, 107 La. 370, 90 Am. St. Rep. 319. According to *Muntz v. Algiers etc. Ry. Co.*, 111 La. 423, 100 Am. St. Rep. 495, a street railroad corporation is liable for injuries caused by the negligent operation of the road by another corporation to which it has leased it. For other cases discussing the liability of a lessor railway corporation for the negligence of the lessee company, see *Ackerman v. Cincinnati etc. R. R. Co.*, 143 Mich. 58, 114 Am. St. Rep. 640; *Travis v. Kansas City etc. R. R. Co.*, 119 La. 489, 121 Am. St. Rep. 526; *Louisville Ry. Co. v. Commonwealth*, 130 Ky. 738, 132 Am. St. Rep. 408.

WELLER v. LEHIGH VALLEY RAILROAD COMPANY.

[225 Pa. 110, 73 Atl. 1024.]

RAILROADS—Liability for Frightening Horses by Escape of Steam.—Where a traveler, finding a locomotive standing at rest without signs of moving, attempts to drive over the crossing in front of it, whereupon the engine suddenly and without warning blows off steam with such force as to frighten the horse and cause it to run away, the railroad company may be held liable for resulting injuries. (p. 862.)

Wheaton, Darling & Woodward, for the appellant.

John M. Garman and W. Alfred Valentine, for the appellee.

¹¹¹ ELKIN, J. The single question raised by this appeal is whether the facts established at the trial show such a failure of duty on the part of appellant as to make it liable in damages on the ground of negligence. An engine belonging to defendant was left standing at a grade crossing in the city of Wilkes-Barre so as to cover the entire sidewalk and to extend out into the street several feet. How long the engine had stood there is ¹¹² not definitely fixed, because the offer to prove this fact was refused on the ground that it was immaterial. The exclusion of this testimony has not been assigned for error, and since the plaintiff recovered a judgment in the court below, it is not important to now consider whether or not it was properly excluded. It is an answer, however, to the argument made for appellant that there was no evidence to show how long the engine stood upon the crossing. There is no such evidence, because the offer was refused on the objection of counsel for appellant. While the engine was standing in this position appellee in a one-horse carriage approached the crossing. Just as his horse was passing in front of the engine, steam was suddenly blown off, which caused the horse to become frightened and run away. The plaintiff was thrown from his carriage and seriously, and perhaps permanently, injured. The evidence shows that the train to which the engine was attached was not being moved at the time of the accident, and that there was other space on the track some distance from the crossing where it could have stood. Under these circumstances it must be determined whether there can be a recovery. The learned counsel for appellant rely upon a line of cases in which it has been held that the emission of steam and smoke are the necessary accompaniment of the use of locomotive engines, and that it is only in exceptional cases where negligence can be imputed to railroad companies because horses on the highway are frightened by escaping steam. As a general proposition, this may

be accepted as a correct statement of the rule. It has been frequently held that the running of locomotives in the usual method or of blowing off steam for proper purposes is not negligence. This is a sound rule, and there is no disposition to disturb it. An examination of the cases cited by appellant will show that this rule has been followed and each case properly decided under its particular facts. We are not convinced, however, that the case at bar is ruled by any of the cases cited, or that anything said in those cases was intended to announce a principle which would deny the right to recover under the facts here presented. The rule is want of care under the circumstances. It is true that ¹¹³ a railroad company has ordinarily the right to the exclusive use of its tracks and right of way, and that it enjoys the privilege of running its trains and operating its engines according to its rules and regulations for every proper purpose. At grade crossings the situation is somewhat different. The railroad company does not have the exclusive use, and the rights of the public must be considered. The railroad company on one hand and a traveler on the highway on the other each has a duty to perform respecting the rights of the other. In the present case the appellee was driving on a street where he had a right to be. He had a right to drive his team over the crossing, and it is not contended that he was negligent in the performance of any duty imposed upon him. He saw an engine standing at rest without showing any signs of moving. It extended out into the street. It was necessary for him to pass it. He attempted to do so, and just as he got in front of the engine steam was suddenly and without warning blown off with such force as to frighten his horse and cause the injuries complained of. We think under these circumstances it was for the jury to determine whether the railroad company, in the exercise of its rights and privileges, had due regard for the rights of the appellee by permitting the steam to be blown off without any warning or notice just as his horse passed in front of the engine.

Judgment affirmed.

THE LIABILITY OF A RAILROAD COMPANY FOR INJURIES DUE TO THE FRIGHTENING OF ANIMALS BY THE EMIS- SION OF STEAM.

- I. The Origin of the Liability, 863.
- II. Circumstances Creating Liability.
 - a. The Rule, 864.
 - b. Maliciously Causing Emission of Steam, 864.
 - c. Recklessly or Wantonly Causing Emission of Steam, 865.
- III. Circumstances Excluding Liability.
 - a. The Rule, 868.
 - b. Statutory Alarms, 869.
 - c. Warning Whistling for Safety of Man or Beast, 869.
 - d. Acts Outside the Scope of Employment of Servants, 869.
- IV. The Burden of Proof, 871.

I. The Origin of the Liability.

In the rapid growth of railroad law, evidenced by a vast accumulation of cases on almost every branch of it, and interdistinguished by the finest demarcation, one is apt to lose sight of first principles and continue a discussion of differences from the last point of settlement, rather than settle each new point on its own basis, and thus one is sometimes induced to economize time at the expense of accuracy and thoroughness. This should not be. In considering the question now under review—the liability of a railroad corporation for injuries due to the frightening of animals by the emission of steam from engines—it must be looked at from the side of the corporation as to its rights and the side of the sufferers of injuries caused either to themselves, their decedents or their animals by reason of the latter taking alarm at the sound of escaping steam. The law, having sanctioned the operation of railroad trains, it must be presumed that the law-makers knew that the running of those trains would cause noise both from the moving train and more especially from the steam whistles used both for challenging signals and for warnings, and, in addition, from the necessary blowing off of steam for safety from the valve or in other working of the engine. The safety of the public equally demands a recognition of their rights. There are those whose business lawfully takes them near the railroad either riding or in a vehicle drawn by horses, and lastly there are those who own animals at large which may roam near the railroad track. Taking these propositions together, it is to be considered how the railroad corporation shall safeguard the public without detriment to its own operations, and how the public shall contribute to that care by reasonably looking after its own safety. If the maxim to guide the public is "Stop, look and listen," that for the railroad corporation should be "Watch, ring and whistle," each taking care that the direction is not extravagantly performed. And when the railroad corporation, in the ordinary work of its road, places engines in charge of skilled men, who find it necessary to create the noise which accompanies the emission of steam, and such noise alarms animals so that injury is worked, the real questions at issue are whether the corporation so acted as to relieve itself from any charge of negligence and whether the injured party so acted as to relieve himself from the charge of contributing to the injury by his own negligence. It all comes back to those simple propositions, untrammelled by those labyrinthine considerations which are ordinarily and improperly contributed to the discussion of railroad law. It has been thought necessary to discuss the liability of the railroad corporation for the act of its engineer in post, III, d. It is proposed in this note to show the result of the judicial decisions on the subject of the title and therewith to demonstrate (excluding the subject of contributory negligence and of such statutory provisions as render the obstruction of highways illegal) that whatever latitude may be allowed a railroad corporation running its engines in the open country, where slight want of care might be unaccompanied by injury to any, its liability for that want of care is immediately created when its operations bring them into populous neighborhoods and through them on grade crossings. The case of *Beisiegel v. New York Cent. R. R. Co.*, 34 N. Y. 622, 90 Am. Dec. 741, decides that a railroad company is bound to exercise more caution and a higher degree of care when running

its cars through a village or city, than in the open country. They have undoubtedly a right of way, but so have others; and while the duty of care cast on ordinary users of a way is equal, that of the one crossing it with a danger-bearing instrument or machine increases in proportion with its menace to the life, limb or property of the other.

II. Circumstances Creating Liability.

a. The Rule.—Those cases where negligence can be imputed to a railroad corporation through animals taking fright at the escaping steam or sounding of the whistle are comparatively rare. The rule as formulated from the various decisions is that a railroad company is not liable for the fright of horses resulting from the ordinary use, movement or situation of its cars, engines or trains, and that it has a lawful right to make all such noises as are necessarily connected therewith. It may, however, become liable if, in such use of its property, it does anything unusual or unnecessary, naturally calculated to frighten ordinarily well-broken and gentle horses: 2 Thompson on Negligence, sec. 1908; *Geveke v. Grand Rapids & I. Ry. Co.*, 57 Mich. 589, 24 N. W. 675; *Hinchman v. Pere Marquette Ry. Co.*, 136 Mich. 341, 99 N. W. 277, 65 L. R. A. 553; *Foster v. East Jordan Lumber Co.*, 141 Mich. 316, 104 N. W. 617; *Dunn v. Wilmington & W. R. R. Co.*, 124 N. C. 252, 32 S. E. 711; *Petersburg R. Co. v. Hite*, 81 Va. 767; and its construction premises always that the negligent act of the tort-feasor is the proximate cause of the injury.

The blowing of a whistle by a locomotive engine is a lawful act; the emission of steam where the engine is propelled by it is a necessary incident to its use, also not of itself unlawful. But both, or either of them, may be negligent when they become unlawful according to circumstances. If the circumstances do not warrant an inference of unlawful use, the mere fact that an accident was caused by either is not sufficient to convict of negligence: *Webb v. Philadelphia & R. R. Co.*, 202 Pa. 511, 52 Atl. 5. If the escape of the steam is wantonly or recklessly caused, and injury ensues, the railroad company is liable: *Stanton v. Louisville & N. R. Co.*, 91 Ala. 382, 8 South. 798; *Louisville N. A. & C. Ry. Co. v. Schmidt*, 134 Ind. 16, 33 N. E. 774.

As in all such cases of negligence, however, it is almost impossible to generalize beyond the iteration of the rule, and as the circumstances vary with nearly every case—even where the inquiry is limited as in this note—the illustrations afford the master key to the principle.

b. Maliciously Causing Emission of Steam.—Where the railroad and a turnpike road alongside of it belonged to the same corporation, and a train and a horse wagon were traveling side by side in the same direction, the former at only three miles an hour, and the engineer saw that the horses were frightened when he was within thirty yards of them and blew off three or four spurts of steam when he approached nearer, as if to aggravate the terror of the horses and create, according to the evidence, an enjoyable spectacle for himself, the question as to whether there was care according to the circumstances was for the jury: *Hanlon v. Philadelphia etc. Turnpike Co.*, 182 Pa. 115, 37 Atl. 943.

In *Texas & P. Ry. Co. v. Jumper*, 24 Tex. Civ. App. 671, 60 S. W. 797, the highway and railroad track were thirty yards apart, and

the engineer, after signaling to his flag station, saw the plaintiff riding a mule on the highway. After smiling at the plaintiff he gave ten or twelve blasts on the whistle and let off a volume of steam. The evidence was held sufficient to sustain a verdict against the railway company. In *Geveke v. Grand Rapids & I. Ry. Co.*, 57 Mich. 589, 24 N. W. 675, the company had a train of cars drawn across a toll-road, and the plaintiff, whose horses were accustomed to the engine whistling, waited for the train to move. In about ten minutes the engineer backed the train, so as to leave the road clear and the plaintiff proceeded to cross. At that time steam was escaping from the safety valve, but caused no alarm to the horses. Just when they and the wagon were on the rails the cylinder cocks on the engine were opened and the steam rushed out with a sharp hissing sound and a cloud of vapor was blown toward the horses, causing them to spring aside and overturn the wagon injuring the plaintiff. These circumstances directly pointed to the negligence and consequent liability of the railway company.

c. **Recklessly or Wantonly Causing Emission of Steam.**—One of the early cases and which has stood the test of thirty-five years is *Borst v. Lake Shore & M. S. Ry. Co.*, 4 Hun, 346, which lays it down that when a flagman stationed at a grade crossing beckons a traveler who is waiting in the highway for an opportunity to cross the track, an engine then occupying about ten feet of the crossing, the traveler has the right to suppose that no change will take place in anything under the control of the railway company likely to increase the danger, and if more steam is emitted from the engine while he is passing than before, that is an unfair surprise to the plaintiff, and, if it contributes to the injury, it is the fault of the defendant's agents for which the defendant is responsible. The very position of the engine in the public highway, and the occupation and blocking up of the highway by it, were of themselves acts of negligence, and the emission of more steam at that particular time was a continuation and aggravation of the original wrong to the public and the plaintiff. The language in *Weller v. Lehigh Valley R. Co.*, 225 Pa. 110, ante, p. 861, 73 Atl. 1024, 24 L. R. A., N. S., 1202, is almost in the same words: "He saw an engine standing at rest without showing any signs of moving. It extended out into the street. It was necessary for him to pass it. He attempted to do so, and, just as he got in front of the engine, the steam was suddenly and without warning blown off with such force as to frighten his horses and cause the injuries complained of." That exposition of the law in *Borst v. Lake Shore & M. S. Ry. Co.*, 4 Hun, 346, was adopted in *Keech v. Rome, O. & W. R. Co.*, 59 Hun, 617, 13 N. Y. Supp. 149, the only difference between the cases being that in lieu of the flagman beckoning the plaintiff as in the former case, the plaintiff asked the engine driver if it was all right for him to cross, and received the reply, "All right, go ahead," and when the plaintiff was abreast of the engine, the steam began to escape from its "pop-whistle," and several "toots" were emitted, which frightened the plaintiff's horses and caused the injuries. The only addition to the principle laid down in the former case is that the railway company is not to be made liable because it made the noises and performed the operations incident to its business, but because, having given the plaintiff, who had waited some

time to obtain it, an assurance of safety, it was its duty, and if it was in its power, to refrain for the moment from unnecessarily doing any act to imperil his safety. That assurance of safety was made without any reservation and implied the control of the engineer over his engine and its instruments of alarming sounds. The whistle was either under the engineer's control or it was not. If it was, it was negligence not to control it; if it was not, but worked automatically, he must be presumed to have been aware of it, and the question would arise whether it was negligence to stop the engine in advance of the plaintiff, instead of in his rear, and tell him to go ahead without regard to the liability of the pop-whistle to go off. The case of *Chicago & A. R. Co. v. Heinrich*, 157 Ill. 388, 41 N. E. 860, is to the same effect. Where the flagman gave an all right signal to a traveler, the engine being concealed from view at the time, and as the horses were crossing the escaping steam startled them and caused the traveler injuries, the company was held responsible for the negligence: *Kalbus v. Abbott*, 77 Wis. 621, 46 N. W. 810.

The case of *Pennsylvania R. R. Co. v. Horst*, 110 Pa. 226, 1 Atl. 217, exhibits the same reasoning on almost the same data. A train divided into two sections stood across a highway, and a traveler asked if it were safe to cross, and was told it was, and when between the sections the brakes were shifted on the cars making such a noise as frightened his horse and caused the injuries for which he recovered damages. It does not appear whether the brakes were managed by steam, but the final words of the opinion warrant the inclusion of the case in this note: "In the present case the right to screw up or release the car brakes is not denied, but whether that was done at a proper time and in a proper manner was a question of fact properly determinable by the jury." This was followed in *Petersburg R. R. Co. v. Hite*, 81 Va. 767.

In *Hinchman v. Pere Marquette R. Co.*, 136 Mich. 341, 99 N. W. 277, 65 L. R. A. 553, the only difference between it and the last two cases is the explanation of the engineer that the whistle was automatic and that he did nothing to occasion the emission of the steam, and the jury were properly instructed that they might infer negligence from the fact that the engineer could either have moved farther on if he knew the steam escape was uncontrollable or should have used appliances to prevent it, if he knew.

The only decision on these circumstances—the flagman's assurance of safety—which is at variance with the other decisions cited is *Duvall v. Baltimore & Ohio R. Co.*, 73 Md. 516, 21 Atl. 496. In that case the plaintiff was lawfully crossing the track in front of the engine—the flagman with his flag furled, indicating safety, the engineer away from his engine—when steam escaping from the safety valve frightened the plaintiff's horse and caused the injuries sued for. The only reason that seemed to actuate the court to hold that there was no negligence was that the train was waiting to go on an up-grade and needed a full head of steam on for the purpose, and, therefore, the escape was an incidental noise and the company not guilty of negligence.

The reasoning, however, is entirely away from that in the whole of the cases cited, and the court seems to have regarded the absence

of the engineer from his post as unimportant. We doubt the prudence of accepting the views enunciated in the case as authoritative.

In *Foster v. East Jordan Lumber Co.*, 141 Mich. 316, 104 N. W. 617, the plaintiff approaching a crossing stopped and looked and listened when he was sixty feet from the crossing and saw and heard nothing to indicate the proximity of a train. As a fact, at that time and for two hours previously, the defendant's engine, under steam, was standing at a point from thirty to ninety feet south of the crossing, but, by reason of piled lumber, it was screened from view. The plaintiff then proceeded and when about ten feet from the crossing his horses took fright at the noise caused by the blower just then put on the engine. The question was properly left for the jury whether defendant's employes ought not to have contemplated that a traveler might be near the crossing at the time the fireman put on the blower and to have refrained from doing so unnecessarily. The defendant had placed its locomotive so near to an important and much traveled public thoroughfare, that the putting on of the blower was likely to frighten any horse that might be near the track and was bound to know that a horse might come upon the crossing at any time.

The case of *Texas Midland R. R. v. Cardwell* (Tex. Civ. App.), 67 S. W. 157, is the original of which *Weller v. Lehigh Valley R. R. Co.*, 225 Pa. 110, ante, p. 861, 73 Atl. 1024, 24 L. R. A., N. S., 1202, is the replica. The only difference between them is that in the Texas case the plaintiff, in lieu of receiving the engineer's assent to cross the track, seeing another team of horses half way across, followed it; and the injury was caused through the fright of the horses at escaping steam. The company was rightly held responsible.

In *Dunn v. Wilmington & W. R. Co.*, 124 N. C. 252, 32 S. E. 711, the engine had been standing on a sidetrack, immediately adjoining a much frequented public street, from 8 A. M. to 4:30 P. M. The evidence disclosed that it need not have been kept there, as there was another sidetrack where it would have been out of the way. The cause of the steam escape which frightened the plaintiff's horses and caused him injury was not given. One witness said that: "An engine standing generates steam and pops off," and another that the noise "could not have been made except when the donkey pump was working or when the injector is put on," thus requiring human agency. These facts were sufficient evidence of negligence to send the case to the jury.

One of the latest utterances on the subject is to be found in *Williams v. Chicago B. & Q. R. Co.*, 78 Neb. 695, 111 N. W. 596, 14 L. R. A., N. S., 1224, and it seems to embody all that is contained in the principle already stated and to add that which makes it perfect. It emphasizes: 1. That ordinarily a railway company is not liable for injuries caused by horses taking fright at the noises incident to the ordinary operations of the engine; 2. That where the conditions are such that such noises would endanger a person at a public crossing, which result could be avoided by temporarily staying or suspending the noises, without materially interfering with the due operation of the train, it should be stayed or suspended until the danger is past; 3. That turning on the steam of an engine standing at a public street crossing without warning, and without taking due precaution to see whether anyone near the crossing is liable to be injured thereby is

actionable negligence, in the absence of special circumstances justifying the act; and 4. That a train standing at a public crossing has no precedence over an ordinary traveler, their rights being equal. Each is bound to act with due regard to the other, and has a right to assume that the other will be controlled by such considerations as would influence the conduct of a man of ordinary care and prudence.

This seems to be almost the last word that can be used in embellishing the rule. The reasoning in *Weller v. Lehigh Valley R. R. Co.*, 225 Pa. 110, ante, p. 861, 73 Atl. 1024, 24 L. R. A., N. S., 1202, is on these premises and *Fay v. Minneapolis etc. Ry. Co.*, 131 Wis. 639, 111 N. W. 683, which was well cited in support, was a decision on the same foundation. An old but none the less valuable case on the same points is *Toledo W. & W. R. Co. v. Harmon*, 47 Ill. 298, 95 Am. Dec. 489.

And more recent decisions, affirming the same doctrines, are *Presby v. Grand Trunk Ry.*, 66 N. H. 615, 22 Atl. 554, *Boothby v. Boston & M. R. R.*, 90 Me. 313, 38 Atl. 155, in which both the engineer and fireman were absent from the engine when the damage-causing noise of the escaping steam occurred, and their absence alone was sufficient evidence of negligence to go to the jury; *Andrews v. Mason City etc. R. Co.*, 77 Iowa, 669, 42 N. W. 513, in which the engine protruded several feet over a street crossing; *Billman v. Indianapolis C. & L. Ry. Co.*, 76 Ind. 166, 40 Am. Rep. 230, where the frightened horses running away killed another horse which was near and the company were held responsible, their original negligent act being the proximate cause of the injury; *Wabash R. Co. v. Speer*, 39 Ill. App. 599, where the horses frightened were at a safe distance from the track when the steam was allowed improperly to escape from the engine; and the following cases in which the same rules have been used in establishing the liability of the railroad company: *Central of Georgia Ry. Co. v. Fuller* (Ala.), 51 South. 309; *Berry v. Boston & M. R. Co.*, 102 Me. 213, 66 Atl. 386; *Rademacher v. Detroit G. H. & M. Ry. Co.*, 158 Mich. 512, 123 N. W. 45; *Lindler v. Southern Ry. Co.* (S. C.), 66 S. E. 995; *Paris & G. N. Ry. Co. v. Calvin* (Tex. Civ. App.), 103 S. W. 428 (affirmed, 101 Tex. 291, 106 S. W. 879); *St. Louis S. W. Ry. Co. v. Moore* (Tex. Civ. App.), 107 S. W. 658; *St. Louis S. W. Ry. Co. v. Nelson* (Tex. Civ. App.), 111 S. W. 1062; *Garber v. St. Louis S. W. Ry. Co.* (Tex. Civ. App.), 118 S. W. 857; *Texas Cent. R. Co. v. Boesch* (Tex.), 126 S. W. 8.

III. Circumstances Excluding Liability.

a. **The Rule.**—Noises are the unavoidable consequences of steam propulsion, which the public of the day demand, and cannot have, save with the concomitant sounds. Under ordinary circumstances, therefore, there is no duty cast on an engineer to stop his train until a driver of horses, in difficulties with them on account of the steam noise, has succeeded in quieting them: *Hanlon v. Philadelphia etc. Turnpike Co.*, 182 Pa. 115, 37 Atl. 943. Cars cannot be moved, nor switching done, by a locomotive without the exhausting of the steam making some noise. The questions in every case arising under the rule are: Did the servants of the company operate the engine with due care, or did they make unnecessary and unusual noise with the steam so as to frighten animals traveling in the vicinity, and if the answer to the latter question is found in the negative,

the railroad company is not liable: Louisville & N. R. Co. v. Roberts (Ga. App.), 67 S. E. 690; Cincinnati Ry. Co. v. Gaines, 104 Ind. 526, 54 Am. Rep. 334, 4 N. E. 34, 5 N. E. 746; Vandalia R. Co. v. McMains, 42 Ind. App. 532, 85 N. E. 1038; Philadelphia W. & B. R. Co. v. Burkhardt, 83 Md. 516, 34 Atl. 1010; Heininger v. Great Northern Ry. Co., 59 Minn. 458, 61 N. W. 558; Abbott v. Kalbus, 74 Wis. 504, 43 N. W. 367, followed in Cahoon v. Chicago & N. W. Ry. Co., 85 Wis. 570, 55 N. W. 900.

Evidence alone that an engine had "a pretty big head of steam on and was exhausting outside," and that "it had its cylinder cocks open and made a great deal of noise in blowing off steam," was not sufficient to sustain a verdict: Abbott v. Kalbus, 74 Wis. 504, 43 N. W. 367.

b. Statutory Alarms.—In some states the mode of signaling at crossings is prescribed by statute, and so long as the statutory requirements are fulfilled it is almost needless to say actionable negligence in that regard cannot be established: Cahoon v. Chicago & N. W. Ry. Co., 85 Wis. 570, 55 N. W. 900.

But where the provisions are disregarded as by whistling when bell ringing was prescribed, the railway company is liable: Georgia R. R. v. Carr, 73 Ga. 557; Chicago R. I. & G. Ry. Co. v. Coffee (Tex. Civ. App.), 126 S. W. 638.

c. Warning Whistling for Safety of Man or Beast.—It is, however, quite a different thing when the whistle is sounded for the express and humane purpose of giving warning. When an engine was approaching a crossing and the engineer saw a herd of horses on it, and whistled loudly and opened the cylinder cocks to frighten them off and slowed down his train, but, nevertheless, one jumped onto the rails in front of the engine and was killed, the court properly said there was no negligence: Missouri K. & T. R. Co. v. Palmer (Tex. Civ. App.), 27 S. W. 889.

And where the whistle is sounded to alarm one driving horses who does not seem to realize his danger, and the horses frightened thereat cause injury, the company is not liable: Pepper v. Southern Pac. Co., 105 Cal. 389, 38 Pac. 974; Schaefert v. Chicago M. & St. P. R. Co., 62 Iowa, 624, 17 N. W. 893; Ocheltree v. Chicago & N. W. Ry. Co., 93 Iowa, 628, 62 N. W. 7.

d. Acts Outside the Scope of Employment of Servants.—The question of whether a railroad company sued for injuries due to the frightening of animals by the emission of steam from their engines can successfully shelter themselves by proving that the act was that of their servant done without or contrary to instructions—express or implied—was considered formerly a vital one. The undoubted preponderance of authority has, we think, set all doubts at rest. One of the latest cases on the point is Paris & G. N. Ry. Co. v. Calvin (Tex. Civ. App.), 103 S. W. 428, affirmed 106 S. W. 879. In it the appellant complained of the refusal of the following special charge: "Should you believe from the evidence that the defendant's servants willfully and maliciously sounded the whistle of the locomotive when the defendant's engine was on the crossing for the purpose of frightening plaintiff's horse and causing it to run away, and that said act of said employes, if you so find, did frighten the plaintiff's horse and cause it to run away and injure plaintiff, as alleged, then you

are instructed that you cannot find for the plaintiff, unless you believe that the giving of said signals was in the scope of employment of defendant's servants, and that said signals were given in the necessary operation of said train and in furtherance of the defendant's business." The court, in upholding the refusal, said that the evidence did not call for the charge, and that "in this kind of a case, we do not believe it is the law."

In *Texas & N. O. R. Co. v. Syfan* (Tex. Civ. App.), 43 S. W. 551, the court said: "If the employes saw plaintiff, and intentionally threw steam upon his horse, the fact that plaintiff had acted imprudently in going there would not prevent him from recovering, for the reason that the intentional, intervening act would be the proximate cause."

Care has to be taken that other malicious or wanton acts are not confused with the emission of steam. The blowing off of steam is within the scope of the engineer's employment. In *Alsever v. Minneapolis & St. L. R. Co.*, 115 Iowa, 338, 88 N. W. 841, 56 L. R. A. 748, Ladd, C. J., said: "The engineer was in charge of the engine and had control of the blow-off cock. How often and when to make use of it was necessarily left to his judgment. All that was exacted of him was that in doing so he exercise ordinary care. In blowing off the steam he was acting within the scope of his employment. The negligence consisted in the manner and place of doing it."

The old case of *Smith v. New York Cent. & H. R. R. Co.*, 78 Hun, 524, 29 N. Y. Supp. 540, is not strictly in point, but is cited for reference. The evidence in that case showed that the station agent placed on the rails for his own amusement torpedoes, which were exploded by the train and injured the plaintiff. The question was whether in so doing he acted within the scope of his employment. The court said that if by doing so he went outside of his employment to effect a purpose of his own—for his own amusement and not for signaling purposes—the company would not be liable.

The importance of this last-named case is minimized by a decision in another "torpedo" case (*Pittsburgh etc. Railway Co. v. Shields*, 47 Ohio St. 387, 21 Am. St. Rep. 840, 24 N. E. 658, 8 L. R. A. 464), in which the direct converse was held. An employé placed torpedoes, used for signals, on the track to frighten ladies in a car which was to pass over the torpedoes. One of the torpedoes was found by a boy, who caused its explosion by hitting it, and injured another. The company was held liable, and the opinion contains a very clear exposition of the law: "A servant may depart from his employment without making his master liable for his negligence when outside of the employment of his master, and he so departs whenever he goes beyond the scope of his employment, and engages in affairs of his own, but he cannot depart from the duty intrusted to him when that duty regards the rights of others in respect to the employment of dangerous instruments by the master in the prosecution of his business, without making the master liable for the consequences; for the first step in that direction is a breach of the duty intrusted to him by the master, and his negligence in this regard becomes at once the negligence of the master. Otherwise the duty required of the master in respect to the custody of such instruments employed in his business may be shifted from the master to the servant, which cannot be done so as to exonerate the master from the consequences of neglect of duty."

In *Toledo W. & W. R. R. Co. v. Harmon*, 47 Ill. 298, 95 Am. Dec. 489, in the same connection the court said: "He used the engine put in his possession and under his control to accomplish the wanton or willful act complained of. Why should not the company be held liable? It is said that he was not employed for the purpose, nor directed to perform the act, and it is equally true that they do not employ engineers to inflict injuries through negligence or incompetency, and yet these bodies are held liable for such acts of their servants."

In *Stephenson v. Southern Pacific Co.*, 93 Cal. 558, 27 Am. St. Rep. 223, 29 Pac. 234, 15 L. R. A. 475, cited also only for reference, the court took a similar view to that in *Smith v. New York Cent. & H. R. R. Co.*, 78 Hun, 524, 29 N. Y. Supp. 540. The engineer in charge of a locomotive, with intent to frighten passengers on a street-car, backed the engine toward the car so that the plaintiff jumped off and was injured. Judge de Haven said: "The engineer was not acting within the scope of his employment . . . if his object in moving the engine was simply to frighten the passengers in the street-car." In *International & G. N. R. Co. v. Yarbrough* (Tex. Civ. App.), 39 S. W. 1096, we find: "If there was no occasion for blowing the whistle in furtherance of the master's business, and the act of the employé in causing the whistle to blow was solely for the purpose of frightening the horse of plaintiff, then the act cannot be said to have been done within the scope of his employment. . . . If, however, the act was done in the discharge of his duties and in furtherance of the master's business, and was performed in a negligent manner, causing the injury, the master would be liable. And this would be true if the servant acted willfully and maliciously, intending to frighten the horse."

From these decisions it appears little difficult to draw a simple conclusion, and it appears to us that the cause of any confusion at all is the endeavor to read in the old rule of the master's nonliability for acts of the servant outside the scope of his employment the newer relations which the construction of railroads has raised between the public and the railroad corporations. The common-sense view appears to be that when the railroad company has placed a skilled man in charge of an engine, the charge and care and use of that engine is the scope of his employment, and that they are responsible for his acts as their agent in charge. This is borne out by the authorities cited.

The public know nothing of private instructions to these officers, either as to when they are to discharge torpedoes or when they are to blow whistles or open steam valves, and we incline to the view in the later cases decided at a time when the operation of the railroads is universal throughout the country rather than to those opinions uttered in the comparatively earlier stages of its history. We think that a defense of the engineer not acting within the scope of his authority would in the face of these late cases be ill-taken and well-nigh impossible to support.

IV. The Burden of Proof.

The burden of proof is always on him who alleges the negligence. He must show that an act in itself lawful, through its commission either at the time, at the place, or in the manner of performance be-

came unlawful: Philadelphia W. & B. R. R. Co. v. Stinger, 78 Pa. 219; Farley v. Harris, 186 Pa. 440, 40 Atl. 798; Webb v. Philadelphia & R. Ry. Co., 202 Va. 511, 52 Atl. 5. On the plaintiff rests the onus of showing that the blowing off of steam and the noises complained of were unnecessary, and recklessly or wantonly done or with the intention of frightening his horses: Stanton v. Louisville & N. R. Co., 91 Ala. 382, 8 South. 798; Philadelphia, W. & B. R. Co. v. Burkhardt, 83 Md. 516, 34 Atl. 1010.

COMMONWEALTH v. RACCO.

[225 Pa. 113, 73 Atl. 1067.]

WITNESS — Discrediting Accused by Showing Prior Convictions.—A person on trial for homicide who takes the stand in his own behalf may be asked on cross-examination if he has not been previously convicted of other crimes. The scope of such cross-examination rests largely in the discretion of the court; and it is not necessary to produce the record of conviction, since the matter is merely collateral to the main issue and arises therein only as affecting the credibility of the witness. (pp. 872, 873.)

WITNESS — Discrediting Accused by Showing Prior Convictions.—When a person accused of crime who has taken the stand in his own behalf denies, when asked on cross-examination, that he has been previously convicted of certain offenses, his prior admissions to the contrary are admissible to impeach his credibility. (p. 874.)

H. K. Gregory and A. W. Gardner, for the appellant.

Charles H. Young, district attorney, and S. L. McCracken, for the appellee.

115 BROWN, J. We have discovered no reversible error in this record, and but two of the seven questions raised by the nineteen assignments call for any discussion. One of these is as to the right of the commonwealth to ask the prisoner on cross-examination **116** whether he had not been previously convicted of various crimes. He was asked, under objection, whether he had not been convicted and sentenced to prison for larceny, assault and battery and wounding and for obtaining money under false pretenses. When he offered to testify in his own behalf, his credibility as an intensely interested witness became at once a question for the jury. It was proper that they should learn whatever might aid them in determining what credit should be given to his testimony, and no one was so able to enlighten them as himself. Under our statute permitting him to testify no restriction was placed upon the limit of his cross-examination. It was therefore largely within the discretion of the trial judge, and, unless that discretion was so abused that substantial injury has

resulted to the prisoner, the judgment will not be reversed. If he had been formerly convicted of the offenses stated, no one knew so better than himself, and it is not to be pretended that his affirmative answers would not have affected his credibility. If he had answered untruthfully in the negative, the way would have been open to the commonwealth to impeach his testimony by competent evidence of his convictions. Though courts in other jurisdictions and text-writers differ as to the right to ask a witness whether he had been convicted of a crime for the purpose of affecting his credibility, the rule as followed by the lower courts in our state since defendants in criminal cases have been made competent witnesses, has been, according to the observation and experience of every member of this court, to allow such questions to be put to a defendant as were asked this prisoner on his cross-examination. The only exception now to be recalled is *Commonwealth v. Pioso*, 19 Lanc. L. R. 145, in which the court of quarter sessions of Lancaster county, following an expression of Paxson, J., in *Buck v. Commonwealth*, 107 Pa. 486, held that it was improper to ask the defendant whether he had not, a short time before, been convicted of a crime. In *Buck v. Commonwealth* the question asked the witness was held to have been improper, because if he had been convicted of embezzlement the proper evidence of that fact was the record. We do not now approve what was there said, and, if it is to be regarded as an expression ¹¹⁷ of the law, it is overruled. If the matter in issue is a conviction, as it is on a plea of *autrefois convict*, the best and only competent evidence is of course to be produced, but when the matter about which a witness is asked, though one of record, is merely collateral to the main issue, and arises in it only as affecting the credibility of the witness, he may testify to it, especially when of all others he knows the exact truth, without regard to the record. The proper rule, followed by the court below, is laid down in *Underhill on Criminal Evidence*, sections 60 and 61: "The accused, when testifying in his own behalf, waives many of the peculiar constitutional privileges which belong to him as one accused of crime. It is usually provided by statute that he may be examined and cross-examined 'as any other witness,' and where such is the case, he will not be permitted to claim any privilege while he is a witness that is not enjoyed by other witnesses. In other words, the rule then is that he cannot claim as a witness the privileges which belong to him solely as the accused. He cannot complain if considerable latitude is allowed on his cross-examination, and, generally, he may be asked on his cross-examination the same questions as any witness. In states where the cross-examination of the accused is not by statute expressly limited to matters brought out on his direct examination, he may be

cross-examined, not only upon matters strictly relevant to the issue, but upon those which are collateral and apparently irrelevant, and which are calculated only to test the credibility and weight of his testimony. . . . He may be questioned as to specific facts calculated to discredit him. Thus his previous arrest, or indictment, his conviction of a felony, a previous imprisonment in a penitentiary, or house of correction, his prior contradictory statements, disorderly actions, or the commission of offenses similar to that charged, attempts to bribe witnesses, or simulation of insanity, may all be brought out by questions put to him on his cross-examination, to show what credit his evidence should receive." If the record of the conviction of a crime by a witness is the only evidence to be received of the fact to affect his credibility, in many cases, of which the present is an illustration, his credibility could not ¹¹⁸ be impeached, though it ought to be, for the record may be in a foreign state or country, and not obtainable in time to be used when found to be needed at the trial.

The second question raised by the appellant which needs brief notice is as to the admissibility of the testimony of the detective Dimaio, that the prisoner had confessed to him the commission of other crimes. Such testimony, if offered for the purpose of establishing his guilt under the indictment on which he was being tried, would clearly have been inadmissible: *Commonwealth v. Wilson*, 186 Pa. 1, 40 Atl. 283; but the offer was for no such purpose. It was to impeach the credibility of the appellant. He had been asked whether he had not been convicted of certain offenses, and, having denied that he had been, Dimaio was called to contradict him by showing his admissions to the contrary. The ruling of the court was, in permitting Dimaio to testify, that the witness would have to testify to other convictions than those admitted by the accused on the trial. He admitted but three and denied the rest.

The assignments of error are all overruled, the judgment is affirmed and the record remitted to the court below for the purpose of execution.

The Impeachment of a Witness by Showing His Prior Conviction of crime is discussed in the note to *Lodge v. State*, 82 Am. St. Rep. 34. That a prior conviction of the accused of an offense may be shown and considered as affecting his credibility as a witness in his own behalf, see *Thornton v. State*, 117 Wis. 338, 98 Am. St. Rep. 924. As to whether such conviction can be proved on cross-examination, without a production of the record of conviction, see *Commonwealth v. State*, 196 Mass. 369, 124 Am. St. Rep. 559. A witness cannot be impeached or discredited by showing that he has been indicted; for an indictment is a mere accusation, raises no presumption of guilt, and is purely hearsay. This rule applies in criminal actions as well as in civil actions, and to all witnesses whether parties or not: *People v. Morrison*, 195 N. Y. 116, ante, p. 780.

Evidence of Other Crimes in Criminal Prosecutions is the subject of a note to *Sykes v. State*, 105 Am. St. Rep. 976.

PENNSYLVANIA STAVE COMPANY'S APPEAL.

[225 Pa. 178, 73 Atl. 1107.]

DEFAULT JUDGMENTS—Conclusiveness and Vacation.—Judgments by confession or upon default remain indefinitely within the control of the court, and upon proper cause shown may be opened or vacated at any time. In this respect they differ from judgments obtained adversely. (p. 875.)

JUDGMENT—Vacation After Term.—The Common-law Power of a court to set aside a judgment regular on its face, which has been adversely recovered as distinguished from a judgment by confession or upon default, ends with the expiration of the term at which it was entered; and the fact that a petition was presented on the last day of the term asking for the vacation of the order, and that a rule had issued thereon, does not change the situation. (p. 876.)

JUDGMENT—When Adverse—Vacating After Term.—When an appeal is taken to the common pleas from a decision of the county commissioners in the matter of tax assessments, but before the appeal is heard the court enters a judgment pursuant to an agreement reached by the parties, the judgment is adverse and hence cannot be set aside after the expiration of the term at which it was rendered. (pp. 875, 876.)

MISTAKE OF LAW—Whether Ground for Equitable Relief.—In no case is ignorance or mistake of law, with full knowledge of the facts, per se a ground for equitable relief. (p. 877.)

Charles M. Culver and John C. Ingham, for the appellant.

M. E. Lilley, William Maxwell and W. E. Lane, for the appellee.

180 STEWART, J. The appeal of the Pennsylvania Stave Company from the decision of the county commissioners acting as a board of revision, in the matter of the assessment of the company's property for taxation to the court of common pleas, was unquestionably an adverse proceeding; and the order of the court therein in the nature of a final judgment, though reached through agreement of the parties, was in its character adversary, quite as much as would be a judgment on a verdict. With respect to their conclusiveness such judgments differ essentially from judgments entered by confession or upon default. The distinction between them is very clearly pointed out in a number of our cases, notably in *Castle v. Reynolds*, 10 Watts, 51, and *King v. Brooks*, 72 Pa. 363. Judgments by confession or upon default remain indefinitely within the control of the court, and upon proper cause shown may be opened up or vacated at any time; but not so with respect to judgments obtained adversely. The power committed to the discretion of the court with respect to the latter has a fixed limitation. The cases cited, and to these may be added, *Stephens v. Cowan*, 6 Watts, 511, and *Fisher v. Hestonville etc. Ry. Co.*, 185 Pa. 602, 40 Atl. 97,

hold, in the most conclusive way, that at the expiration of the term at which it was entered the common-law power of the court to set aside a judgment regular on its face, ends. In the present case we are concerned only with the common-law power of the court. The order setting aside the final adjudication in the matter of the assessment of appellant's land is not based on considerations of fraud in its procurement, or any other matter which could call into exercise the equitable power of the court. Therefore, it can have no other warrant than can ¹⁸¹ be found in the common law, and by this it must be judged. It was not made until after a whole term had intervened. The fact that a petition had been presented on the last day of the term in which the original order had been made asking for its vacation, and that a rule had issued thereon, does not in any way change the situation. The authorities above cited are to the effect that the power of the court ends with the term. It would be strangely inconsistent to hold that the power of the court ended with the term, and yet hold that the court could by its own act prolong its power, and that, too, indefinitely, by the issuing of successive rules.

We have said that there was nothing in the case calling for equitable interference. If there had been, the ending of the term would not necessarily preclude relief. The learned judge very properly accompanied his order of vacation with a statement of his reasons, and we are left in no doubt as to the considerations which influenced the mind of the court. The whole controversy before the commissioners, and the only question raised on the appeal to the court, was whether certain property assessed against the stave company was real or personal. If the latter, it was agreed that it was not taxable. When the case came on to be heard in the common pleas an adjustment was reached by agreement between the commissioners and the stave company involving a reduction from the assessment, and the court was asked to decree in accordance with the agreement. The only averment in the petition for vacation of the decree was that at the time the agreement of adjustment was made the commissioners and their counsel were of opinion that the stave company's assessment was upon property which the law regarded as personal, and that in a recent decision, unknown to them then, property of like character has been held to be real estate. The learned judge in the statement of his reasons assumes nothing with respect to the character of the property assessed, or as to the application of the decision relied upon to the facts here, but concludes that inasmuch as the decree was made without hearing the evidence and finding the facts, pursuant to an agreement which he holds to have been improvidently ¹⁸² made, the decree should be set aside. Whether or not the agreement on the part of the commissioners was improvident

was a matter that could not be inquired into; it is enough to know that the commissioners had the power to adjust the matter in dispute, and the court was within its power in deciding according to the terms agreed upon. The result reached was nothing more than the commissioners could have accomplished by their own action at any time without the court's intervention. Admitting that the agreement was entered into in ignorance of the law—on no other ground can it be said to be improvident—this fact would not call for equitable interference. "In no case is ignorance or mistake of law with a full knowledge of the facts per se a ground for equitable relief": *Norris v. Crowe*, 206 Pa. 438, 98 Am. St. Rep. 783, 55 Atl. 1125. The facts with respect to the nature and location of appellant's property were just as well known to the commissioners when the agreement was made as at any time after, and they had the same opportunity to acquaint themselves with the law as the appellant. The case calls for no further discussion. The final order when set aside had ceased to be within the breast of the court, the term in which it was made having expired. Nor was there anything in the case calling for equitable interference by the court.

The order making absolute the rule for the opening, vacating and setting aside the final decree entered in the appeal from the board of revision and appeal is reversed, at the cost of the appellee, and the original decree is reinstated.

At Common Law a Court has No Power to Set Aside a Judgment Free from the Jurisdictional Defects after the expiration of the term at which it was rendered: *Alabama etc. Ry. Co. v. Bolding*, 69 Miss. 255, 30 Am. St. Rep. 541; *Zinc Carbonate Co. v. First Nat. Bank*, 103 Wis. 125, 74 Am. St. Rep. 845; *Liddell v. Bodenheimer*, 78 Ark. 364, 115 Am. St. Rep. 42. See, also, *Grannis v. Superior Court*, 146 Cal. 245, 106 Am. St. Rep. 23. But it seems that a void judgment may be vacated or relieved from at any time: *Huffman v. Huffman*, 47 Or. 610, 114 Am. St. Rep. 943; *Skjelbred v. Shafer*, 15 N. D. 539, 125 Am. St. Rep. 614; *Stubbs v. McGillis*, 44 Colo. 138, 130 Am. St. Rep. 116.

The Vacation of a Default Judgment rests largely in the discretion of the court: *Schneider v. Hutchinson*, 35 Or. 253, 76 Am. St. Rep. 474; *Miller v. Carr*, 116 Cal. 378, 58 Am. St. Rep. 180; *Griswold Linseed Oil Co. v. Lee*, 1 S. D. 531, 36 Am. St. Rep. 761.

STERNBERGH v. BROCK.

[225 Pa. 279, 74 Atl. 166.]

CORPORATION.—Preferred Stockholders are Entitled to Share with the common stockholders in all profits distributed after the latter have received an amount equal to the stipulated dividend on the preferred stock, in the absence of contract stipulations to the contrary (p. 881.)

CORPORATION—Preferred Stock—Participation in Dividends.

Preferred stock, issued by a company incorporated under the act of 1874, is entitled to participate in the distribution of profits remaining after the common stock has received a dividend equal to that paid on the preferred stock, notwithstanding the fact that only ten per cent of the subscription on such common stock has been called and paid. (pp. 879, 881, 882.)

CONTRACTS.—In Applying the Rule That Contemporary Construction of a contract by acts of the parties is entitled to great weight, it should appear with reasonable certainty that they were acts of both parties, done with knowledge and in view of a purpose at least consistent with that to which they are sought to be applied. (p. 883.)

CONTRACTS.—The Rule That Contemporary Construction by Acts of the parties is entitled to great weight applies only where the contract is ambiguous and the intention doubtful. (p. 883.)

Cyrus G. Derr and D. T. Watson, for the appellants.

John G. Johnson, for the appellees.

²⁸¹ **POTTER, J.** On July 7, 1899, four manufacturing concerns, the Pennsylvania Bolt and Nut Company, J. H. Sternbergh & Son, the Lebanon Iron Company and the East Lebanon Iron Company, entered into an agreement, by which they were to transfer to a proposed corporation the whole of their respective "plants, franchises, goodwill, business, patents, trademarks and property of every sort and kind." The agreement further provided that they should receive for the property so transferred full paid and nonassessable preferred stock of the proposed corporation, of the par value of \$50 per share, of which \$3,000,000 worth were to be issued and divided among ²⁸² them in designated proportions. The agreement also provided: "The said preferred stock shall have an accumulative preference of Five Percent (5%) divided annually, payable quarterly on the first days of January, April, July and October, and the first preference as to the distribution of the assets of the Company; and further none of the property or franchises of the proposed company can be mortgaged without the consent of at least a majority of the preferred stock." Common stock to the extent of \$17,000,000 was also to be issued, divided into 340,000 shares, with a par value of \$50 each, upon which \$5 per share was to be paid in cash.

In pursuance of this agreement the American Iron and Steel Company was incorporated on August 21, 1899, under the laws of Pennsylvania, for the manufacture of iron and steel products. The capital named in the articles of incorporation was twenty shares, with a par value of \$1,000, but this was increased, by action of the stockholders on August 23, 1899, to \$20,000,000, divided in \$3,000,000 of preferred and \$17,000,000 of common stock, all of a par value of \$50 a share.

By resolution adopted at the stockholders' meeting of August 23, 1899, it was provided "that the preferred stock whose issue was thereby authorized to the amount of \$3,000,000 should be entitled, (a) 'to receive a cumulative yearly dividend of five per cent, payable quarterly on the first days of January, April, July and October, in each year before any dividends shall be set apart or paid on the common stock; (b) to be paid in full both principal and accrued dividends in the event of liquidation or dissolution of the company before any amount shall be paid to the holders of the common or general stock; (c) to require the consent in writing of a majority of the holders thereof to the creation of any mortgage.' "

The stock was issued as provided for in the agreement and the resolution of the stockholders. On February 27, 1905, the common stock was reduced, after an assessment of \$2.50 a share had been levied, to 51,000 shares, of the par value of \$2,550,000, making the total capital stock \$5,550,000.

From the organization of the company until the year 1907, the holders of preferred stock were paid the stipulated five ²⁸³ per cent annual dividend, and no more, while all profits above the amount so paid were distributed by dividends to the common stockholders. In March, 1907, a quarterly dividend of two per cent was declared by the directors upon all the stock, both preferred and common, which was at the rate of eight per cent per annum.

J. H. Sternbergh, who was a holder of the common stock, filed this bill of equity against the directors and treasurer of the company and the corporation itself, alleging that the preferred stockholders were not entitled to receive more than five per cent per annum on the par value of their stock, and praying the court to enjoin the payment to them of the dividend declared in excess of one-quarter of that amount.

Answers and replication were filed, and the case was tried before Audenried, J., who found that the plaintiffs were not entitled to an injunction, and recommended that the bill be dismissed. Exceptions to the findings of the trial judge were dismissed by the court in bank, and a decree made dismissing the bill, with costs. Plaintiffs have appealed, and have assigned for error the dismissal of their exceptions and the decree dismissing the bill.

Three questions are raised by the arguments of counsel on this appeal.

1. Whether preferred stock issued by a company incorporated under the corporation act of 1874 is limited as to dividends to the amount of its preference; or whether, after payment of an equal amount as dividend on the common stock it is entitled to participate in the distribution of the remaining profits, if any.

2. Whether, under the agreement and resolution in the present case, the preferred stockholders can receive dividends of more than five per cent per annum on the par value of their stock.

3. Whether the alleged fact that for a long series of years the preferred stockholders were paid, without objection on their part, only five per cent per annum and the entire balance of profits was paid to the common stockholders, is to be considered in determining the present rights of the parties.

²⁸⁴ The authority to issue the preferred stock in the present case is derived from the act of April 29, 1874, section 16, Public Laws, 43, which provides: "Every corporation created under the provisions of this act, or accepting its provisions, may, with the consent of a majority in interest of its stockholders, obtained at a meeting to be called for that purpose, of which public notice shall be given during thirty days in a newspaper of the proper county, issue preferred stock of the corporation, the holders of which preferred stock shall be entitled to receive such dividends thereon as the board of directors of the corporation may prescribe, payable only out of the net earnings of the corporation."

The learned judge of the trial court was of opinion that the present case is ruled by *Fidelity Trust Co. v. Lehigh Valley R. R. Co.*, 215 Pa. 610, 64 Atl. 829, 7 Ann. Cas. 613. It was there said (page 617): "When each class of stock had been paid ten per cent, they were equal, and equally entitled to partake of whatever remained in the fund applicable for dividend purposes. The preferred stockholders were not creditors."

In *West Chester etc. R. R. Co. v. Jackson*, 77 Pa. 321, a loose expression was used, when it was said that "preferred stock is only a form of mortgage." Whatever the extent of the preference in that case may have been, speaking generally, stock, whether it be common or preferred, does not represent indebtedness; its possession means ownership of the company.

The authority under which the preferred stock was issued in *Fidelity Trust Co. v. Lehigh Valley R. R. Co.*, 215 Pa. 610, 64 Atl. 829, 7 Ann. Cas. 613, was contained in the act of March 4, 1850, Public Laws, 129, which provided: "And the said additional stock so issued shall be entitled to a preference over all the other stock of the said company in every future dividend of profits which may be declared by the said company, until the holders of such additional stock shall have been paid from the funds applicable to the payment of such dividend, ten per cent per annum on the amount of capital stock of the company represented by said shares of additional stock so held by them respectively; and the holders of the other stock of the company shall not be entitled to participate in any future dividend of the profits

285 of the company until the holders of said additional stock shall have been paid from the funds applicable to such dividend, ten per cent per annum on the amount of the capital stock of the company represented by said additional shares so held by them respectively." In reply to the same contention which is made here, the court below very appropriately, and as we think convincingly, said: "In attempting to distinguish between the contract in the present case and that considered by the supreme court in *Fidelity Trust Co. v. Lehigh Valley R. R. Co.*, 215 Pa. 610, 64 Atl. 829, 7 Ann. Cas. 613, much reliance is placed by counsel for the plaintiffs on three peculiarities of expression in the act of 1850. These are, first, the use of words alluding to the preferred stock thereby authorized as representing a definite part of the company's aggregate capital stock; second, the limitation of the preference by the words, 'until the holders of such additional stock shall have been paid ten per cent per annum'; and third, the employment of the word 'participate' as applied to the right of the holders of the common stock to receive dividends from the company's profits. These points of difference are but trifling, and constitute no sound distinction between the essential terms of the two contracts under comparison. With respect to the use of the word 'participate,' it is enough to say that it probably refers here to the sharing of the profits of the corporation among the holders of the common shares themselves rather than to the distribution between the two classes of stockholders. The words which serve to limit the preference of the additional shares, viz., 'until the holders of such additional stock shall have been paid ten per cent per annum,' imply nothing different from what is implied by the words 'before any dividend shall be paid or set apart on the common stock,' contained in clause a of the resolutions of the American Iron and Steel Manufacturing Company, above quoted. The words 'amount of capital stock represented by said additional stock,' in the act of 1850, are devoid of the significance ascribed to them. They are merely a clumsy paraphrase of the expression 'par value' which the draftsman of the act probably regarded as too colloquial a term for use by the legislature."

286 Where there is no stipulation in the contract to the contrary, the weight of authority clearly favors the right of preferred stockholders to share with the common stockholders, in all profits distributed, after the latter have received an amount equal to the stipulated dividend on the preferred stock.

"In the absence of special provisions, the holders of preferred stock in a corporation are in precisely the same position, both with respect to the corporation itself and with respect to creditors of the corporation, as the holders of com-

mon stock, except only that they are entitled to receive dividends on their shares, to the extent guaranteed or agreed upon, before any dividends can be paid to the holders of common stock": 2 Clark & Marshall on Private Corporations (1901), sec. 417c. "A share of stock is a share of stock, whether preferred or common": 1 Cook on Corporations, sec. 269, note. See, also, 1 Elliott on Railroads, 2d ed., sec. 84; 2 Beach on Private Corporations, sec. 501.

We do not find anything in the agreement or resolution in the present case which limited the preferred stockholders to a dividend of five per cent per annum upon their stock.

With regard to the contention that the court should follow the construction placed upon the contract, which it is alleged the parties followed for a series of years, that is, by paying to the preferred stockholders only the stipulated five per cent dividends, and awarding the remaining profits to the common stockholders, the trial judge does not find that any such construction was established, and he further finds that, except in the years 1905 and 1906, the dividends paid on the common stock were less than five per cent of its par value. In discussing this feature he says: "Has there grown up any usage in the company at variance with the rights of the preferred stockholders as ascertainable from a fair reading of the resolutions under which the preferred shares were issued? The plaintiffs assert that there is such a custom, and in support of their statement point to the dividends paid on the common stock during the first sixteen months of the company's existence, which aggregated \$1.25 per share on the common stock, a return of more than eighteen per cent per annum on the sum paid in ²⁸⁷ on this stock, while during the same period the holders of preferred stock accepted without murmur dividends at the yearly rate of five per cent on their shares. The effect of this evidence is entirely overcome, however, by the consideration that the dividends paid on the common stock yielded less than two per cent on its par value. It is to be assumed that before the holders of preferred stock could claim more than the five per cent dividends that they received, the holders of the common stock were entitled to receive a dividend of the same percentage on the par value of their shares. To refuse them this right would be unjust. True it is that they had paid in only ten per cent of the amount of their subscriptions, and that the company had the use of but a comparatively small part of what they were obliged to pay in if called on, but the company enjoyed the credit of having such a resource as the unpaid subscriptions to its stock, and the common stockholders had at risk in the venture not only what money they had paid in, but all for which they were still liable. It was proper, therefore, that the par value of their stock should be taken as

the basis of their share in the company's profits, and until they received more than five per cent per annum on that basis (which they never did prior to 1905), the holders of preferred stock had no reason to complain." This conclusion commends itself to us.

With reference to this subject, the present chief justice in *Kane v. Schuylkill Ins. Co.*, 199 Pa. 205, 48 Atl. 989, said (page 207): "Contemporary construction of a contract by acts of the parties is entitled to very great weight, but it ought to appear with reasonable certainty that they were acts of both parties, done with knowledge, and in view of a purpose at least consistent with that to which they are now sought to be applied." In our view, these requirements are not met in the present case. Further, it should be noted that the rule invoked applies only to contracts that are ambiguous, and where the intention is doubtful.

In 2 Page on Contracts (1905), section 1126, the rule is thus stated: "If a contract is ambiguous in meaning, the practical construction put upon it by the parties thereto is of great weight, even though the contract is in writing, and ordinarily ²⁸⁸ is controlling. . . . The practical interpretation of the parties is to be regarded, however, only when the contract is ambiguous. If clear and free from ambiguity, the intention shown upon its face, if written, must be followed, though contrary to the practical interpretation of the parties, and even if such practical construction has been acquiesced in for a long period of time."

We see no need in the present case, for looking beyond the terms of the contract. We think it was properly construed by the court below. The assignments of error are overruled and the decree is affirmed.

What is Preferred Stock and what are the special rights of its holders are discussed in the note to *Heller v. National Marine Bank*, 73 Am. St. Rep. 227. An agreement that the preferred stock of a corporation is to be paid out of the surplus profits arising from its business a dividend equal to six per cent per annum before any dividend shall be paid to the common stock is valid, binds all the stockholders, and is inviolable; *Roberts v. Roberts-Wicks Co.*, 184 N. Y. 257, 112 Am. St. Rep. 607.

STEHLE v. JAEGER AUTOMATIC MACHINE COMPANY.

[225 Pa. 348, 74 Atl. 215.]

MASTER AND SERVANT—Employment of Minor in Violation of Law.—Where a boy under fourteen years of age is employed in violation of statute, the employer cannot escape responsibility for an injury to the boy by showing that when he received it he was doing an act in a negligent manner which he had been ordered not to do. The illegal employment, not the imprudence or negligence of the employé, is the proximate cause of the injury. (pp. 885, 886.)

NEGLIGENCE—Doctrine of Proximate Cause.—Where a circumstance or event which concurs with a negligent act in causing an injury might reasonably have been foreseen as likely to occur under the circumstances, the person guilty of the negligent act is liable for the resulting injury. (p. 886.)

CONSTITUTIONAL LAW—Sufficiency of Title to Act.—The title to a statute regulating the employment of women and children is sufficient if a fuller or more distinct statement of the subject could be made only by introducing the statute itself into the title. (p. 887.)

PARENT AND CHILD—Recovery for Injury to Child.—Where a minor is injured while employed in violation of statute, both the father and child may recover damages from the employer. (p. 887.)

MASTER AND SERVANT—Employment of Minor in Violation of Law.—One who employs a minor under fourteen years of age in violation of statute cannot escape liability for injuries received by him, by showing that a factory inspector advised that as the boy had been employed prior to the enactment of the statute he was not within its scope. Every man is presumed to know the statute law and to construe it aright, and when one violates it through ignorance he must abide by the consequences. (pp. 887, 888.)

NEGLIGENCE—Violation of Statute.—It is never a question for a jury whether one violating a positive statute exercised reasonable care and caution in so doing. (p. 888.)

Francis Stark Brown and Alexander Simpson, Jr., for the Jaeger Automatic Machine Company, appellant.

William F. Brennan, for George Stehle, Jr.

William F. Brennan, for George Stehle, Sr.

359 STEWART, J. When this case was before us in 220 Pa. 617, the judgment was reversed, because the court below in its instructions had failed to give effect to the act of May 2, 1905, Public Laws, 352, regulating the employment of children in industrial establishments. The second section of this act in express terms makes it unlawful to employ any child under fourteen years of age in any "establishment" as defined in the act. It was not disputed then, nor is it now, that the plaintiff was under fourteen years of age, and that the place where he was employed, and where he received his injuries, was such an establishment as the act contemplates. In the opinion delivered by our Brother ELKIN it was held

that if the plaintiff's injury "resulted by reason of the employment prohibited by law, there can and should be a recovery in the case." On the ³⁵¹ second trial the court was asked to instruct specifically in accordance with the view here expressed. The plaintiff's twelfth point was as follows: "If the jury find from the evidence that the injuries to the boy, George Stehle, resulted by reason of his employment, prohibited by law, there can and should be a recovery in this case, and the verdict should be for the plaintiff." The point was affirmed without qualification. It is now insisted that the trial judge should have qualified it, by explaining to the jury that the mere employment of the plaintiff could not be regarded as the cause of the injury received, if the boy was in no way engaged in the duties of his employment at the time, or if the injury was sustained in consequence of the boy's own inadvertence. The plaintiff was injured in attempting to clean a pipe in which there was a rapidly revolving wheel. By means of this pipe and wheel the loose materials which resulted from the mechanical operation in the polishing-room were carried by force of suction without the building. Plaintiff inserted his hand in a hole in the intake pipe some ten inches from the wheel: the suction drew it against the wheel, and both hand and arm were lacerated and broken in consequence. The effort on part of the defense was to show that not only cleaning the pipe through this hole was no part of plaintiff's duty, but that he had been specially warned not to attempt it, and much evidence was offered and admitted on this branch of the case. Let it be that these were the established and admitted facts. That they would be conclusive against an adult's right of recovery is unquestioned; but we are not dealing here with the case of an adult. The plaintiff is within a class of persons whom the law seeks to protect in the matter of their employment, because as a rule they are not able to adequately protect themselves. There can be no doubt that one of the chief purposes of the law in forbidding their employment in industrial establishments was to prevent their exposure to the danger of personal injury from the machinery used therein. If the danger in their case were only such as the adult is exposed to, there would be little justification for the law. It contemplates a special danger to persons of this class in connection with ³⁵² such employment, because of the characteristics incident to the immaturity of youth—imprudence, lack of judgment, heedless curiosity and playfulness—and so it makes their employment unlawful. When a child has been employed in violation of law and is injured in the place where he is employed, to allow the employer to escape liability because the injury resulted from the imprudence or negligence of the child would be to defeat the purpose of the law.

and render it absolutely futile. It was because a child under fourteen years of age is likely to be imprudent and negligent, and is therefore exposed to greater danger to himself and others as well, that his employment in industrial establishments is forbidden. So it is never a question of risk of employment or of contributory negligence. The fact of plaintiff's employment in an industrial establishment was in itself sufficient evidence to warrant an inference of the defendant's negligence, regardless of the nature and character of the work assigned him. With defendant's negligence established, but one question remained: Was this negligence of the defendant the proximate cause of the plaintiff's injury? It was, if incidental to the employment in a way that showed causal connection. Clearly, the accident would not have happened but for the plaintiff's illegal employment. If it happened immediately and directly because the boy did something in a negligent manner which he was not ordered to do, such circumstance cannot be considered the proximate cause, since it was the danger of just such occurrences through indiscretion that moved the legislature to forbid the employment of children, and the defendant was bound to have respect to this danger and not set the law at defiance. If the negligent act of the defendant in employing the plaintiff induced or offered opportunity for the subsequent act of the latter, and if his act was of a character common to youthful indiscretion, not only would causal connection be shown, but the law would refer the injury to the original wrong as its natural and probable cause, notwithstanding the intervening agency between that wrong and the injury. It is the settled doctrine of our cases that where the circumstance or event which concurs ³⁵³ with the negligent act in causing the injury might reasonably have been foreseen as likely to occur under the circumstances, the person guilty of such negligent act is liable for the resulting injury. The rule is thus stated in Cooley on Torts, 76: "If the original act was wrongful and would naturally, according to the course of events, prove injurious to some others, and result, and does actually result, in injury, through the intervention of causes not wrongful, the injury shall be referred to the wrongful cause, passing through those that were innocent." It was for the jury here to find the proximate cause. No special instructions were asked for on the subject; but following the light they had the jury found it to be the employment of the plaintiff. There are other assignments of error which present the same question only in different form. These do not call for separate consideration. All are overruled for the reasons stated. Nor do we deem it necessary to discuss at length the question raised as to the constitutionality of the act of May 2, 1905. Its constitutionality is challenged on

the ground that the title of the act does not give notice of its several provisions, these relating to several distinct subjects. So far as regards section 2 of the act—and this is the only part here under consideration—the title contains clear and distinct notice of the subject of the enactment. It recites that it is an act to regulate the employment in all kinds of industrial establishments of women and children employed—“by regulating the age at which minors can be employed,” etc. A fuller or more direct statement of the subject could only be made by introducing the section itself into the title. The assignments of error are overruled and the judgment in favor of the minor plaintiff is affirmed.

The father, George Stehle, was plaintiff also in his own right. The result in his case was a verdict for the defendant. The record discloses no facts or circumstances peculiar to the father which can justify this conflicting finding. The evidence was the same in both cases, and the same law applies to each. It follows that if the son was entitled to recover upon the law and the evidence, so too was the father. We make no attempt to explain the surprising result. There was manifest ³⁵⁴ error in the charge of the court which might well have operated to the common prejudice of the plaintiffs, but it afforded no ground for discriminating between them. It appeared in evidence that the minor had been in defendant's employ prior to May 2, 1905, and had so continued until October of that year when he was laid off. He resumed his employment in November and continued working until injured. Defendant's superintendent was permitted, against objection, to testify that after the passage of the act of May 2, 1905, defendant's establishment was visited by a deputy factory inspector, who, upon being informed that this minor, then in defendant's employ, was under fourteen years of age, advised the superintendent that inasmuch as the boy had been employed prior to the passage of the act, he was not within its terms, and that this officer approved of his employment. This evidence was offered and admitted as tending to excuse the employment of the minor. Respecting this feature of the case the learned judge charged as follows: “So when he [the boy] returned in November, doubtless these employers remembered their conversation with the inspector, that this certificate of employment received by them prior to the passage of the act, was sufficient to warrant their employing it. Therefore the question here for you to decide, notwithstanding the fact of the employment under the age of fourteen years is *prima facie* negligence, whether these employers did everything that a reasonably cautious person would have done under the circumstances, in order to comply with the law, and if you believe that they behaved as reasonably cautious persons in taking the advice and following the

instructions, if you think it was given by the inspector—if you believe that that is what a reasonably cautious person would have done, then it is not negligence, and they are entitled to recover. That is my view of the law.” This instruction, which is assigned for error, went wide of the true mark. It is elementary that every man is presumed to know the statute law and to construe it aright, and when one violates it through ignorance, he must abide the consequence. He may not aver in a court of justice that he has mistaken the law, ³⁵⁵ this being a plea which no court of justice is at liberty to receive. Neither factory inspector nor anybody else could absolve the defendant from his statutory liability, which in this case was to refuse employment to the boy. It is never a question for a jury whether one violating a positive statute exercised reasonable care and caution in so doing. This assignment of error is sustained and the judgment for the defendant is reversed with a venire de novo.

A Boy Employed in Violation of a Statute Fixing the Age Limit under which boys shall not be employed in a certain business is not chargeable with contributory negligence, or with having assumed the risks of employment in such business: *Lenahan v. Pittston Coal Min. Co.*, 218 Pa. 311, 120 Am. St. Rep. 885. See, also, *Monson v. La France Copper Co.*, 39 Mont. 50, ante, p. 549, and cases cited in the cross-reference note thereto.

One Who Employs a Child in Willful Violation of a Statute forbidding the employment of children cannot escape responsibility for injuries to the child by showing that he left the work given him to perform and negligently undertook to do something else which resulted in the injury: *Strafford v. Republic Iron Co.*, 238 Ill. 371, 128 Am. St. Rep. 129.

An Employer must Know at His Peril That Children Employed by him are of an age that he may lawfully employ them: *Strafford v. Republic Iron Co.*, 238 Ill. 371, 128 Am. St. Rep. 129.

DIEHLE v. UNITED GAS IMPROVEMENT COMPANY.

[225 Pa. 494, 74 Atl. 349.]

GAS COMPANY—Liability for Explosion After Notice of Escaping Gas.—Where a gas company employs a man to patrol a street where excavations are being made for a public improvement, with instructions to watch for and immediately report any escape of gas, and at different times he is notified that gas is escaping at certain points but makes no report thereof to the company, and several hours later an explosion occurs which injures workmen engaged in the excavation, the gas company is liable. (p. 891.)

Action to recover damages for personal injuries suffered from the explosion of gas escaping from the pipes of the

United Gas Improvement Company. From a judgment for the plaintiff the defendant appeals.

R. Stuart Smith and Charles E. Morgan, for the appellant.

William H. Wilson, Joseph P. Rogers and Francis M. McAdams, for the appellee.

499 BROWN, J. On the argument of this appeal we were much impressed by what was said by the learned counsel for appellant in asking us to reverse the judgment in favor of the appellee, but our subsequent examination of the evidence has satisfied us that the single question in the case—appellant's negligence—was for the jury.

That the appellee was injured by an explosion of gas which came from the pipes of the appellant was clearly established. At the time of the explosion he was in the employ of the Millard Construction Company, which was engaged in excavating the bed of Market street, between Sixth and Seventh streets, in the city of Philadelphia, for the construction of a subway. The excavation was on the north side of Market street, just west of Sixth. Its north edge was about two feet south of the north curb of Market street. The appellant, the United Gas Improvement Company, maintained certain gas mains at the corner of Sixth and Market streets. A ten-inch main ran east and west on Market street, between the north curb of that street and the north line of the excavation. A six-inch main ran north and south on Sixth street, three feet and ten inches east of the west curb of that street. It crossed and connected with the ten-inch main on Market street through an appliance called a "cross," which was also north of the subway excavation. To guard against any injury which might result from the escape of gas from its pipes at Sixth and Market streets, where the excavation for the subway was in progress, the appellant had employed a man named Leans, whose duty it was to patrol both sides of the street that was being excavated for the purpose of detecting the odor of escaping gas, and, if the same was detected, to report the escape at once to the company's office. William H. Smith, a superintendent of the defendant company, testified as follows: "We had a man named Frank Leans that we **500** called a watchman. His duties were to patrol both sides of the street that was excavated looking for any defects so far as the odor of gas was concerned and report to our office. . . . Q. Was Mr. Leans the only man there in the employ of the United Gas Improvement Company, and was he stationed at that very section at night on the night of October 4th? A. He was the only man under instruction to patrol. Q. And to report any trouble? A. Yes, sir. . . . Q. What was your system

at night when no work was being done by the construction company? A. We simply kept the watchman for to patrol in case there would be any settlement and bring about a rupture of the pipe and, consequently, the odor of gas, and he would notify us. . . . Q. You said that it was a part of Mr. Leans' duty if there was an unusual odor of gas there to report it to the office, is that so? A. Yes, sir."

The following is from the testimony of Samuel B. Turnier, a foreman employed by the appellant and called as a witness by it: "Q. Leans was the only night man you had there that night? A. Yes, sir. Q. He was under your control; you were his boss? A. To start him in at night. He had a paper where he had to go around—he would leave the box, you see, and he would go around and come down to Broad and Arch, and he would phone and keep going all the time. Q. He made all his reports by phone there at Broad and Arch? A. Yes, sir; and if anything happened, and he had phones all around the neighborhood. Q. He had phones all around the neighborhood which were there for his use? A. No, not only for his use. Q. But he was instructed to use them in case there was anything wrong? A. Yes, sir." After stating that the duty of his men was to notify him at once if there was any faint smell of gas, no matter where it was, this witness further testified as follows: "Q. That was also Leans' duty, was it, the night man? A. He was to report right to the office. Q. It was his duty if there was a faint odor of any gas to make a report? A. Not to go near it himself but to call the office. Q. To call whoever were in charge of the office and notify them to that effect? A. Yes, sir; he was in my charge when I started in at night. To be sure there was ⁵⁰¹ a man there at night. Q. And you told him when he started in that if he smelled any gas he should report it to the office? A. Not only that, but the next morning he should give me a note of what happened. . . . Q. Your men, that is, the employes of the United Gas Improvement Company, were the only men who were permitted to make any repairs or have anything to do with your gas mains? A. Yes, sir. Q. You would not permit anyone else to have anything to do with it? A. Yes, sir, even if there was a dead main along there we would not allow anyone else to break it out."

Leans was on duty on the night of October 4, 1906, and was told by the appellee, between 9 and 10 o'clock, that there was an "awful leak" of gas at Sixth and Market streets. The appellee had noticed the odor of gas throughout the entire day, which seemed to grow stronger toward evening. Other witnesses testified that they noticed this odor during the night and, as the night wore on, it became

heavier. The reply of Leans to the appellee, when told of the escaping gas, was, "Go on back; that is all right; there is no danger there." This, without more, was sufficient to submit to the jury the question of the appellant's negligence. The explosion occurred at 6:30 on the morning of October 5th, and the appellant had received actual notice of the escaping gas nine hours before. Well knowing the duty that rested upon it of exercising a high degree of care to prevent the escape of the dangerous substance under its exclusive control, and of promptly staying such escape when notified of it, the appellant had employed a watchman to give it instant notice of any escape of its gas; but he was faithless, and the law charges his infidelity to it. Notice to him of the escaping gas was notice to his employer, and, no matter how it escaped, the company could not permit the escape to go on imperiling life and property. Its unquestioned duty was to act the instant the escape was brought to its attention. Much more, however, was proved than the notice to Leans between 9 and 10 o'clock of the night of October 4th that the gas was escaping. At about 2 o'clock on the morning of the 5th, Diehle hunted him up and told him that the gas was so strong ⁵⁰² he could not work. Leans walked up with him to the hole at Sixth and Market streets where he had been working, but declined to do anything. For an hour or two before this there had been a heavy rainfall, and there were holes and depressions in the street, to which the attention of Leans was called, but again he did nothing. His reports to his company throughout the night were that everything was "O. K." That he failed in the discharge of the duty which had been imposed upon him by his employer was a fact that the jury were bound to find. As stated, nine hours before the explosion occurred he was first told of the escaping gas, and continually afterward by several persons, but he paid no heed to it. If he had reported promptly, as was his duty, the cause of the escaping gas might have been discovered and the flow stopped. If the escape of gas was due to the fracture of the pipes, caused by their sinking after having been undermined by the rain or by water from a broken sewer, the gradual sinking might have been stayed within the time that elapsed between the discovery of the holes and the depression in the street and the explosion, and the fracture might have been prevented. Without taking from the jury the question of a leak from a defective joint, the court expressed the opinion that the weight of the evidence was that the gas had not so escaped. The finding of the jury evidently was that the escape was due to a fracture in the pipe, but, be this as it may, under the evidence there were three questions of fact for their determination, which

were resolved against the defendant: 1. Was the gas escaping from the pipes of the defendant company for nine hours before the explosion occurred? 2. Did the employé of that company, whose special duty it was to be on the watch for escaping gas, know that it was escaping and fail to give notice to the company? And 3. Was there sufficient time after he knew the gas was escaping to have stayed the further escape before the explosion occurred?

The answers to the points, which are assigned as error, were correct, and, as the case could not have been taken from the jury, the judgment is affirmed.

A Gas Company is Held to a High Degree of Care and Vigilance to prevent the escape or explosion of gas to the injury of persons or property: *Heh v. Consolidated Gas Co.*, 201 Pa. 443, 88 Am. St. Rep. 819; *Dow v. Winnepesaukee Gas etc. Co.*, 69 N. H. 312, 76 Am. St. Rep. 173; *Evans v. Keystone Gas Co.*, 148 N. Y. 112, 51 Am. St. Rep. 681. Negligence of a gas company resulting in the escape of its gas from its pipes and mains into the plaintiff's lot and his dwelling thereon, where it explodes, sets fire to, and destroys the building and its contents, renders the company answerable to the plaintiff for the loss thus occasioned: *Mississinewa Min. Co. v. Patton*, 129 Ind. 472, 28 Am. St. Rep. 203.

If a Gas Company is Negligent in suffering the escape of gas or in not discovering such escape when warned of it, and a policeman, in searching for the leak with a lighted candle, causes an explosion, the escape of the gas, and not the lighted candle, is the proximate cause of such explosion: *Consolidated Gas Co. v. Getty*, 96 Md. 683, 94 Am. St. Rep. 603.

Notice to an Agent as Notice to His Principal is discussed in the note to *Trentor v. Pothén*, 24 Am. St. Rep. 228. The general rule is, that notice to an agent, while acting within the scope of his authority, is notice to his principal: *Field v. Campbell*, 164 Ind. 389, 108 Am. St. Rep. 301; *Marsh v. Wheeler*, 77 Conn. 449, 107 Am. St. Rep. 40. But knowledge of an agent will not be imputed to his principal when it is such that it is the agent's duty not to disclose it: *Lea v. Iron Belt Mercantile Co.*, 147 Ala. 421, 119 Am. St. Rep. 93.

COMMONWEALTH v. MASSI.

[225 Pa. 548, 74 Atl. 419.]

JUDGMENT—Entry on Warrant of Attorney—Second Judgment.—The entry of judgment on a bond and warrant of attorney exhausts the power of the warrant, and a second judgment entered thereon will be set aside. This rule applies where the judgment is on a bail bond. (pp. 893, 894.)

JUDGMENT—Entry on Warrant of Attorney.—A Second Judgment entered under a warrant of attorney, on a bail bond, will be set aside, although the first judgment was prematurely and improvidently entered, and hence voidable as to the defendant but otherwise valid. (pp. 893, 894.)

Granville J. Clark, for the appellant.

S. S. Herring and W. S. Casterline, for the appellees.

550 POTTER, J. On July 5, 1907, James Massi and E. E. Wagner entered into a recognizance to the commonwealth of Pennsylvania, in the sum of three thousand dollars, for the appearance of Massi at the next court of quarter sessions of Luzerne county, to answer a criminal charge. The recognizance provided that "in the event of the foregoing recognizance being forfeited I do hereby authorize and empower the district attorney of Luzerne county, whoever he may be, or any other attorney of any court of record of the state of Pennsylvania, or elsewhere, to appear for me in any action instituted for the collection of this recognizance," and confess "judgment or judgments" therein against the obligees for the sum of three thousand dollars, the amount of the recognizance.

On July 6, 1907, judgment was entered on the above recognizance in the court of common pleas of Luzerne county, by virtue of the warrant of attorney contained therein.

On October 7, 1907, a rule to strike off the judgment was allowed, which on November 9, 1908, was made absolute.

The ground on which the judgment was stricken off was, that as the recognizance had not been forfeited at the time it was entered, the judgment was premature and improvidently entered; the warrant of attorney authorizing the entry of judgment only in the event of the forfeiture of the recognizance.

On September 12, 1907, an action of assumpsit was brought by the commonwealth of Pennsylvania, at the instance of the Wilkes-Barre Law and Library Association, against the obligors in the recognizance, the same having been duly forfeited on September 11, 1907, and judgment was confessed against the defendants, by virtue of the warrant of attorney contained in the recognizance, in the sum of three thousand dollars.

On October 14, 1907, a rule was granted to show cause why this second judgment should not be stricken off, and on November 9, 1908, the rule was made absolute. Plaintiffs **551** excepted to the order striking off the judgment and have appealed. The error assigned is making absolute the rule to strike off the judgment.

The court below struck off the second judgment on the ground that by the entry of the first judgment the power to confess and enter judgment against the defendants, by virtue of the warrant of attorney in the recognizance, was exhausted, and the warrant was *functus officii*.

It is the settled doctrine of our cases that the entry of judgment on a bond and warrant of attorney exhausts the

power of the warrant, and a second judgment entered thereon will be set aside: See *Philadelphia v. Johnson*, 208 Pa. 645, 57 Atl. 1114. In that case, the first judgment was prematurely entered, and for that reason the action was discontinued. But it was held that, although the entry was premature, it exhausted the power conferred by the warrant of attorney, and it could not be used a second time. In the present case, the court below relied also upon *Osterhout v. Briggs*, 37 Pa. Super. Ct. 169, which does rule this case very closely. The facts are very much the same, except that the judgment there was entered on an ordinary judgment note, while here it is on a bail bond.

We see no merit in the suggested distinction that the judgment in the case at bar was void, and not voidable merely. It was voidable, but if the defendant had not raised the question that it was prematurely entered, it would have stood upon the record as a valid judgment. As regarded parties other than the defendants, it was not even voidable. This principle is clearly set forth in the opinion of the superior court, in *Osterhout v. Briggs*, 37 Pa. Super Ct. 169, and is sustained by the cases there cited.

The assignments of error are overruled and the judgment is affirmed.

A Warrant of Attorney to Confess Judgment must be strictly construed and the power strictly pursued: *First Nat. Bank v. White*, 220 Mo. 717, 132 Am. St. Rep. 612, and cases cited in the cross-reference note thereto.

SMITH'S ESTATE.

[225 Pa. 630, 74 Atl. 622.]

ADMINISTRATORS.—Adopted Children of a Decedent have No Right to administer his estate, to select an administrator, or to object to an appointment by the register of wills. (p. 895.)

SUCCESSION.—An Adopted Child cannot Inherit from Collateral Kindred of the adopting parents, under the laws of Pennsylvania. (p. 895.)

F. M. Estes, F. X. Geraghty and J. G. Carroll, for the appellant.

E. C. Highbee, of Sterling, Highbee & Matthews, D. M. Hertzog and Crow & Shelby, for the appellee.

⁶³¹ **POTTER, J.** It appears from the record in this case that there was an appeal to the orphans' court of Fayette county from the decree of the register of wills, refusing to

revoke letters of administration granted to Herman M. Kephart on the estate of Berthena Rosanna Smith, deceased. The petitioners and appellants are children of Robert L. Smith, deceased, and of his first wife. They were step-children of the decedent, Berthena Rosanna Smith, and not of her blood. The decedent died intestate and without known relatives, leaving a large estate, mostly realty. Information was given to the commonwealth, and proceedings were instituted to escheat the estate, Herman M. Kephart being appointed escheator and subsequently administrator.

The children of Robert L. Smith claimed to be interested in the estate upon three grounds:

1. They claimed to have been adopted as children by the decedent.

2. They claimed that decedent had made a will in their favor, which was lost, or at least had promised to make such a will.

3. They claimed that there was a resulting trust in the real estate of the decedent in favor of her husband, Robert L. Smith, and that therefore the said real estate had descended to them as his heirs at law.

The orphans' court heard testimony upon these contentions, and found that none of them were sustained by the evidence produced. The petition was dismissed and the refusal of the register to revoke the letters of administration was sustained. The petitioners have taken this appeal.

The assignments of error are all bad in form, and the final decree of the court below dismissing the exceptions is not assigned for error. Waiving the insufficiency of the specifications of error, the appellants, upon their own showing, had no standing to maintain their petition to revoke the letters of administration. If their claim to be adopted children of decedent were sustained, it would confer upon them no right to administer the estate, or to select an administrator, or to object to an appointment made by the register of wills.

⁶³² In McCully's Appeal, 10 Week. Not. Cas. 80, this court held that an adopted child does not acquire by reason of his adoption the right to administer upon the estate of the adopting parent.

In a recent case, *Burnett's Estate*, 219 Pa. 599, 69 Atl. 74, the rule of the earlier cases was recognized, and it was held that "An adopted child, under the laws of Pennsylvania, cannot inherit from collateral kindred of the adopting parents." The act of May 19, 1887, Public Laws, 125, which, so far as the rights acquired by an adopted child are concerned, merely re-enacts the provisions of the act of May 4, 1855, Public Laws, 430, does not affect the rule of McCully's Appeal, 10 Week. Not. Cas. 80.

If it had been shown that a will which the law would regard as the last will of the decedent had been lost, and due proof of its execution and contents had been made, such will might be admitted to probate and the letters of administration would then necessarily be revoked. But no such proof was made. Nor was there any evidence of a contract to make a will. The loose expressions of decedent as to how she intended to dispose of her property did not constitute either a will or a contract. Nor was any consideration alleged for such a contract.

If there was a resulting trust in the real estate, that fact can be established in an appropriate proceeding. But the fact, if established, could not bear in any way upon the right to letters of administration upon the personal estate of the decedent. If the letters should be revoked, it would not affect in the slightest degree the rights of any person having an interest in the real estate.

In view of the fact that the appellants have no standing to object to the register's action in granting letters of administration, it is unnecessary to consider the other questions attempted to be raised by this appeal.

The decree of the court below is affirmed.

The Right of an Adopted Child to Nominate an Administrator for the estate of deceased adopting parent is recognized in *Estate of McKeag*, 141 Cal. 403, 99 Am. St. Rep. 80.

The Right of Adopted Children to Inherit is the subject of a note to *Hockaday v. Lynn*, 118 Am. St. Rep. 684.

TEED'S ESTATE.

[225 Pa. 633, 74 Atl. 646.]

WILL—Presumption as to Unattested Alterations.—An unattested alteration in a will, although made by the testator, is presumed to have been made after the execution of the instrument. (p. 899.)

WILL—Addition of Clause Appointing Executor.—Where a will is written, signed and attested on the fourth page of a sheet of letter paper, an unsigned and unattested clause at the top of the third page appointing an executor is presumed to have been made after the signatures of the testatrix and subscribing witnesses; and if there is not sufficient evidence to overthrow this presumption, the instrument will be probated without such clause. (pp. 897, 899.)

Thomas H. Hudson, D. W. McDonald and James R. Cray, for the appellant.

William E. Crow and S. Ray Shelby, for the appellee.

634 POTTER, J. It appears from the record in this case that a paper purporting to be the last will of Sarah E. Teed was admitted to probate by the register of wills of Fayette

county. It was written on the fourth page of a sheet of letter paper, and was signed by testatrix at the foot of the fourth page of the sheet and was there attested by two subscribing witnesses. On the third page of the sheet of paper was written an unsigned and unattested clause. The following is a full copy of the instrument:

“Uniontown Pa. Sept 13th 1906.

“I Sarah E. Teed give and bequeathe to My son Charles G. Teed and his Son Wm. E. Teed and Daughter Allice E. Teed, all My real and personal property. I want My funeral expenses paid and all Moneys left in bank to go to My son Charles G. Teed.

“I give to My cousin Mrs. Thomas Brownfield my gold watch & chain.

“I give to Kate Messmore the sum of one dollar.”

“SARAH E. TEED.

“Witnesses:

“WM. H. MILLER

“JOHN N. DAWSON.”

At the top of the third page of the sheet appeared this clause, disconnected, and unsigned:

“I appoint My friend Thomas Brownfield My Executor.”

Decedent's daughter, Kate Messmore, appealed from the ⁶³⁵ decree of the register admitting the will to probate, and the court dismissed the appeal, refused an issue and ordered that the probate should stand, except as to the clause appointing an executor, which was adjudged to be void. Exceptions to this order were overruled, and dismissed by the court. The daughter then took this appeal.

It is conceded by the court below, as well as by the appellee, that if the clause appointing an executor was written before the testatrix signed the will, then it was not signed “at the end thereof,” as required by the act of 1833, the statute of wills, and could not be admitted to probate. But counsel for appellee claim that the evidence taken before the court below shows that the clause in question was written after the execution of the will proper, and amounts to no more than an unexecuted codicil. The court below so found, and in its opinion said: “The main question before the court then is, whether the clause on the fourth [should be third] page appointing an executor was there when the will was signed and witnessed or whether it was added at a subsequent time. We have examined the testimony in this case with great care for the purpose of determining this question, and are of the opinion from all the testimony offered that the clause on the fourth [third] page appointing the executor was written after the testatrix signed her name on the first [fourth] page and after the same was witnessed by the two witnesses.”

The only testimony as to the signing is that of Thomas Brownfield, who wrote the will. In the first part of his testimony he was not quite clear as to whether he wrote the whole thing at once. He said he wrote the will on September 13, 1906, the day it bears date, wrote all of it on both sides of the sheet; would not like to say that he wrote all of it at the same time. Saw both witnesses sign the will. Would say that Miller signed it first. After testatrix signed the will, witness took it and left it with Mr. Bowman of the National Bank of Fayette county. Mr. Bowman sealed it in an envelope, and after the death of testatrix, witness got the will from Bowman and left it for record. Referring to the clause on third page, appointing an executor, he said he did not think it was written ⁶³⁶ when the will was signed, but thought it was written after the signature was attached.

On cross-examination, witness testified as follows: "Q. Mr. Brownfield, as I understood in your testimony, when you got down to the bottom of this page in writing it, Mrs. Teed signed? A. That is my recollection. Q. And the other part was written after, but you do not know when? A. She said then she wanted me her executor. Q. And that was afterward attached? A. Yes. Q. You do not know when? A. It was very soon after. Q. But was it after the will was signed? A. After she had signed that."

This is explicit. The two witnesses to the will also testified that the front page was read in their presence and they signed as witnesses. Neither one saw the writing on the other page, which is the clause in dispute, and it was not read to the testatrix. It did not appear that either witness saw anything, except the first page, which testatrix had signed.

The only thing upon which appellant pretends to stand is the evidence of I. L. Messmore and H. K. Barb, who testified that the witness, Thomas Brownfield, had told them on different occasions that he did not write any of the will after testatrix had signed it, and that the part of the will on the back of the sheet was written at the same time as the front page and before testatrix signed it.

Brownfield testified that he had no recollection of having made these statements. The evidence of the two witnesses does nothing more than put into dispute the fact of the alleged conversation, and its substance. It throws no light upon the real matter under investigation, which is, the time of signing the instrument, as compared with the time when the additional clause was written. Our examination of the testimony has satisfied us of the soundness of the conclusion reached by the court below in this respect. The matter written on the fourth page constituted in itself a complete will. If the additional clause in question had been signed, it would not have changed anything which appeared in the body of the will. It only provided an executor. While the witness

Brownfield admitted that his recollection was not entirely clear, yet he ⁶³⁷ stated as his final belief that the clause in question was written after the will was signed. Against this appears no opposing testimony, but only the possibility that at some other time, not when he was testifying under the sanction of an oath, Brownfield may have given as his recollection a different version. Be that as it may, in his evidence in this case, his final conclusion, and the best of his recollection is, that Mrs. Teed signed the will at the bottom of the page, as soon as it was written, and that the line on the top of the third page was written by him afterward. There is no evidence to contradict this, and the appearance of the paper, its form and contents, all go to sustain the statement. In the absence of evidence the presumption would be, that such an addition to the will as that here shown was made after the signature of the testatrix, and that of the subscribing witnesses had been put upon the paper. The general rule is thus stated in 1 Underhill on Wills (1900), section 268, where it is said: "Unattested alterations in a will, though proved to have been made by the testator, in the absence of any evidence showing when they were made, will be presumed to have been made after execution, and consequently, unless properly attested, will not operate as a partial revocation of the will." And again in Page on Wills (1901), section 432, it is said: "An alteration in a will is, as a general rule, presumed, in the absence of evidence, to have been made by the testator after the execution of the will. This rule is different from that often said to obtain in the case of other written instruments for this reason: In the case of other instruments it is a civil wrong, if not a crime, to alter a written instrument. In case of wills the testator may alter the will as much as he pleases, without wronging anyone."

We feel that the evidence against the conclusion that the will was signed before the attaching of the clause on page 3 is so vague and unsatisfactory, that a verdict against the validity of the will, on that account, ought not to be allowed to stand. Under this test, which is the proper one to apply, we think that the court below was undoubtedly right in refusing an issue. The specifications of error are overruled, and the decree of the court below is affirmed. .

That an Attempted Alteration of a Will does not revoke the instrument, see *In re Knapen's Will*, 75 Vt. 146, 98 Am. St. Rep. 808; *Thomas v. Thomas*, 76 Minn. 237, 77 Am. St. Rep. 639; *Strong's Appeal*, 79 Conn. 123, 118 Am. St. Rep. 138. The addition of a further provision to a will, though made in the presence of the testator and of the witnesses, without any further signing on his part or attestation on theirs, has no effect on the will: *Hesterberg v. Clark*, 166 Ill. 241, 57 Am. St. Rep. 135. On the burden of proof as to whether an alteration in a will was made before or after the execution of the instrument, see *Scott v. Thrall*, 77 Kan. 688, 127 Am. St. Rep. 449.

CASES

IN THE

SUPREME COURT

OF

SOUTH DAKOTA.

WOLFINGER v. THOMAS.

[22 S. D. 57, 115 N. W. 100.]

PLEADING—Liberality Allowed in Making Amendments.—The code provision for the amendment of pleadings is given a liberal construction to prevent a failure of justice and the dismissal of actions on the ground of variance between the allegations and the evidence. (p. 903.)

PLEADING—Amendment.—A Complaint by a Vendee of Land may be Amended at the trial so as to change his action to rescind the contract of sale on the ground of fraudulent representations on the part of the vendor to an action to rescind on the ground of mutual mistake of the parties. (pp. 901, 905.)

VENDOR AND VENDEE.—In an Action by a Vendee of Land to Rescind the contract, the court does not err in not finding the value of the use of the land during the time between the transfer and the trial, if no claim is made by the vendor for the use of the land, and no evidence is introduced showing its value or that the vendee ever used or rented it. (p. 905.)

APPEAL.—A Verdict on Conflicting Evidence, if not contrary to the preponderance thereof, will not be disturbed on appeal. (p. 906.)

VENDOR AND VENDEE—Rescission—Placing in Statu Quo.—Where, in an action by a vendee of land to rescind the contract on the ground of mistake and recover the consideration consisting of a cash payment and a horse, the court requires the vendor to repay the money and the value of the horse which he has sold, this places the defendant in substantially the same condition as before the contract was made, as required by law. (p. 906.)

VENDOR AND VENDEE—Rescission of Contract—Interest.—In an action by a vendee of land to rescind the contract on the ground of mutual mistake, it is proper to allow interest on the cash consideration paid by him from the time of the payment to the time of the trial. (p. 906.)

VENDOR AND VENDEE—Rescission—Value of Use of Property.—In an action by a vendee of land to rescind the contract and recover the consideration which consists in part of a horse, it is error for the court to find the value of the use of the horse from the time of its transfer to the time of the trial, if the animal was sold by the vendor soon after he received it and he received nothing for its use during that time. (p. 907.)

Preston & Hannett, for the appellants.

P. A. Zollman, for the respondent.

⁵⁸ CORSON, J. This action was instituted by the plaintiff to rescind an executed contract for the sale of a certain quarter section of land in Brule county, entered into by him with the defendant, on the ground of fraudulent representations by the defendant in inducing the plaintiff to enter into the same. Plaintiff alleges in his complaint, in substance, that the contract was made and entered into on the tenth day of April, 1905, by the terms of which it was provided that said Thomas did that day sell to the plaintiff the southeast quarter of section 30, township 105, range 67, in Brule county, at the agreed price of \$2,600, and for which the plaintiff agreed to pay the sum of \$1,100 in cash and a stallion valued at \$1,500; that the plaintiff paid said defendant the sum of \$1,100, and delivered to him the stallion described in the contract; that the plaintiff was induced to enter into said contract by the fraudulent representations of the defendant upon which he relied; that the said fraudulent representations consisted of the pointing out by the defendant, through ⁵⁹ his agent, to the plaintiff of a different and more valuable quarter section of land as the one to be conveyed instead of the quarter section of much less value actually conveyed to the plaintiff by the defendant; that the plaintiff, prior to the commencement of the action, and immediately upon the discovery of said fraud, notified the defendant that he rescinded said contract, and offered to reconvey to him the premises conveyed to him under the terms of said contract upon the payment to him of the sum of \$1,100, with interest and the return of said stallion, and the plaintiff demanded judgment that the said contract be rescinded by order of the court and delivered up and canceled, and for the recovery of the stallion described in said contract, and, in case the same could not be delivered, for \$1,500, the agreed value of the same in the contract. The defendant by his answer admitted that the defendant conveyed to the plaintiff the land described in said contract, and that the plaintiff paid the defendant the agreed price therefor, and denied all the other allegations of the complaint. On the trial of the case, after the plaintiff and defendant had rested, the court, upon its own motion, against the objection of the defendant, allowed the plaintiff to amend his complaint, alleging the cause of action founded on mutual mistake instead of fraudulent representations on the part of the defendant as alleged in the original complaint; the original answer being allowed to stand as the answer to the amended complaint. It appears from the evidence that the plaintiff failed to prove any fraudulent representations on the part of the defendant or his agent; but the evidence

clearly establishes the fact that there was a mutual mistake on the part of the plaintiff and defendant. The court in its findings finds that there was a mutual mistake between the parties in entering into the contract, and concludes that the plaintiff is entitled to a rescission of the contract; that he was entitled to recover \$1,100 and interest from June 5, 1905, at the rate of seven per cent per annum, and was entitled to recover the possession of the stallion described in the contract, together with the value of the use of the same from April 14, 1905, and, in case the stallion could not be delivered, then he was entitled to recover \$800 the value of the same, and interest at seven per cent from April 14, 1905; and that the plaintiff was entitled to a lien on the quarter section described in the contract for the satisfaction of said judgment, and judgment was thereupon entered accordingly.

It is contended by the defendant that the court, in permitting the plaintiff to amend his complaint at the trial by changing it from an action to rescind the contract on the ground of fraudulent representations on the part of the defendant to an action to rescind the contract on the ground of mutual mistake of the parties, committed ⁶⁰ error, as such an amendment at the trial is not permissible under the provisions of our code authorizing amendments to pleadings at the trial, for the reason that the amendment substantially changed the claim of the plaintiff from that originally claimed in his complaint of fraudulent representations on the part of the defendant to that of mutual mistake by the parties. The amendment was ordered by the court, evidently for the purpose of conforming the pleadings to the proof in this action, and the principal question presented by this court for its consideration is, Was the court authorized under the provisions of our code to permit this amendment? Section 150, Revised Code of Civil Procedure, provides that "the court may, before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process, or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party or a mistake in any other respect; or by inserting other allegations material to the case, or when the amendment does not change substantially the claim or defense by conforming the pleading or proceeding to the facts proved, or by facts in support of which proof is offered." It will be observed that this section of the code is broad and comprehensive, and authorizes the court on the trial, or subsequently thereto, to permit the pleadings to be amended to conform to the facts proven when the amendment "does not change substantially the claim or defense." This section of our code is substantially the same as those found in the codes of most of the code states. The courts of those states have generally given

to the section a very liberal construction in order to prevent a failure of justice and the dismissal of actions on the ground of variance between the allegations of the complaint and the evidence given on the trial, in order that litigation between the parties may as far as practicable be disposed of in one action instead of encouraging a multiplicity of actions. The primary object of the plaintiff in the case at bar was the rescinding of the contract which he had entered into, and to recover from the defendant the consideration paid under the terms of said contract.

The claim of the plaintiff in the broad sense of the term was not intended to be and was not in fact changed, either as regards form or the general scope of the controversy involved, other than the elimination therefrom of the fraudulent representation on the part of the defendant and the substitution therefor of mutual mistake of the parties. The amendment worked no change in the form of the action as to its being legal or equitable, nor changed the nature of the recovery necessary to vindicate the plaintiff's rights. In the original complaint the plaintiff sought to rescind the contract and recover back the consideration paid thereunder, and in the latter he sought to obtain the same relief on the ground of ⁶¹mutual mistake of the parties, and to close up the matter in controversy which led to the litigation. The result was the elimination of the fraudulent representations and the substitution in its place of the mutual mistake of the parties; in either case the rescission of the contract and the recovery of the consideration paid thereunder were the real objects of the controversy. The contention of the appellant, therefore, that the amendment effected a change in the plaintiff's claim contrary to the provision of the code is untenable.

We are of the opinion that there is ample authority conferred upon the trial court by the section above referred to to allow the amendment complained of. All the facts in the case were before the court, and the only limitation upon the power of the court is that the amendment should be in furtherance of justice and upon such terms as might be proper. Clearly, such an amendment was in furtherance of justice. To have dismissed the action on account of variance between the proof and the allegations of the original complaint would have been in contravention of section 146 of the Revised Code of Civil Procedure, which provides as follows: "No variance between the allegation in a pleading and the proof shall be deemed material, unless it has actually misled the adverse party to his prejudice, in maintaining his action or defense, upon the merits. Whenever it shall be alleged that a party has been misled, the fact shall be proved to the satisfaction of the court, and in what respect he has been misled; and thereupon the court may order the pleading to be amended,

upon such terms as shall be just"; and section 147 which provides: "Where the variance is not material as provided in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment without costs." By reading section 150, above quoted, in connection with the two sections last quoted, it is clear that the law-making power intended to abrogate the technical rules existing under the common-law system of pleading, and to substitute therefor a system better calculated to conform and further the ends of justice and to prevent a multiplicity of actions. The courts of the code states in construing similar sections of their codes have given to the same a very broad and liberal construction in order to carry into effect the evident object and purpose of the law-making power in the enactment of the new and reformed Code of Civil Procedure: *Hopf v. United States Baking Co.*, 21 N. Y. Supp. 589; *Post v. Campbell*, 110 Wis. 378, 85 N. W. 1032; *Gates v. Paul*, 117 Wis. 170, 94 N. W. 55; *Anderson v. First Nat. Bank*, 5 N. D. 80, 64 N. W. 114; *Cook v. Croisan*, 25 Or. 475, 36 Pac. 532; *Culp v. Steere*, 47 Kan. 746, 28 Pac. 987; *Halloran v. Holmes*, 13 N. D. 411, 101 N. W. 310. In *Hopf v. United States Baking Co.*, 21 N. Y. Supp. 589, a very recent case, this subject is very fully discussed,⁶² and the conclusion reached that the power of amendment may be exercised in a proper case to the extent of changing entirely the cause of action so long as the real controversy between the parties is not fully departed from. What is meant by the word "claim" is very fully considered by the supreme court of Wisconsin in *Post v. Campbell*, 110 Wis. 378, 85 N. W. 1032, under a section identically the same as section 150 of our code, above quoted, and that court says that the section "has had judicial construction many times to the effect that the limit of the power of amendment is only exceeded by a departure from the subject of the action." This subject was again very fully considered by the court in the case of *Gates v. Paul*, 117 Wis. 170, 94 N. W. 55, in which it was held that it was competent for the court, in an action brought to wind up a partnership and to declare the plaintiff entitled to certain interest in real property, to allow the plaintiff to amend his complaint by eliminating therefrom the allegations of partnership, and inserting in lieu thereof allegations that the defendant held the property in trust for the plaintiff, and the court in its opinion said: "It was in equity originally, and remained so, notwithstanding the amendment; that neither worked a change in the form of the action as regards whether legal or equitable, nor materially changed the nature of the recovery necessary to vindicate the plaintiff's rights. At first, under a certain state of facts, respondent sought to recover as a wronged partner a specified

interest in property, and to terminate his relations to the defendant in respect thereto. In the end he sought to obtain the same relief as regards property rights, and to close up the identical subject matter of controversy which led to the litigation and was the sole ground thereof, by substituting as the primary purpose of the suit the establishment of relations of trustee and cestui que trust between him and appellant, and the winding up of such relations for that of partnership relations and the winding up thereof. The result was to drop out the primary matter, the subject of establishing a partnership contract and a dissolution thereof, and substitute in its place the establishment of a trust in land and a termination of the trust. In either case the situation of the real estate and the recovery of an interest therein by the plaintiff was the real substance of the controversy." We do not deem it necessary to extend this opinion by further quotations from the authorities, as it is quite clear from an examination of the same that the trial court in the case at bar was fully authorized to permit the plaintiff to amend his complaint in the manner above stated. We have examined the cases of *McMichael v. Kilmer*, 76 N. Y. 36, and *Dudley v. Scranton*, 57 N. Y. 424, relied on by appellant in ⁶³ support of his contention, and in our opinion they are not in point, as in neither of these cases was the question of amendment of the pleadings involved.

It is contended by counsel for the defendant that the court erred in not finding the value of the use of the land during the time intervening between the transfer of the same by the defendant to the plaintiff and the trial of the action; but it is sufficient answer to this contention that there was no claim made on the part of the defendant for the use or occupation of the land, no evidence introduced on the trial showing its value, and no evidence that the plaintiff ever used the land or rented the same, and, in fact, it was disclosed by the evidence that the plaintiff, as soon as he discovered the mistake as to the land conveyed him, gave notice to the defendant of his intention to rescind the contract.

It is further contended that the court erred in its fourth finding of fact, wherein it finds that the value of the stallion at the time of its delivery to the defendant was \$800, and in finding that the value of the use of the same from April 14, 1905, to the time of trial was \$200. As we have seen by the terms of the contract, the value of the stallion was fixed at \$1,500; but the court declined to find for the plaintiff the value of the stallion as fixed in the contract, but permitted evidence to be introduced of its actual value, and upon the evidence so introduced the court found the value to be \$800, as stated in its findings. It appears from the evidence that soon after the transfer of the horse to the defendant he sold the

same, but for what price does not appear, and the evidence upon the subject of the value of the horse was conflicting, and, upon a review of this evidence, we cannot say that there was a preponderance of the same against the findings of the court.

It is further contended by counsel for defendant that as the horse had been disposed of the defendant could not be restored to the same condition as provided by section 2354, Revised Civil Code, which reads as follows: "Rescission cannot be adjudged for mere mistake, unless the party against whom it is adjudged can be restored to substantially the same condition as if the contract had not been made"; and that therefore the court was in error in allowing the rescission of the contract; but we cannot agree with counsel in their contention. The court, by requiring the defendant to repay to the plaintiff the \$1,100, with interest, and to pay to the plaintiff the value of the horse, as found by the court, placed him in substantially the same condition as before the contract was made. ⁶⁴ If the contention of counsel should be sustained, it would practically prevent the rescission of contracts where any part of the consideration received on account of the contract had been disposed of by the defendant. All that is required in such a case is that the defendant be substantially restored to the same conditions as before the contract, and this, in our opinion, was done in this case.

It is further contended that the court erred in allowing interest on the \$1,100 from the time it was paid to the defendant by the plaintiff to the time of the trial; but we are clearly of the opinion that the court committed no error in allowing the legal rate of interest upon the money so paid.

It is further contended by counsel for the defendant that the court erred in deciding that the plaintiff was entitled to a lien upon the land to secure the sums of money that the court found should be paid to the plaintiff, as there was no evidence before the court that the defendant was insolvent. This contention is clearly untenable, as the court had acquired jurisdiction of the subject matter; and the case comes within the spirit of the rule that, when the equity power of the court has been once brought into action, the active jurisdiction of the court will be continued until full justice has been done between the parties: *Probert v. McDonald*, 2 S. D. 495, 39 Am. St. Rep. 796, 51 N. W. 212; *Brace v. Doble*, 3 S. D. 110, 52 N. W. 586. It was clearly competent, therefore, for the court, in the exercise of its equity powers, to make the judgment of the court a lien upon the property until the same should be satisfied.

It is further contended by counsel for defendant that the court erred in finding the value of the use of the horse from the time of its transfer to the defendant up to the time of the trial was \$200, as there was no competent evidence of the

value of such use during that time. We are of the opinion that counsel is right in this contention, as it appears from the undisputed evidence that the horse was sold by the defendant soon after it was turned over to him by the plaintiff, and there was no evidence that the defendant received anything for the use of the horse during that time. This being so, it is quite clear that the finding of the court that the value of the use of the horse was \$200 is not supported by the evidence. In our opinion, therefore, the judgment should be modified by striking therefrom the said sum of \$200, so found to be the value of the use of the horse by the court; and the judgment as so modified is affirmed. Because of the modifications, appellants will be allowed one-half of their taxable costs and disbursements.

Amendments to Pleadings not admissible because they change the cause of action are discussed in the note to *Flanders v. Cobb*, 51 Am. St. Rep. 414. Recent cases showing when amendments are allowable are *Sunflower Lumber Co. v. Turner Supply Co.*, 158 Ala. 191, 132 Am. St. Rep. 20; *Robards v. P. Bannon Sewer Pipe Co.*, 130 Ky. 380, 132 Am. St. Rep. 394; *Ryder-Gougar Co. v. Garretson*, 53 Wash. 71, 132 Am. St. Rep. 1053; *Reynolds v. Lawrence*, 147 Ala. 216, 119 Am. St. Rep. 78; *Boyd v. United States Mortgage etc. Co.*, 187 N. Y. 262, 116 Am. St. Rep. 599; *Brown v. Brown*, 71 Neb. 200, 115 Am. St. Rep. 568; *Russell v. Sharp*, 192 Mo. 270, 111 Am. St. Rep. 496.

The Rule That He Who Seeks the Rescission of a Contract must restore in specie whatever he has received under it is one of justice and equity, not of procedure—of substance, not of form—and must be reasonably construed and applied. All that is necessary is that the one party shall be placed in substantially his original situation, and that the other shall derive no unconscionable advantage from his conduct: *Basye v. Paola Refining Co.*, 79 Kan. 755, 131 Am. St. Rep. 346, and see cases cited in the cross-reference note thereto. Consult, also, *Bowe v. Gage*, 127 Wis. 245, 115 Am. St. Rep. 1010. As to the right of a vendee of land to rescind a contract, see the recent cases of *Davis v. Lee*, 52 Wash. 330, 132 Am. St. Rep. 973; *Crim v. Umbsen*, 155 Cal. 607, 132 Am. St. Rep. 127; *Cutter v. Wait*, 131 Mich. 508, 100 Am. St. Rep. 619.

McPHERSON v. SWIFT.

[22 S. D. 165, 116 N. W. 76.]

PARTNERSHIP — Joint Venture in Real Estate. — Under an Agreement whereby A purchases real estate for the joint benefit of himself and B, B furnishing the money and taking the legal title, and whereby A is to look after the property and receive for his services one-half the net profits after first deducting therefrom interest on the purchase price, and whereby A is to pay one-half of any ultimate loss and have one-half of any ultimate profits, each party to pay one-half of all costs on the property—A is not an employé whose employment is terminated on the death of B, but they are in effect partners, and the real estate, as to their interests, is regarded as personalty. (pp. 909-912.)

PARTNERSHIP.—The Relations Between Partners are confidential; they are trustees for one another. (p. 912.)

PARTNERSHIP—Succession on Death of One Partner.—On the death of one partner the surviving partners succeed to all the firm property, whether real or personal, in trust for purposes of liquidation, even though the deceased was appointed by agreement sole liquidator; and his interest in the ultimate distribution of the assets passes to those who succeed to his other personal property: Rev. Civ. Code, secs. 1726–1761. (p. 912.)

APPEAL.—To Make Findings of Fact in Causes Heard on Appeal is not the province of the supreme court, although the evidence clearly warrants them. (p. 912.)

TRIAL.—Failure or Refusal to Make Findings.—It is Error for a trial court to refuse or fail to find upon any material issue of fact, but the error may not be ground for reversal because not prejudicial to any substantial right. (p. 912.)

RES JUDICATA.—Unless Rendered on the Merits a Decree is not a bar to a subsequent action on the same demand. (p. 917.)

RES JUDICATA.—A Voluntary Dismissal by the Plaintiff is not a bar to subsequent action, especially if expressed to be without prejudice. But the mere fact that the dismissal is not expressed to be “without prejudice” does not necessarily establish that it was a decision on the merits. (p. 917.)

EVIDENCE.—Parol Affecting Judicial Record.—Matters Adjudicated.—Though it is never permissible to introduce extrinsic evidence to vary or contradict a judicial record which does not on its face show the precise questions which were determined, parol or other extrinsic evidence which is not in conflict with the record may be introduced to aid and explain it by showing the precise questions which were determined, or that certain questions were not passed upon, or otherwise clear up existing doubts. (p. 917.)

RETRAXIT.—What Constitutes.—At Common Law a Retraxit is a voluntary acknowledgment that the plaintiff has no cause of action, and therefore will not proceed further, made by him in open court in person. (p. 917.)

RETRAXIT.—What is not.—A Verified Return to an Order to Show Cause why the defendant should not withdraw certain paragraphs from his answer, which prays the “court to discharge the order to show cause and dismiss the bill of complaint herein,” does not amount to a retraxit, when from the record it does not appear to have been filed by the plaintiff in person, does not acknowledge that he has no cause of action, and is not inconsistent with the intention further to litigate his rights. (pp. 915, 917.)

PARTNERSHIP.—In an Action for an Accounting of partnership property wherein the plaintiff offered to pay a certain amount in consideration of having his claims in the property recognized, which offer is not essential to his cause of action, his withdrawal thereof long after it has been refused is not a renunciation of his right to an accounting. (pp. 917, 918.)

PARTNERSHIP.—Where the Plaintiff in a Partnership Accounting declines an offer of the defendant to withdraw his prayer for affirmative relief and submit to a decree on such terms as the court may deem just, and withdraws his action, the defendant not having pleaded a counterclaim, he is not estopped to maintain another action for the same relief. (p. 918.)

PARTNERSHIP.—Delay in Demanding Accounting.—Failure to prosecute a partnership accounting until ten years after the death of a partner is not such laches as to preclude the plaintiff, if the defend-

ant is not prejudiced thereby, he having enjoyed the possession of the property and its proceeds during the intervals. (p. 918.)

PARTNERSHIP—Limitation of Action for an Accounting.—An action in equity to ascertain and recover a deceased partner's interest in the ultimate distribution of partnership assets is one for relief "not specially provided for," to be commenced within ten years after the cause of action accrued. (p. 918.)

LIMITATION OF ACTIONS.—A Cause of Action Does not Accrue until the party owning it is entitled to begin to prosecute an action thereon; it accrues at the moment when he has a legal right to sue on it, and not earlier. (p. 918.)

PARTNERSHIP—Limitation of Action for Accounting.—When the right of action to sue for the settlement of partnership affairs accrues, so as to set the statute of limitations in motion, depends upon circumstances, and cannot be held as a matter of law to arise at the date of the dissolution, or to be carried back by relation to that date. (pp. 918, 919.)

Martin & Mason, Chambers Kellar and James G. Stanley, for the appellant.

Edwin Van Cise and Frank J. Grant, for the respondents.

170 HANEY, P. J. This is an action wherein the plaintiff demands that he be adjudged to be the owner of an undivided one-half interest in certain real property situate in Lawrence county; that his title thereto be quieted and confirmed; that an accounting be had; that he have judgment against defendant Swift for whatever sum shall be found due; that the property be partitioned; that defendant Coe be restrained from paying rents and profits to defendant Swift pending the litigation; and that he have such other and further relief as may be just and equitable. He alleges in his complaint that on May 14, 1888, defendant Swift and one James K. P. Miller entered into the following written contract: "This contract, between Joseph Swift, of Essex county, state of New Jersey, party of the first part, and James K. P. Miller, of Deadwood, Lawrence county, Dakota, party of the second part, witnesseth: That, whereas, the said party of the second part has purchased for the said party of the first part, and for joint account, the property situated in the city of Deadwood, Lawrence county, D. T., known as the Hawkeye mineral claim, comprising U. S. mineral claims numbered forty-five and fifty-three, excepting certain portions not deeded to said Swift as shown from his deed from Veymeyer on record at register of deeds office, Lawrence county, D. T. And in consideration of the said party of the second part looking after said property, collecting the rents, attending to all the necessary repairs, paying taxes, insurance, etc., the said party of the first part agrees that the said party of the second part shall receive for said services one-half of all the net profits from said property, first deducting from said profits eight per cent per annum interest on the

\$18,500 paid therefor. The said party of the second part to remit to the said party of the first part monthly, or as fast as collected, the said interest and his half of the profits; and, furthermore, in consideration of the said party of the second part agreeing to pay to the said party of the first part one-half of any ultimate loss that may occur on said purchase price of \$18,500, ¹⁷¹ the said party of the first part agrees that the said party of the second part shall receive one-half of the profits ultimately accruing from the sale of said property above the said purchase price of \$18,500. The said party of the second part agrees that in case there be no income on the investment, owing to the property lying vacant of tenants at any time, to settle with and remit to the said party of the first part at least once each six months, eight per cent interest on one-half of the said purchase price of \$18,500. Each party hereto pays in cash when due one-half of all costs upon said property, for taxes, insurance, repairs or other necessary expenses. All money realized from sales of any part of said property shall be remitted to said party of the first part, and credited upon said sum of \$18,500 purchase money, in liquidation thereof and stopping the eight per cent interest to extent of such credits. Additional investments for improvements subject to same conditions." He also alleges, in substance, that Miller died January 12, 1891, having property in Lawrence county; that William Selbie, of Deadwood, was appointed administrator with will annexed of the Miller estate by the county court of Lawrence county, May 23, 1892; that Selbie qualified and entered upon the discharge of his duties; that Miller's estate was insolvent, owing debts to an amount exceeding \$100,000; that it became necessary to sell the real property belonging to the estate, including the property in controversy, in order to pay debts owing by the estate; that on September 29, 1892, pursuant to an order of the county court, Selbie, as administrator, sold, assigned and transferred to the plaintiff all the right, title and interest of the Miller estate in and to the aforesaid contract, and in and to the premises therein described, and on January 11, 1893, by deed, duly acknowledged and delivered, transferred and conveyed to the plaintiff all the interest of such estate in and to said contract and the premises therein described; that such sale was confirmed by the county court December 29, 1892; that the consideration paid by the plaintiff for such transfer was the sum of \$5,005; that Miller performed all the conditions of the aforesaid contract on his part; that the property was, in fact, purchased by Miller, Swift furnishing the money with which to pay for the same; that since Miller's death ¹⁷² defendant Coe, as agent of defendant Swift, has been collecting the rents, issues and income of the property, and paying the same to Swift, less certain commissions; that Swift is not

a resident of this state; that when the property was purchased, title was taken in Swift's name in accordance with the aforesaid contract for the joint interest and benefit of Miller and Swift; that the rents, issues and income received by Swift have been more than sufficient to pay for all repairs, taxes, insurance and other expenses properly chargeable to the premises, together with \$18,500, the original purchase price, and interest thereon as provided in the contract, and that there is a balance due to the plaintiff; that on July 22, 1892, Selbie, as administrator, notified Swift in writing that the Miller estate claimed an interest in the property, and that he would care for it, and account for rents and profits agreeably to the terms of the contract; and that prior to the commencement of this action plaintiff demanded of Swift a conveyance of an undivided one-half interest in the property described in the contract remaining unsold and an accounting, with which demand Swift refused to comply.

The cause was tried without a jury on the issues presented by the complaint and defendant Swift's separate answer; defendant Coe having been connected with the controversy only as the former's agent. Swift's answer is very voluminous, containing so many conclusions of law, arguments and unnecessary repetitions as to render an accurate statement of the issues somewhat difficult. It will be construed as denying all the material allegations of the complaint, except those relating to the execution of the contract between Miller and Swift, the death of Miller, the insolvency of his estate, the notice and offer of the administrator, the plaintiff's demand for a conveyance, and an accounting, and the collection by Swift of rents, issues and income subsequent to Miller's death; and as alleging the following affirmative defenses: (1) Estoppel by conduct; (2) bar by retraxit; (3) res judicata; (4) general statute of limitations; (5) special statute of limitations; and (6) laches. It contains numerous allegations concerning the fraudulent procurement of the contract between Miller and Swift, but, as no evidence was offered in support of such allegations, they require no further ¹⁷³ notice. It also alleges, in substance, that the property described in the complaint was bequeathed by Miller to Swift and two other persons in trust for the purposes mentioned in the former's last will and testament.

It is contended the trial court's decision does not cover all the issues of fact presented by the pleadings, to the manifest prejudice of the plaintiff; the execution of the contract between Miller and Swift is established. When it was executed, legal title to the realty was in Swift. "Thenceforward," as found by the circuit court, "Miller collected the rents on this real property and accounted to Swift therefor, and for sundry improvements made on the property, and for a sale of

some portion thereof, in accordance with the terms of the contract, until Miller's death, January 12, 1891." In other words, Miller performed his obligations under the contract while living. He was not merely an employé, whose employment was terminated by his death. The execution of the contract created a partnership or a joint venture, which was in essence and effect a partnership transaction, and, though the stock in trade was real estate, it was, as to the interests of the parties, to be regarded as personal property: Rev. Civ. Code, sec. 1723; Hyman v. Peters, 30 Ill. App. 134; Brady v. Kreuger, 8 S. D. 464, 59 Am. St. Rep. 771, 66 N. W. 1083; Betts v. Letcher, 1 S. D. 182, 46 N. W. 193. The parties were to share in the profits and losses, each was to pay one-half of the expenses, and each had authority to bind the other in matters relating to the property. The compensation for Miller's services depended solely upon the ultimate success of the enterprise. The property of a partnership consists of all that is contributed to the common stock at the formation of the partnership, and of all that is subsequently acquired thereby. The interest of each member of a partnership extends to every portion of its property. The relations of partners are confidential. They are trustees for each other within the meaning of chapter 1 of the title on trusts. On the death of a partner the surviving partners succeed to all the partnership property, whether real or personal, in trust for the purposes of liquidation, even though the deceased was appointed by agreement sole liquidator; and the interest of the deceased in the ultimate distribution of the partnership assets passes to those ¹⁷⁴ who succeed to his other personal property: Rev. Civ. Code, secs. 1726, 1727, 1732, 1761. So from the undisputed facts, it necessarily follows that at the time of his death Miller had an interest in the property which he could have bequeathed to anyone in trust or otherwise, to the exclusion of the creditors of his estate, and that such interest passed to his administrator for the benefit of his individual creditors. As to whether this interest was transferred to the plaintiff pursuant to an order of the county court the decision of the circuit court is silent. Manifestly, the acquisition of Miller's interest is an essential element of plaintiff's alleged cause of action. It is not the province of this court to make findings of fact in causes heard on appeal, though the evidence would clearly warrant them. It is error for a trial court to refuse or fail to find upon any material issue of fact: Taylor v. Vandenberg, 15 S. D. 480, 90 N. W. 142; McKenna v. Whittaker, 9 S. D. 442, 69 N. W. 587. Nevertheless such refusal or failure may not be ground for reversal because not prejudicial to any substantial right. When the existence of the omitted finding would not change the ultimate result—as where a complete affirmative defense

is established—failure to find some fact essential to the plaintiff's cause of action will not justify a reversal. "The law neither does nor requires idle acts": Rev. Civ. Code, sec. 2431. If, in this case, the plaintiff's alleged cause of action be barred by the statute of limitations, or if, by reason of any other properly established fact, it clearly appears that he would in no event be entitled to recover, it would be absurd to order a new trial. Therefore, the judgment of the circuit court must be reversed, unless it shall clearly appear that the plaintiff is precluded from obtaining any relief by reason of one or more of the alleged affirmative defenses.

The defenses of estoppel by conduct, bar by retraxit, and res adjudicata rest upon the record of a former action instituted May 20, 1893, wherein the plaintiff in this case was plaintiff and defendant Swift was defendant, and wherein substantially the same cause of action was alleged and the same relief sought as in the present action; such record being made a part of the circuit court's findings of fact. It was also alleged by the plaintiff in the former action that prior to its commencement he tendered to the defendant ¹⁷⁵ \$9,250, as the sum apparently due from the former to the latter in order to entitle the former to the full benefits of the contract; that prior to the commencement of the action he tendered to the defendant a quitclaim deed to an undivided one-half interest in the property described in the contract then remaining unsold; that he demanded a conveyance of an undivided one-half interest in the property; that the sum so tendered was deposited in a bank subject to defendant's order; that defendant refused to accept such tender, or to convey an interest in the property as requested. It was alleged that this tender and demand was in writing. The complaint in the former action also contained an offer to bring the sum previously tendered into court and a sum sufficient to pay one-half of any taxes or expenses paid by the defendant, or any other sums found to be due the defendant under the contract, and to produce a quitclaim deed to an undivided one-half interest in the property. Subsequently the cause was removed to the United States circuit court on defendant's motion, where a demurrer to the complaint was overruled, and the defendant answered, admitting certain allegations of the complaint, denying others, and alleging certain affirmative defenses. Plaintiff's replication was filed August 6, 1894. On September 26, 1895, the defendant filed a verified petition reciting the history of the litigation, and alleging "that this suit has now been pending over two years and four months; that this defendant is exceedingly anxious to dispose of it; that he has made frequent overtures and offers to the plaintiff and his solicitors to settle the same by admitting plaintiff to a joint interest or ownership in the property described in the

amended bill of complaint upon his accounting equitably to this defendant for the moneys expended in the purchase, protection and improvement thereof, and your petitioner now renews this offer, and respectfully asks leave of this honorable court to withdraw from his answer now on the files of this court those portions thereof numbered paragraphs 13 and 14, pleaded as affirmative defense, and to submit to a decree in plaintiff's favor on such terms as may to this honorable court be found equitable and just." Upon this petition an order to show cause was issued "why defendant should not be allowed to withdraw from his answer paragraphs 13 and 176 14 thereof, and this cause be referred to the master in chancery of this court, or some special master to be agreed upon between the parties, to take testimony and make an accounting between the parties to this suit, touching the real property in controversy and the moneys paid out by defendant on account thereof and interest thereon, and the rents, revenues and returns received by defendant therefrom, and report the same to this court, or such other order be made in the premises as may be meet and according to equity."

On February 22, 1896, plaintiff's solicitors moved to dismiss the complaint, and on the same day the following affidavit was filed in answer to the order to show cause: "Donald A. McPherson, the complainant in the above-entitled cause, being duly sworn, says in answer to the petition of the defendant attached to the order to show cause herein that he has moved this honorable court to dismiss the bill of complaint herein, and desires to have such bill of complaint dismissed, for the following, among other, reasons: The offer and tender of the purchase price for the property involved in this controversy was long since withdrawn by affiant, and was so withdrawn before the procurement of said order to show cause. When the tender was made to the defendant by affiant's direction, the property in controversy was of very considerable value, so much so that if affiant's demand had been complied with by the defendant, as it ought to have been at the time of such tender and affiant given an interest in said property, it could have been sold for a sum which would have realized the price which affiant was willing to pay therefor, and a considerable profit in addition, but the defendant refused to accept the tender, and refused to give affiant any interest whatever in said property, and refused to carry out such contract, and denied that plaintiff was entitled to any interest whatever in said contract. Affiant further says that afterward, and before the order to show cause was procured in this case, the property in controversy was very much depreciated in value, and would not have sold, and will not now sell, and is not worth in the market near the amount which affiant was willing to

pay therefor. Therefore, defendant having declined to receive the tender or to give affiant any interest in said property whatever, ¹⁷⁷ denying to him any right to dispose of the same and refusing himself to dispose of it, or any portion of it, this affiant did not deem it incumbent upon him to leave so large an amount of money idle, nor did he feel himself bound in any wise to make another tender, or to pay the price which he was willing to pay therefor while said property was of value. Affiant further says that the only offer which the defendant has ever made to this affiant to accept this affiant as a co-owner in said property, or to carry out the contract set out in the bill of complaint in this cause, has been accompanied by so gross and unreasonable an account for expenditures in caring for the property as to indicate to affiant that, if he becomes a co-owner with the defendant in the title of the property, he would be constantly harassed by unjust and outrageous claims made as pretended expenditures for the care of said property and the collection of the income therefrom. Affiant further says that the account which was handed to affiant by the agents of said defendant contained charges amounting to \$6,182.07 for the collection of rents upon said property amounting to \$5,841.86, and containing other like charges for pretended expenditures, which satisfied this affiant that under no circumstances which could be seen and understood by affiant would it be possible to escape constant annoyance, litigation and loss by becoming a part owner of said property with the defendant. Affiant further says that defendant himself subsequent to his account being handed to affiant, admitted to affiant and stated that there was \$1,000 or \$2,000 of charges in the account which undoubtedly were incorrect and wrong. Affiant further says that at no time has the defendant tendered or offered to execute and deliver to this affiant any conveyance to the one-half interest in said property, or for any portion thereof, or to give him any reasonable information, or to exhibit to him any vouchers for any expenditures which he has made with reference to said property. Affiant says that the contract set out in the bill of complaint does not require this affiant to pay any part of the purchase money for said property, but the same is to be paid at affiant's option out of the proceeds of the sales thereof. Affiant was willing at the time nevertheless to pay ¹⁷⁸ all that the said Miller could possibly be under obligations to pay at any time, and take the title to himself of his share of the property, to the end that it might be disposed of while the ruling and market rates of said property were of the character which affiant has indicated, and which would have paid both of the parties a fair profit, but since defendant's refusal to convey for an unreasonable time, and the

depreciation of the value of the property, affiant is not willing now to exceed the strict letter of the contract with reference to the mode and manner of reimbursing the said defendant for the original purchase price thereof. Wherefore the complainant prays this court to discharge the order to show cause and dismiss the bill of complaint herein, as prayed for in his motion."

Thereupon the following decree was entered: "This cause coming on to be heard upon the application of the defendant Joseph Swift for leave to withdraw from his answer now on the files of this court paragraphs 13 and 14 thereof, and submit to a decree in plaintiff's favor on such terms as may be found equitable and just, and upon the order granted September 22, 1895, by the judge of this court, requiring the plaintiff or his solicitors to show cause why the defendant should not be allowed to withdraw from his answer said paragraphs 13 and 14 thereof, and this cause be referred to the master in chancery of this court, or some special master to be agreed upon between the parties, to take testimony and make an accounting between the parties to this suit touching the real property in controversy and the moneys paid out by defendant on account thereof and interest thereon, and the rents, revenues and returns received by defendant therefrom, and report the same to this court, or such other order be made in the premises as might be meet and according to equity, and the same being now heard before this court upon the petition of Joseph Swift, verified by his solicitor, Edwin Van Cise, upon which said order to show cause was based, and upon the resisting affidavit of the plaintiff Donald A. McPherson, this day submitted and filed, and at the same time the complainant, by his solicitors, filing his motion in this court to dismiss his bill of complaint heretofore filed herein in this case, the complainant, Donald A. McPherson, appearing by his solicitors, ¹⁷⁹ G. C. Moody and E. W. Martin, and the defendant by his solicitor, Edwin Van Cise, and the court having heard the matters in controversy upon the affidavits aforesaid, and the bill of complaint, verified answer, and replication, on file herein, and being fully advised in the premises, it is now ordered that the application of the defendant be and the same is hereby denied, and the order to show cause granted September 26, 1895, be and the same is hereby vacated and discharged. It is further ordered, considered, adjudged and decreed that this suit and the bill of complaint heretofore filed herein on behalf of the complainant and against the defendant be and the same is hereby dismissed. It is further ordered and adjudged that defendant have and recover of and from the complainant, Donald A. McPherson, the costs of this suit, taxed at \$30.30."

Notwithstanding the former action was upon the same claim or demand, it is not a bar to the present action, unless the former decree was rendered on the merits: *Selbie v. Graham*, 18 S. D. 365, 100 N. W. 755; *Dewey v. Feiler*, 11 S. D. 632, 80 N. W. 130; 24 Am. & Eng. Ency. of Law, 794. A voluntary dismissal by the plaintiff is not a bar, especially if expressed to be without prejudice. But the mere fact that the dismissal is not expressed to be "without prejudice" does not necessarily establish that the dismissal was a decision on the merits: 24 Am. & Eng. Ency. of Law, 805, 806. Though it is never permissible to introduce parol or other extrinsic evidence to vary or contradict a judicial record, where the record does not on its face show the precise question determined, or in other respects leaves any matter open to doubt, parol or other extrinsic evidence, which is not in conflict with the record, may be introduced to aid and explain it by showing the precise questions which were determined, or that certain questions were not passed upon, or otherwise clear up any doubts which might exist: 24 Am. & Eng. Ency. of Law, 193. In this instance we think the record shows on its face that there was no adjudication on the merits. If, however, this be not so, it is clear that the contrary does not appear, and the court below erred in excluding parol evidence offered by the plaintiff to prove that there was not, in fact, any determination of ¹⁸⁰ the issues involved. Either view entitles the plaintiff to a new trial so far as the defense of *res adjudicata* is concerned.

The contention that the record in the former action discloses a *retraxit* which precludes the plaintiff from maintaining the present action is not tenable, even if it be assumed that anything of the sort is sanctioned by the rules of practice prevailing in this jurisdiction. At common law a *retraxit* is a voluntary acknowledgment that the plaintiff has no cause of action, and therefore will not proceed further, made in open court by the plaintiff in person: 18 Ency. of Pl. & Pr. 898. Though the return to the order to show cause was verified by the plaintiff, there is nothing in the record to indicate that it was filed by the plaintiff in person, nor does it disclose an acknowledgment on his part that he had no cause of action. On the contrary, the reasons assigned therein for declining defendant's offer impliedly assert the existence of his alleged cause of action, and are not in the slightest degree inconsistent with an intention to further litigate his rights. The offer in plaintiff's complaint to pay a certain sum in consideration of having his claim to an undivided one-half interest in the remaining property recognized was not an essential element of his cause of action. He was, if the other allegations of his complaint were true, entitled to an accounting without any such offer or previous

tender, and the withdrawal of the offer long after it had been refused was in no sense a renunciation of his right to insist upon an accounting.

What has been said regarding the alleged retraxit applies with equal force to the contention that "the acts and declaration of the plaintiff in procuring the decree of February 22, 1896, in the former suit, estop him from maintaining this action for the same relief he sought in that, and which he there asked and induced the court to deny." There is no conflict between the plaintiff's position in the former and present action. He did not "ask and induce the court to deny" the relief sought by him in the former action. He merely declined to accept the defendant's offer, and elected to withdraw his action, which he had a perfect right to do, the defendant not having pleaded a counterclaim. Moreover, the position of the defendant was not prejudiced. He was in possession of the property and its proceeds. If he desired a termination of ¹⁸¹ his trust relation to the property, he should have instituted an action in equity for that purpose. The plaintiff is not estopped by his conduct. For the same reason he is not chargeable with such laches as should preclude him from maintaining the present action. It is alleged in the complaint and denied in the answer (a material issue upon which no finding was made) that the plaintiff paid \$5,005 for Miller's interest in the partnership property. If he did so, he paid a substantial price for a substantial right, and no reason appears why such right should not be enforced, unless the plaintiff's cause of action be barred by some statute of limitation. Clearly, this is not an action on the contract embraced by the provisions of the six-year limitation: Rev. Code Civ. Proc., sec. 60. It is an action in equity to ascertain and recover a deceased partner's interest in the ultimate distribution of partnership assets. Such assets, as between the defendant and the successor of his deceased partner, must be regarded as personal property held by the defendant in trust for the purpose of distribution according to the equitable rules governing such property. It is therefore entirely clear that the limitation upon actions for the recovery or possession of real property, based on adverse possession or payment of taxes under color of title, have no application. The action is one for relief not specially provided for, and must have been commenced within ten years after the cause of action accrued: Rev. Code Civ. Proc., sec. 66. A cause of action does not accrue until the party owning it is entitled to begin and prosecute an action thereon. It accrues at the moment when he has a legal right to sue on it, and not earlier: 19 Am. & Eng. Ency. of Law, 193. When the right of action to sue for the settlement of partnership affairs accrues, so as to set the statute

of limitations in motion, depends upon circumstances, and cannot be held, as a matter of law, to arise at the date of the dissolution, or to be carried back by relation to that date: *Riddle v. Whitehill*, 135 U. S. 621, 10 Sup. Ct. Rep. 924, 34 L. ed. 283. Upon the dissolution of the partnership in this case, by the death of Miller, Swift, as surviving partner, succeeded to all the partnership property, whether real or personal, in trust for the purpose of liquidation: Rev. Civ. Code, sec. 1761. Miller's personal representative, until otherwise informed, was justified in presuming that such trust was being ¹⁸² faithfully performed, and neither he nor his successor in interest was entitled to sue for a settlement of the partnership affairs before making a demand or receiving notice of the trustee's renunciation of his trust. The following statement appears in the decision of the circuit court as a finding of fact: "Upon his death the defendant Swift appointed A. W. Coe his agent to collect the rents and attend to the care and management of the property, and has retained him since. Swift at once, upon Miller's death, asserted in good faith and under the advice of counsel learned in the law, and has since continued so to assert, that he was the sole owner of the property, that, if Miller had any interest in it, it terminated with his death, and said Swift has also since the date of said Miller's death denied that the estate of Miller had any interest whatever in said real property, and has all the time asserted an ownership and possession exclusive in himself and adverse to the estate to the whole of such real property, all this to the knowledge of the administrator, William Selbie, appointed June 1, 1892, and of the plaintiff, all the time a resident of Deadwood, Lawrence county, and familiar with defendant's possession and claim of title." These facts and conclusions do not support the contention that the statute of limitations began to run upon Miller's death. The employment of a resident agent to collect rents and care for the property does not indicate an intention to apply the rents so collected otherwise than for the purposes of liquidation. It was Swift's duty as a surviving partner to employ an agent to care for the property, if he was unable to care for it himself. Where and to whom did he assert that he was the sole owner of the property and that Miller's interest terminated with his death? Manifestly not to the administrator of Miller's estate prior to June 1, 1892, because there was none before that time. Assuming that notice of renunciation to plaintiff prior to his acquisition of Miller's interest would have set the statute running, it does not affirmatively appear that he had such notice, and certainly it would be unreasonable to infer the existence of such notice before he acquired any interest in the property. After Miller's death there was,

so far as the decision discloses, no representative of his estate who could have demanded a settlement or to whom notice of renunciation ¹⁸³ could have been given before the appointment of Selbie. Therefore no right of action accrued prior to June 1, 1892, and the present action, as found by the trial court, was begun June 18, 1901, less than ten years later.

None of the affirmative defenses having been established, the failure to find whether the plaintiff acquired Miller's interest and to make an accounting, the failure to find upon all the material issues presented by the pleading was prejudicial error, or, if it be assumed, as contended by respondent, that the only question properly presented by the record is whether the findings of fact sustain the conclusions of the circuit court, it must be held that they are insufficient for that purpose.

The judgment and order appealed from are reversed.

What Constitutes a Partnership is the subject of a note to Brotherton v. Gilchrist, 115 Am. St. Rep. 400.

Partnership Real Estate is the subject of a note to Goldthwaite v. Janney, 48 Am. St. Rep. 62. As to whether agreements in regard to partnership dealings in real estate are within the statute of frauds, see the recent cases of Chase v. Angell, 148 Mich. 1, 118 Am. St. Rep. 568; Garth v. Davis, 120 Ky. 106, 117 Am. St. Rep. 571; Miller v. Ferguson, 107 Va. 249, 122 Am. St. Rep. 840. Real estate purchased for partnership purposes, with partnership funds, and used as part of the stock in trade, is regarded as personal property: Miller v. Ferguson, 107 Va. 249, 122 Am. St. Rep. 840.

NORTHWESTERN PORT HURON COMPANY v. IVERSON.

[22 S. D. 314, 117 N. W. 372.]

COUNTERCLAIM—Cases in Which Permissible.—When a Cause of Action arises out of the transaction or is connected with the subject of the action set out in the complaint, it may be pleaded as a counterclaim without regard to its character as ex contractu or ex delicto. It is only when the cause of action sought to be counterclaimed arises upon an independent contract that it is material that it should be one on contract and existing at the time of the commencement of the action. (p. 923.)

COUNTERCLAIM—Liberal Construction of Statute.—A statute providing for counterclaims should receive a liberal construction to avoid multiplicity of suits and to enable litigants to determine their differences in one action. (pp. 923, 924.)

COUNTERCLAIM—Conversion.—In an Action on Notes Secured by a chattel mortgage on machinery, the defendant may counterclaim for the wrongful conversion of the machinery by the plaintiff

in attempting to foreclose the mortgage without complying with the statute. (pp. 924, 925.)

CHATTEL MORTGAGE—Foreclosure not Complying With Statute.—Where a mortgagee of personal property takes possession of the goods for the purpose of foreclosing the mortgage without a substantial compliance with the statute, he converts the property and his lien is extinguished. (p. 925.)

CHATTEL MORTGAGE—Foreclosure must Conform to Statute. The statutory provisions relating to sales of property under chattel mortgages by advertisement must be substantially complied with. (p. 925.)

CHATTEL MORTGAGE—Whether a Lien or Transfer.—A chattel mortgage constitutes a lien upon the property; the title to the property does not pass until foreclosure. (p. 926.)

CHATTEL MORTGAGE—Foreclosure After Removal to Another County.—Where a chattel mortgage is executed and filed in one county and subsequently the property is removed into another, an attempted foreclosure in the latter county, without there filing the mortgage or a copy of it, is unauthorized and void, in view of the statute providing that "notice of sale shall be published in a newspaper, published nearest the place of sale in the county wherein the mortgage or a certified copy shall have been filed." (pp. 925, 926.)

CHATTEL MORTGAGE—Foreclosure—Counterclaim for Conversion.—Where a mortgagor, sued on the indebtedness, counterclaims for the value of the property which the mortgagee has converted, he may recover the value thereof without deduction of the mortgage debt, if the mortgage notes are still outstanding and unpaid, the mortgagee having disposed of them before the trial and having offered no evidence as to the amount due on them. (p. 926.)

ACTION—Dismissal Against Surety.—Where the Plaintiff, in an action against a principal and surety in which the principal counterclaims, moved for a dismissal, he cannot, on appeal, complain that the court refused to dismiss the action as to the principal but granted a dismissal as to the surety. (pp. 922, 926.)

W. E. Dodge, Wm. A. Tautges and J. J. Batterton, for the appellant.

Howard Babcock, for the respondent.

315 CORSON, J. This action was instituted by the plaintiff, a corporation, to recover from the defendants an indebtedness represented by certain promissory notes executed by the defendant Olaf Iverson, as maker, and Bjorn Iverson, as surety, aggregating \$1.975, together with costs. It is alleged in the complaint "that said notes and the debt thereof were secured by a chattel mortgage upon a certain threshing machine and engine, which said mortgage was foreclosed on the twenty-eighth day of January, 1905, and the proceeds of ³¹⁶ the sale thereof applied on the payment of the first of the above-described notes; that the mortgage on said machine, which was for the security of the notes above described, contained certain clauses and conditions, among others that if the said notes or any part thereof were not paid when due, or if the mortgagor abandoned said prop-

erty or failed to care for it, and protect it from the weather, or if at any time the said mortgagee deemed himself insecure, he might himself, or his duly appointed agent, seize the said property, and might elect to declare the whole amount of said notes and debt secured by the mortgage to be due and payable at once." It is then alleged that there was a default on the part of the defendants, the machinery mortgaged was abandoned, and that the plaintiff elected to declare the whole amount of the mortgage debt due, aggregating \$1,975, with interest as before stated. The defendants answered separately. Bjorn Iverson admits the incorporation of the defendant; admits that he executed the promissory notes described in plaintiff's complaint, and alleges that he executed the same as surety, receiving no consideration therefor, and denies that he at any time made, executed or delivered the chattel mortgage described in the complaint or any chattel mortgage whatever to secure the payment of said note. Olaf Iverson in a separate answer admits the incorporation of the plaintiff, the execution and delivery of the promissory notes, and the execution of the chattel mortgage, but denies that the chattel mortgage or any copy thereof was ever at any time filed for record in the office of the register of deeds in and for Roberts county, and denies that on the twenty-ninth day of January, 1905, or at any other time, said plaintiff foreclosed said chattel mortgage as alleged in the complaint, and for a counterclaim alleges as follows: "Further answering said complaint, and for a counterclaim herein, this defendant alleges that on or about the first day of January, 1905, said plaintiff wrongfully and unlawfully, without the consent of this defendant, took from this defendant's possession the threshing machine and engine which was covered by said mortgage, and which was then the property of the defendant, and removed the same from the county of Marshall, and wrongfully and unlawfully secreted and disposed of the same and converted the same to its own use; that the actual value of ³¹⁷ said threshing machine and engine at that time and now was and is the sum of \$3,500." The defendant further alleged that, by reason of said conversion, he had sustained damages in the sum of \$1,000 and demanded judgment for \$4,500. Before the commencement of the trial the plaintiff moved to dismiss the action, which motion was granted as to the defendant Bjorn Iverson, but denied as to the defendant Olaf Iverson, to which ruling the plaintiff duly excepted.

It is contended by appellant that "the so-called counterclaim is interposed in an action predicated on contract for the recovery of money only. It does not arise out of the same transaction, and, since it sounds in tort, cannot be interposed under the statute in an action of this character."

It is the contention of the respondent Olaf Iverson that the counterclaim set out in his answer states a cause of action which arose out of the "transaction set forth in the complaint as the foundation of plaintiff's claim," and is also "connected with the subject of the action." We are inclined to the opinion that the respondent is right in his contention, and that the counterclaim did arise out of the transaction set forth in plaintiff's complaint as the foundation of the plaintiff's claim, and is connected with the subject of the action. Section 127 of the Revised Code of Civil Procedure provides: "The counterclaim mentioned in the last section must be one existing in favor of a defendant, and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action: 1. A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action. 2. In an action arising on contract, any other cause of action arising also on contract and existing at the commencement of the action." It will be observed from the reading of the foregoing section that three cases are provided for in which a counterclaim is permissible: First, in a case where the cause of action as set out in the counterclaim arises out of the contract or transaction set up in the complaint; second, a cause of action connected with the subject of the action; and, third, in an action on a contract, a cause of action arising on contract and existing at the commencement of the action ³¹⁸ may also be counterclaimed. Where the cause of action sought to be counterclaimed arises out of the contract or transaction, or is connected with the subject of the action set out in the complaint, it is not material whether the cause of action be one arising on contract or by reason of a tort. When the cause of action arises out of the transaction or is connected with the subject of the action, it may be pleaded as a counterclaim without regard to its character, and it is only where the cause of action sought to be counterclaimed arises upon an independent contract that it becomes material that the cause of action so sought to be counterclaimed should be one on contract and existing at the time of the commencement of the action.

In *McHard v. Williams*, 8 S. D. 381, 59 Am. St. Rep. 766, 66 N. W. 930, this court said: "One of the more important purposes of the adoption of the code system of pleading was to avoid, as far as possible, a multiplicity of suits, and to enable parties to determine their differences in one action. And to this end counterclaims were designed, not only to include recoupment and setoffs at common law, but to enlarge their scope, so that but few cases could arise in which all litigation between the parties to the action might not be

settled in the same suit. . . . These provisions should receive a liberal construction, as, in the language of Mr. Justice Fuller, in *Laney v. Ingalls*, 5 S. D. 183, 58 N. W. 572, it enables litigants to determine their controversies without additional expense, and, in case a plaintiff is insolvent, it is often the only means by which a defendant may obtain justice": *Minneapolis Thresher Machine Co. v. Darnall*, 13 S. D. 279, 83 N. W. 266. And this seems to be the view taken by the learned supreme court of North Dakota in the analogous case of *Hanson v. Skogman*, 14 N. D. 445, 105 N. W. 90. In that case the court says: "Courts and text-writers have expended much time and learning in attempting to define the meaning of the word 'transaction,' and of the phrase 'subject of the action,' as used in this statute, which is common to many states, and, it must be confessed, without marked success. Bliss on Code Pleading, section 371, in referring to this provision, says: 'Three classes of counterclaims are here provided for: First, a demand existing in favor of the defendant and against the plaintiff. ³¹⁹ which arises out of the contract upon which the plaintiff has based his action; second, a demand so existing, which arises out of the transaction—a broader term than contract—upon which the plaintiff has based his action; and, third, a demand so existing which need not necessarily arise out of either the contract or the transaction involved in the action, but is sufficient if it is connected with the subject of the action.' The 'transaction' upon which the plaintiff's action is based included the chattel mortgage as well as the note. The obligations and liabilities of the parties arise out of that transaction. It is sufficient to say that, under the settled construction of this statute, the defendant's cause of action for the conversion of the mortgaged property was a proper subject of counterclaim under either the second or the third grounds; i. e., because it arose out of the 'transaction,' or because it was connected with the subject of the action." And in support of the views expressed by that court it cites the following cases: *McHard v. Williams*, 8 S. D. 381, 59 Am. St. Rep. 766, 66 N. W. 930; *Ainsworth v. Bowen*, 9 Wis. 348; *Hyman v. Jockey etc. Co.*, 9 Colo. App. 299, 48 Pac. 671; *Rush v. First Nat. Bank*, 71 Fed. 102, 17 C. C. A. 627; *First Nat. Bank v. O'Connell*, 84 Iowa, 377, 35 Am. St. Rep. 313, 51 N. W. 162; *Streeper v. Thompson* (Tex. Civ. App.), 23 S. W. 326. See, also, Bliss on Code Pleading, secs. 372-377, and cases cited.

It is disclosed by the record in the case at bar that the defendant Olaf Iverson purchased the threshing machine rig from the plaintiff; that, to secure the payment of the same, the defendant Olaf, as principal, and Bjorn Iverson, as surety, executed certain promissory notes for the amount;

that, to secure the payment of these notes, the defendant Olaf Iverson executed a chattel mortgage upon the machinery purchases; that the plaintiff attempted to foreclose the chattel mortgage, but failed to comply with the provisions of the statute relating to the foreclosure of chattel mortgages, and thereby in effect converted the property so mortgaged to its own use and became liable for the value of the same to the defendant Olaf Iverson; that, by virtue of the provisions and stipulations in the chattel mortgage, it sought to declare the full amount due on the notes before the time specified for their payment set forth in plaintiff's complaint. It will thus be seen that the execution of the notes and chattel mortgage were a part of the ³²⁰ same transaction, and that the conversion of the threshing machinery by the plaintiff and its election to declare the notes due and payable were all a part of the same transaction. The case, therefore, comes clearly within the rule laid down in *McHard v. Williams*, 8 S. D. 381, 59 Am. St. Rep. 766, 66 N. W. 930, *Minneapolis Threshing Machine Co. v. Darnall*, 13 S. D. 279, 83 N. W. 266, *Hanson v. Skogman*, 14 N. D. 445, 105 N. W. 90, and *Carpenter v. Manhattan Life Ins. Co.*, 93 N. Y. 552.

It is further contended by the appellant that the evidence of the defendant is insufficient to show a conversion by the plaintiff, but in our opinion this contention is clearly untenable. It appears from defendants' evidence that the attempted foreclosure of the chattel mortgage was made in violation of sections 2073-2077, Revised Civil Code, inclusive, and therefore did not constitute a valid foreclosure, but was in effect a conversion of the property: *Everett v. Buchanan*, 2 Dak. 249, 6 N. W. 439, 8 N. W. 31. The law as laid down in that case has been uniformly followed in this state, and it may be regarded as settled within this jurisdiction that where a mortgagee of personal property takes possession of the same for the purpose of foreclosing his mortgage, and sells the same without a substantial compliance with the statute, he converts the property and his lien on the same is extinguished. The provisions relating to the sales of property under chattel mortgages by advertisement is statutory, and the proceedings required by the law must be substantially complied with: *Felker v. Grant*, 10 S. D. 141, 72 N. W. 81; *Pitts Agricultural Works v. Baker*, 11 S. D. 342, 77 N. W. 586; *Colby v. W. W. Kimball Co.*, 99 Iowa, 321, 68 N. W. 786. In the case at bar the property at the time it was mortgaged was situated in Marshall county, and the chattel mortgage was recorded in that county. The property, however, before the sale was removed to Roberts county, and without filing the mortgage or a copy thereof in that county an attempted foreclosure was made, and the property

sold at Sisseton in the latter county. By section 2077 of the code, above referred to, it is provided that "the notice of sale shall be published in a newspaper, published nearest the place of sale in the county wherein the mortgage or a certified copy shall have been filed." The foreclosure, therefore, attempted in a county other than that in which the mortgage was executed and filed was clearly unauthorized and void.

³²¹ It is further contended by the appellant that, if in fact there was sufficient evidence to establish the conversion of the mortgaged property, it does not appear that the defendant sustained any damages, and in any event he would be entitled to recover only the value of the property, less the amount of the mortgage debt. This contention is untenable, for the reason that it was disclosed by the record that the plaintiff had previous to the trial disposed of the notes, and that they were still unpaid and outstanding as against the defendants. The plaintiff offered no evidence in the action tending to prove the amount due upon the notes, and hence the controversy as to the notes and amount due thereon was practically out of the case, and the defendant Olaf Iverson, having introduced evidence showing the value of the mortgaged machinery at the time of its alleged conversion by the plaintiff, was entitled to recover the value of the same, and there was ample evidence to support the findings of the jury that the value of the mortgaged property at the time of the conversion was \$3,500, found by them in favor of the defendant Olaf Iverson by their verdict.

It is further contended by the appellant that the title to the property passed by virtue of the chattel mortgage to the plaintiff, but this contention is untenable, for the reason that under the code of this state (section 2042, Revised Civil Code) a mortgage only constitutes a lien upon the property. The title of the property thereto does not pass until there is a legal foreclosure of the mortgage.

The contention of the appellant that the court erred in dismissing the action as to Bjorn Iverson is clearly untenable, for the reason that the action was dismissed as to him upon the motion of the appellant, and the fact that the court denied the motion to dismiss the action as to Olaf Iverson does not in any manner affect a dismissal of the action as to Bjorn Iverson, or render such dismissal erroneous. We are of the opinion that the court was right in directing a verdict in favor of the defendant Olaf Iverson, as the evidence tending to prove a conversion of the property by the appellant was practically undisputed.

Finding no error in the record, the judgments of the circuit court in favor of the defendants are affirmed.

Statutes Providing for Counterclaims are given a liberal interpretation: *Mellard v. Williams*, 8 S. D. 381, 59 Am. St. Rep. 766; First

Nat. Bank of Snohomish v. Parker, 28 Wash. 234, 92 Am. St. Rep. 828. It is a general principle that two suits shall not be maintained for the determination of matters in controversy between the same parties, whether relating to legal or equitable rights, or to both, when such determination can be had as effectually and properly in one suit: **Hubley Mfg. etc. Co. v. Ives**, 81 Conn. 244, 129 Am. St. Rep. 209. In an action at law for a liquidated demand, the defendant may set off the value of goods belonging to him which the plaintiff has tortiously converted to his own use: **Tidewater Quarry Co. v. Scott**, 105 Va. 160, 115 Am. St. Rep. 864. And in an action to foreclose a mortgage the defendant may assert as a counterclaim damages suffered by him in a previous suit by the mortgagor for the possession of the premises, in which he was placed in such possession and so remained until the final determination of that suit, if the statute authorizes a counterclaim "in an action arising out of a contract or transaction set forth in the complaint as the foundation of the plaintiff's claim or connected with the subject of the action": **First Nat. Bank of Snohomish v. Parker**, 28 Wash. 234, 92 Am. St. Rep. 828.

CITY OF BROOKINGS v. NATWICK.

[22 S. D. 322, 117 N. W. 376.]

SPECIAL ASSESSMENT — Personal Liability. — A Statute is Unconstitutional which makes a special assessment against abutting property for a local improvement the personal obligation of the owner recoverable by an action, regardless of any consideration of benefits, damages, exemptions, due process of law, or the guaranty against taking property for public use without just compensation. (p. 929.)

Bailey & Voorhees, for the appellant.

G. A. Mathews, for the respondent.

322 FULLER, J. At the trial of this action against the owner of abutting property to recover the amount expended in the construction of cement sidewalks in the city of Brookings a general demurrer was overruled, and the judgment appealed from entered for the full amount claimed, which with costs and disbursements amount to seven hundred and seven dollars and eighty-one cents. Section 35 of the special act of 1883 to incorporate the city of Brookings authorizes certain proceedings by the city council to cause new sidewalks to be built by owners of property within the city limits. In case an owner refuses or neglects to build as required and within the time specified by the published resolution, such improvement may be made at his expense by the street commissioner, and the city council is given power to levy and enter a special assessment upon each abutting lot or parcel of land and proceed to collect the same, either by a city treasurer's **323** sale of the property in the usual man-

ner or "by suit in any court having competent jurisdiction in civil cases. And no property shall be exempt from execution for the collection of the judgment and costs in such cases."

It is the contention of counsel for appellant that the act is unconstitutional so far as it relates to the enforcement of a personal liability by suit against the abutting owner, and subjects all his real and personal property, wherever situated, to execution in satisfaction of any judgment that may be obtained. As considerations of public convenience usually suggest the necessity of building sidewalks, the special assessment for the entire expenditure laid on abutting property is justified only upon the theory that such property is thereby especially benefited. There being no contract or promise, express or implied, the obligation of the owner is not in the nature of a debt that would have been recoverable by a common-law action of assumpsit. That a special assessment is greater than the special benefit conferred may or may not be a valid objection to its enforcement by a sale of the abutting property, but when it exceeds the value of such delinquent property after the local improvement has been completed, the subjection of all other property the owner may possess to execution in satisfaction of a judgment for such assessment is wholly inconsistent with the supposition that he is receiving a special benefit. Mr. Elliott, in his treatise on the law of Roads and Streets, at page 400, says: "It is not easy to perceive how the assessment can extend beyond the property against which it is directed, since the sole foundation of the right to direct and enforce the assessment rests upon the theory that the land receives a benefit equal to the assessment. If the land with the superadded value given it by the improvement will not pay the assessment, there is no constitutional warrant for the right to seek payment of the assessment elsewhere, for the land is all that the improvement can by any possibility benefit, and land that is not benefited cannot be seized without violating the principle which forbids the taking of property without compensation, nor without breaking down the only theory upon which it is possible to sustain local assessments, and yet, if there is a personal liability, the assessment may be enforced, although the land, even ³²⁴ as enhanced in value by the improvement, may not be worth a tithe of the expense of making the improvement. The power of making special assessments is at best a dangerous one to intrust to municipalities. It is one, too, that is deduced by a process that it requires no little argument to defend, and it ought not to be so extended as to put in peril, not only the land theoretically benefited, but all the other property of which its owner may be possessed. The deci-

sions which declare the statutes imposing a personal liability upon the land owner unconstitutional are, in our judgment, so strongly intrenched in principle that they cannot be shaken." To the same effect are the following authorities: 2 Cooley on Taxation, 3d ed., pp. 1289, 1290, inclusive; Village of Norwood v. Baker, 172 U. S. 269, 19 Sup. Ct. Rep. 187, 43 L. ed. 443; Hoover v. People, 171 Ill. 182, 49 N. E. 367; Taylor v. Palmer, 31 Cal. 240; City of Seattle v. Yesler, 1 Wash. 571; City of St. Louis v. Allen, 53 Mo. 44; Asberry v. City of Roanoke, 91 Va. 562, 22 S. E. 360, 42 L. R. A. 636.

Viewed with reference to practical results, the provision under consideration is unconstitutional in so far as the special assessment against abutting property for a local improvement is made the personal obligation of the owner recoverable by an action, regardless of any consideration of benefits, damages, exemptions or the guaranty against the taking of private property for public use without just compensation or due process of law.

The judgment appealed from is reversed, with the direction that the action be dismissed.

WHETHER A PERSONAL LIABILITY MAY BE CREATED FOR AN ASSESSMENT.*

- I. Necessity for Assessment to be Collected in Strict Conformity With Statute, 929.
- II. Nature of the Proceedings as to Whether in Rem or in Personam, 930.
- III. Conflicting Decisions as to Whether Personal Liability Exists.
 - a. In General, 930.
 - b. Decisions Holding No Personal Liability Exists, 931.
 - c. Decisions Holding Personal Liability Does Exist, 936.
- IV. Rule Under Special Circumstances.
 - a. Where Improvement is Made Under the Police Power, 939.
 - b. Where Property Owner has Agreed to Pay for Improvement, 939.
 - c. Where Sale of the Property Assessed Would be Against Public Policy, 939.

I. Necessity for Assessment to be Collected in Strict Conformity With Statute.

The levying and collection of assessments for local improvements is a purely statutory proceeding and in derogation of the common law. It is a general rule that where a statute creates a new right and prescribes a remedy therefor, the remedy is exclusive. This principle applies to statutes which give the power to municipal or other public corporations to levy assessments for local improvements and which

*REFERENCES TO MONOGRAPHIC NOTES.

- Apportionment of taxes and assessments: 55 Am. Dec. 287.
 What purposes justify imposition of taxes or assessments: 16 Am. St. Rep. 365.
 Recovery of personal judgment for taxes: 42 Am. St. Rep. 655.
 Am. St. Rep., Vol. 133—59

provide for their collection. Hence it follows that no other liability can exist in respect to an assessment than that prescribed by the statute: *Mix v. Ross*, 57 Ill. 121; *Connorsville v. Merrill*, 14 Ind. App. 303, 42 N. E. 1112; *Neenan v. Smith*, 50 Mo. 525; *Pleasant Hill v. Dasher*, 120 Mo. 675, 25 S. W. 566; *State v. Frey*, 42 Neb. 186, 60 N. W. 601; *Marvin v. Town*, 56 Hun, 510, 10 N. Y. Supp. 148; *In re Hun*, 144 N. Y. 472, 39 N. E. 376. Being in the nature of a tax, an assessment cannot be collected as an ordinary debt by a common-law action unless such remedy is given by statute even in those states which recognize a personal liability on the part of the property owner for the assessment: *McKeesport v. Fidler*, 147 Pa. 532, 23 Atl. 799; *Lane Co. v. Oregon*, 7 Wall. 71, 19 L. ed. 101.

II. Nature of the Proceeding as to Whether in Rem or in Personam.

A proceeding to collect an assessment for a local improvement is frequently spoken of as one in rem although many courts, in passing on questions involving the constitutionality of statutes providing for the levying and collection of such assessments, do not deem it necessary to determine the character of the proceeding in that respect: *Buchanan v. MacFarland*, 31 App. D. C. 6; *Hoover v. Peabody*, 171 Ill. 182, 49 N. E. 367; *Lake Erie etc. R. Co. v. Walters*, 9 Ind. App. 684, 37 N. E. 295; *Scherm v. Short*, 25 Ky. Law Rep. 1108, 77 S. W. 357; *Barber Asphalt Pav. Co. v. Watt*, 51 La. Ann. 1345, 26 South. 70; *Farrell v. St. Paul*, 62 Minn. 271, 54 Am. St. Rep. 641, 64 N. W. 809, 29 L. R. A. 778; *In re Hun*, 144 N. Y. 472, 39 N. E. 376; *Hagemann's Appeal*, 88 Pa. 21. But in other cases it has been said that a proceeding to enforce a lien for a local improvement is not one which is strictly in rem: *Wood v. Curran*, 99 Cal. 137, 33 Pac. 774; *Jaicks v. Sullivan*, 128 Mo. 177, 30 S. W. 890. The United States supreme court, in accord with its policy of following state decisions in matters of that character, has declared such proceedings to be in rem: *Chadwick v. Kelly*, 187 U. S. 540, 23 Sup. Ct. Rep. 175, 47 L. ed. 293.

III. Conflicting Decisions as to Whether Personal Liability Exists.

a. *In General.*—The decisions involving the consideration of the subject of this note are not very satisfactory. In perhaps the majority of the cases which hold that a personal judgment may be rendered against the owner of the property assessed for the amount of the assessment, the validity of the statute which allowed the rendition of such a judgment has been assumed. In other cases the allowance or refusal of such a personal judgment has been determined upon the phraseology of the statute allowing the assessment without any discussion as to the validity of such statutory provisions. While in other cases the rendition of personal judgments in cases of that character has been declared as against the policy of the law creating assessments for local improvements without any particular consideration of the constitutionality of legislation of this character. In some of the states the decisions have not been consistent in following any set rule. It is, however, safe to say that by the weight of authority and the best reasoned cases, the rule now is that no personal liability can be created for an assessment for a local improvement.

We believe that it is quite manifest from the best considered cases that a personal liability for a local assessment to the extent of the excess of the cost of the local improvement over the special and peculiar benefits accruing to the abutting property is a taking of

private property for public use without just compensation and hence, to that extent at least, a statute attempting to create a personal liability would be unconstitutional. But until that question is squarely presented to the United States supreme court we shall expect to find an irreconcilable conflict amongst the authorities. The decisions of the courts sustaining what is commonly known as the "front foot rule" of assessment do not, we apprehend, affect the question under consideration in this note for the reason that that mode of assessment is sustained, as we understand, upon the idea that exact equality of taxation is not always attainable, and hence that excess of cost over special benefits will not be sufficient to avoid an assessment unless the excess be of a substantial character.

b. Decisions Holding No Personal Liability Exists.—The weight of authority and the better reasoning support the rule that no personal liability for an assessment for a local improvement exists against the owner of the property assessed. The decisions so affirming the rule have not, however, at all times declared whether the refusal to hold such property owners personally liable was because of the phraseology of the statute authorizing the assessment or because of the fundamental theory upon which assessments of this character are based. In many of the cases, however, the court has entered into an exposition of the reason for the rule: *Taylor v. Palmer*, 31 Cal. 240; *Gillis v. Cleveland*, 87 Cal. 214, 25 Pac. 351; *Manning v. Den*, 90 Cal. 610, 27 Pac. 435; *Virginia v. Hall*, 96 Ill. 278; *Illinois Cent. R. Co. v. East Lake Fork Drainage Dist.*, 129 Ill. 417, 21 N. E. 925; *Lightner v. Peoria*, 150 Ill. 80, 37 N. E. 69; *Lemont v. Jenks*, 197 Ill. 363, 90 Am. St. Rep. 172, 64 N. E. 362; *Killian v. Andrews*, 130 Ind. 579, 30 N. E. 700; *Leeds v. De Frees*, 157 Ind. 392, 61 N. E. 930; *Meyer v. Covington*, 103 Ky. 546, 45 S. W. 769; *Barker v. Southern Const. Co.*, 20 Ky. Law Rep. 796, 47 S. W. 608; *Jackson v. McHargue*, 32 Ky. Law Rep. 564, 106 S. W. 871; *Moody v. Chadwick*, 52 La. Ann. 1888, 28 South. 361; *Macon v. Patty*, 57 Miss. 378, 34 Am. Rep. 451; *Carondelet v. Picot*, 38 Mo. 125; *Neenan v. Smith*, 50 Mo. 525; *St. Louis v. Bressler*, 56 Mo. 350; *Pleasant Hill v. Dasher*, 120 Mo. 675, 25 S. W. 566; *State v. Angert*, 127 Mo. 456, 30 S. W. 118; *Heman Const. Co. v. Loevy*, 179 Mo. 455, 78 S. W. 613; *Heman Const. Co. v. Wabash R. Co.*, 206 Mo. 172, 121 Am. St. Rep. 649, 104 S. W. 67, 12 L. R. A., N. S., 112, 12 Ann. Cas. 630; *Omaha v. State*, 69 Neb. 29, 94 N. W. 979; *Raleigh v. Peace*, 110 N. C. 32, 14 S. E. 531, 17 L. R. A. 330; *Chamberlain v. Cleveland*, 34 Ohio St. 551; *Ivanhoe v. Enterprise*, 29 Or. 245, 45 Pac. 771, 35 L. R. A. 58; *City of Brookings v. Natwick*, 22 S. D. 322, ante, p. 927, 117 N. W. 376, 18 L. R. A., N. S., 1259; *Galveston v. Heard*, 54 Tex. 420; *Green v. Ward*, 82 Va. 324; *Asberry v. Roanoke*, 91 Va. 562, 22 S. E. 360, 42 L. R. A. 636; *Seattle v. Yesler*, 1 Wash. Ter. 571.

Sometimes the refusal to allow a personal liability for such assessments is based upon a construction of the statute authorizing the assessment without respect to the question whether a statute allowing it would be valid: *State v. Aetna Life Ins. Co.*, 117 Ind. 251, 20 N. E. 144; *Des Moines v. Casady*, 21 Iowa, 570; *Roxbury v. Nickerson*, 114 Mass. 544; *In re Hun*, 144 N. Y. 472, 39 N. E. 376; *Deake v. Beasley*, 26 Ohio St. 315; *Davis v. Cincinnati*, 36 Ohio St. 24; *McKeesport v. Fidler*, 147 Pa. 532, 23 Atl. 799; *Philadelphia v. Merkle*, 159 Pa. 515, 28 Atl. 360; *Scranton v. Sturgis*, 202 Pa. 182, 51 Atl. 764.

This is upon the theory that no personal liability can be created as against the owner of the property assessed, in the absence of statutory provisions expressly making him personally liable: *Smith v. Des Moines*, 106 Iowa, 590, 76 N. W. 836; *Mogg v. Hall*, 83 Mich. 576, 47 N. W. 553; *Philadelphia M. & Trust Co. v. Omaha*, 63 Neb. 280, 93 Am. St. Rep. 442, 88 N. W. 523. The fact that the property owner appears and contests the assessment does not render him subject to a judgment in personam: *Hoover v. People*, 171 Ill. 182, 49 N. E. 367.

In *Macon v. Patty*, 57 Miss. 378, 34 Am. Rep. 451, the court, in adverting to the fact that personal judgments were formerly allowed against the property owner, said: "At first these local assessments were so insignificant in amount, as compared with the value of the property on which they were levied, that the right to have, as a remedy for their collection, a personal judgment against the owner was not challenged, and there are many instances in which such judgments were rendered. At length the spirit of speculation in town and city lots induced a pushing of street improvements far beyond the immediate necessities for them in the hope that the progressive enterprise and rapid growth of the towns and cities in which they were made would soon overtake them, and amply repay the costs in the enhanced value of the lots in the neighborhood. In many instances, these hopes were not realized and the cost of making expensive improvements on newly opened streets, which were but sparsely settled, was found to be so great as to induce a surrender of the property assessed; but contractors for the improvements, to whom the assessments were assigned as their means of compensation, were unwilling to accept the property thus enhanced in value by the improvements for the cost of making them, and after having exhausted this property, sought to collect the unpaid balance from the general estate of the owner. These attempts were resisted in the courts, and caused a more careful inquiry into the nature of these assessments. The conclusion was reached in California and Missouri, that it was not within the power of the legislature to make these assessments a charge beyond the property on which they were made: *Taylor v. Palmer*, 31 Cal. 240; *St. Louis v. Allen*, 53 Mo. 45. We agree that the result reached is correct; but a logical conclusion from the grounds upon which these assessments were justified would have been to confine the remedy to the increased value of the estate, caused by the improvement." The case just cited also contains an exhaustive discussion of the origin and nature of the power to levy local assessments.

The right to enforce a personal liability against the owner of the property has been both affirmed and denied in the same state. This was the case in California. The right to enforce such a personal liability was asserted in *Emery v. San Francisco Gas Co.*, 28 Cal. 345; *Emery v. Bradford*, 29 Cal. 75; *Walsh v. Mathews*, 29 Cal. 123; *Chase v. Christianson*, 41 Cal. 253. While the right was denied in *Creighton v. Manson*, 27 Cal. 613; *Taylor v. Palmer*, 31 Cal. 240; *Beaudray v. Valdez*, 32 Cal. 269; *Guerin v. Reese*, 33 Cal. 292; *Gaffney v. Gough*, 36 Cal. 104; *Randolph v. Bayue*, 44 Cal. 366; *Gillis v. Cleveland*, 87 Cal. 214, 25 Pac. 351; *Manning v. Den*, 90 Cal. 610, 27 Pac. 435.

In *Taylor v. Palmer*, 31 Cal. 240, which is a leading case on this subject, the court, after showing the distinction between the exercise of the power of taxation and of making assessments for local im-

provements, used the following language with reference to the power to enforce assessments: "At the time the constitution was framed this word had, in the connection in which it is used, obtained a popular and legal signification which was well understood. Moreover, the provision of the constitution in which it is found was borrowed from the constitution of New York, where, as well as in other states, the word had already received a judicial interpretation. The constitutional convention must, therefore, be understood to have used the word in the sense in which it had been used in the constitution from which it was taken, which also was its popular sense. It was employed, therefore, to represent those local burdens imposed by municipal corporations upon property bordering upon an improved street or situated so near it as to be benefited by the improvement, for the purpose of paying the cost of the improvement, and laid with reference to the benefit which such property is supposed to receive from the expenditure of the money. This definition *ex vi termini* describes the power and defines with precision its limits. It is not a power to tax all the property within the corporation for general purposes, but a power to tax specific property for a specific purpose. It is not a power to tax property generally founded upon the benefits supposed to be derived from the organization of a government for the protection of life, liberty and property, but a power to tax specific property founded upon the benefit supposed to be derived by the property itself from the expenditure of the tax in its immediate vicinity. Hence property not benefited by the improvement cannot be subjected to the burden imposed for that purpose.

"To say that the owner of land bordering upon an improved street can be made personally liable for the payment of the improvement is equivalent to saying that his entire estate, real, personal and mixed, whether bordering upon the street or remote from it, whether within the corporate limits or without, whether benefited or not, shall be held responsible for the tax, which, in turn, is equivalent to saying that his entire estate may be taxed for the improvement in direct contradiction to the very terms of the power."

The principal reason why no personal liability is created by an assessment for a local improvement is that such assessments are supported on the theory that the property so charged is so situated as to be specially benefited by the improvement, and hence, as an equivalent for its enhanced value, is made to bear the burden. The other property of the owner is only affected by the improvement in the same manner as the property of other citizens of the community and hence it would be unjust to compel such owner to contribute to the expense of the improvement if other citizens are not likewise compelled to do so. In other words, the whole theory of local assessments confines them to the property benefited by them for if the owner is personally liable, they are not local assessments, but general ones as against him and all of his property: *Ivanhoe v. Enterprise*, 29 Or. 245, 45 Pac. 771, 35 L. R. A. 58.

In *Neenan v. Smith*, 50 Mo. 525, which is a case most frequently cited in this connection, the court, in refusing to hold the owner personally liable, said: "There is a broad distinction, and one of universal recognition, between the foundation upon which is based the right of general taxation for governmental purposes and that which supports the rights of local assessments. The authority to impose

either is referred to the taxing power; but the object of one, as giving the authority, widely differs from that of the other.

"All taxation is supposed to be for the benefit of the person taxed. That for raising a general revenue is imposed primarily for his protection as a member of society, both in his person and his property in general, and hence the amount assessed is against him, to be charged upon his property, and may be collected of him personally. But, on the other hand, local taxes for local improvements are merely assessments upon the property benefited by such improvements, and to pay for the benefits which they are supposed to confer; the lots are increased in value, or better adapted to the uses of town lots, by the improvement. Upon no other ground will such partial taxation for a moment stand. Other property held by the owner is affected by this improvement precisely and only as is the property of all other members of the community, and there is no reason why it should be made to contribute that does not equally apply to that of all others.

"The sole object, then, of a local tax being to benefit local property, it should be a charge upon that property only, and not a general one upon the owner. The latter, indeed, is not what is understood by a local or special assessment, but the very term would confine it to the property in the locality; for, if the owner is personally liable, it is not only a local assessment, but also a general one as against the owner. The reasonableness of this restriction will appear when we reflect that there is no call for a general execution until the property charged is exhausted. If that is all sold to pay the assessment, leaving a balance to be collected otherwise, we should have the legal anomaly—the monstrous injustice—of not only wholly absorbing the property supposed to be benefited and rendered more valuable by the improvement, but also of entailing upon the owner the loss of his other property."

Where the property assessed has paid the value of the special benefits conferred by the improvement, its owner stands in the same relation to any residue of the cost of the improvement remaining unpaid, that any other member of the public does, since all must bear the burden of paying such residue by general taxation. If a sum is exacted in excess of the value of the special benefits conferred, it is, as to such excess, a taking of private property for public use without just compensation: *Chamberlain v. Cleveland*, 34 Ohio St. 551.

"In our opinion," said the court in *Asberry v. City of Roanoke*, 91 Va. 502, 22 S. E. 360, 42 L. R. A. 636, a well-considered case, "where the legislative act authorizes the authorities of the city to create a personal charge or debt against an abutting lot owner for the assessment levied upon his property for the entire cost of improvements to the street in front thereof, the theory, and the only theory, upon which the assessment can be upheld, if at all, is abandoned, and the act at once authorizes a system of taxation for city or local purposes that is unequal, and without uniformity, as required by section 1, article 10, of the constitution of Virginia. 'These assessments are not founded upon any idea of revenue, but upon the theory of benefits conferred by such improvements upon the adjacent lots': *City of Norfolk v. Ellis*, 26 Gratt. 227. Strike out the element of benefit, and a special assessment loses its foundation: *Elliott on Roads and Streets*, 405. So long as the lot owner is the recipient of benefits to his property by improvements to the streets, or otherwise, over and above the

general benefits to all property owners in the vicinity, the theory of benefits may be considered as maintained, as he bears no greater burden than other taxpayers similarly situated; but, when an act of the legislature undertakes to confer upon the authorities of a city power to place him in any worse position, such an act must be held as unconstitutional and inoperative: Hare's Constitutional Law, 291. 'If there be a personal assessment, or the owner can be made personally liable for the tax thus imposed, then we have a remarkable result—that, for a tax which is imposed upon a lot of land upon the theory that its pecuniary value is increased by the improvement, the lot may be sold, and if there is a deficiency the owner may be required to pay it; or in other words, for the benefit conferred on the property the property may be confiscated, and the owner, for the privilege of having it confiscated, may be required to pay a tax into the treasury of the city': Burroughs on Taxation, 475." After differentiating taxes and assessments, the court continued: "Such an assessment regards nothing but the benefits to be conferred upon the particular estate. The levy is made on the supposition that that estate, having received the benefits of a public improvement, ought to relieve the public from the expense of making them. In such a case, if the owner can have his land taken from him for a supposed benefit to the land, which, if the land is sold for the tax, it is conclusively shown he has not received, and he then be held liable for the deficiency in the assessment, the injustice, not to say the tyranny, is manifest."

Similar reasoning was employed by the court in *Raleigh v. Peace*, 110 N. C. 32, 14 S. E. 521, 17 L. R. A. 330, and *Brookings v. Natwick*, 22 S. D. 322, ante, p. 927, 117 N. W. 376, 18 L. R. A., N. S., 1259.

In *Dewey v. Des Moines*, 173 U. S. 193, 19 Sup. Ct. Rep. 379, 43 L. ed. 665, the validity of a personal judgment for an assessment against a nonresident property owner was presented to the United States supreme court. The court held such a personal judgment invalid as against a nonresident property owner, but declined to express any opinion as to the validity of such a judgment as against a resident of the state. The court, in rendering its opinion, said: "This plaintiff was at all times a nonresident of that state, and we think that a statute authorizing an assessment to be levied upon property for a local improvement, and imposing upon the lot owner, who is a nonresident of the state, a personal liability to pay such assessment, is a statute which the state has no power to enact, and which cannot, therefore, furnish any foundation for a personal claim against such nonresident. There is no course of reasoning as to the character of an assessment upon lots for a local improvement, by which it can be shown that any jurisdiction to collect the assessment personally from a nonresident can exist. The state may provide for the sale of the property upon which the assessment is laid, but it cannot, under any guise or pretense, proceed further and impose a personal liability upon a nonresident to pay the assessment or any part of it. To enforce an assessment of such a nature against a nonresident, so far as his personal liability is concerned, would amount to the taking of property without due process of law, and would be a violation of the federal constitution. . . . The principle which renders void a statute providing for the personal liability of a nonresident to pay a tax of this nature is the same which prevents a state from taking jurisdiction through its courts, by virtue of any statute, over a nonresident

not served with process within the state, to enforce a mere personal liability, and where no property of the nonresident has been seized or brought under the control of the court. This principle has been frequently decided in this court. One of the leading cases is *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565, and many other cases therein cited: *Mexican Central Ry. Co. v. Pinkney*, 149 U. S. 194, 13 Sup. Ct. Rep. 859, 37 L. ed. 699.

"The lot owner never voluntarily or otherwise appeared in any of the proceedings leading up to the levying of the assessment. He gave no consent which amounted to an acknowledgment of the jurisdiction of the city or common council over his person.

"A judgment without personal service against a nonresident is only good so far as it affects the property which is taken or brought under the control of the court or other tribunal in an ordinary action to enforce a personal liability, and no jurisdiction is thereby acquired over the person of a nonresident further than respects the property so taken. This is as true in the case of an assessment against a nonresident, of such a nature as this one, as in the case of a more formal judgment."

The rule shown above was applied in Illinois in respect to a sidewalk assessment against a nonresident property owner: *Craw v. Village of Tolono*, 96 Ill. 255, 36 Am. Rep. 143.

c. Decisions Holding Personal Liability Does Exist.—Notwithstanding the forceful reasons set forth by the courts which hold that no personal liability is created against the property owner by the levying of an assessment against it, there are numerous cases which hold that such personal liability does exist in addition to the ordinary lien which exists against the property itself. In many of these cases the validity of legislation which authorizes such personal liability is assumed without discussion or decided upon precedent without any extended discussion of the reasons for or against the rule: *New Haven v. Fair Haven etc. R. Co.*, 38 Conn. 422, 9 Am. Rep. 399; *Waterbury v. Schmitz*, 58 Conn. 522, 20 Atl. 606; *Hazzard v. Heacock*, 39 Ind. 172; *Bate v. Sheets*, 64 Ind. 209; *Louisville etc. R. Co. v. State*, 8 Ind. App. 377, 35 N. E. 916; *Beatty v. Pruden*, 13 Ind. App. 507, 41 N. E. 961; *Pittsburgh etc. Ry. Co. v. Hays*, 17 Ind. App. 261, 44 N. E. 375, 45 N. E. 675, 46 N. E. 597; *Burlington v. Quick*, 47 Iowa, 222; *Muscatine v. Chicago etc. Ry. Co.*, 79 Iowa, 645, 44 N. W. 909; *Farwell v. Des Moines etc. Mfg. Co.*, 97 Iowa, 286, 66 N. W. 176, 35 L. R. A. 63; *Hedrick v. Smith*, 137 Iowa, 625, 115 N. W. 226; *Atchison etc. R. Co. v. Peterson*, 5 Kan. App. 103, 48 Pac. 877, affirmed in 58 Kan. 818, 51 Pac. 290; *Clemens v. Baltimore*, 16 Md. 208; *Moale v. Baltimore*, 61 Md. 224; *Philadelphia etc. R. Co. v. Shipley*, 72 Md. 88, 19 Atl. 1; *Lowell v. Wyman*, 12 Cush. 273; *Lefevre v. Detroit*, 2 Mich. 586; *Lincoln v. Lincoln St. Ry. Co.*, 67 Neb. 469, 93 N. W. 766; *Litchfield v. Vernon*, 41 N. Y. 123; *Ithaca v. Babcock*, 72 App. Div. 260, 76 N. Y. Supp. 49; *Matter of Elsner*, 86 App. Div. 207, 83 N. Y. Supp. 670; *Corry v. Gaynor*, 21 Ohio St. 277; *Gest v. Cincinnati*, 26 Ohio St. 275; *In re Vacation of Centre Street*, 115 Pa. 247, 8 Atl. 56; *Franklin v. Hancock*, 204 Pa. 110, 53 Atl. 644; *Washington v. Nashville*, 1 Swan, 177; *San Antonio v. Berry*, 92 Tex. 319, 48 S. W. 496; *Lovenberg v. Galveston*, 17 Tex. Civ. 162, 42 S. W. 1024; *Allen v. Drew*, 44 Vt. 174.

In some of the states such as California, Missouri, North Carolina and Virginia, the earlier decisions recognized the validity of statutes creating a personal liability, but later decisions in those states have overruled the earlier ones, as was shown in the previous subdivision: *Emery v. Bradford*, 29 Cal. 75; *St. Louis v. Newman*, 45 Mo. 138; *St. Louis v. Clemens*, 49 Mo. 552; *Wilmington v. Yopp*, 71 N. C. 76; *Moseley v. Boush*, 4 Rand. 392.

The court in *Re Vacation of Centre St.*, 115 Pa. 247, 8 Atl. 56, in upholding the power of the legislature in this respect, said: "Municipal assessments for grading, paving, opening, widening or vacating streets, and other purposes for which, within proper limits, they may be authorized, are referable solely to the taxing power. Indeed, there is nothing else upon which they can be sustained: *McMasters v. Commonwealth*, 3 Watts, 292; *In re Washington Ave.*, 69 Pa. 352, 8 Am. Rep. 255; *Seely v. Pittsburgh*, 82 Pa. 360, 22 Am. Rep. 760, and other cases recognizing the same principle. . . . While it is perhaps true that such assessments are generally against the property specially benefited, and not against the owner thereof personally, the fact that the legislature has authorized them to be made against the owner, as in this case, cannot affect the constitutionality of the law. The object, in either case, is to provide a mode of collecting the assessment, and that is wholly within the discretion of the legislature: *Desty on Taxation*, 286. Assessment against the property itself is only a method of compelling the owner to pay, and thus relieve his property from the charge or lien against it. In some cases dicta may be found, and perhaps decisions also, to the effect that assessments for benefits cannot be made or enforced against the owner of the property benefited; but the principle is unsound. As already remarked, the remedy for the collection of such assessments or taxes, as well as every other species of tax, is a matter of legislative discretion."

In a more recent case in that state the personal liability of the land owner for such an assessment was justified by a quotation from *Blackstone's Commentaries*, to the effect that "every person is bound and has virtually agreed to pay such particular sums of money as are charged on him by the sentence, or assessed by the interpretation of the law": *Franklin v. Hancock*, 204 Pa. 110, 53 Atl. 644.

And in *Burlington v. Quick*, 47 Iowa, 222, the court, in answering the argument directed against the constitutionality of legislation of this character, said: "Counsel have not cited any provisions of the constitution with which the statute conflicts. Nor have we been cited to any adjudicated cases, except two, in which it is claimed such a statute has been held to be unconstitutional. One of these is *Nunan [Neenan] v. Smith*, 50 Mo. 529 [525]. An examination of that case will show the ruling was based on the ground that the statute under which it was claimed did not authorize a personal judgment. The other case is *Palmer v. Taylor [Taylor v. Palmer]*, 31 Cal. 240. This decision is based on a provision in the constitution of California which is not contained in the constitution of this state. It is not applicable. In *Cooley on Taxation*, 472, 473, it is said: 'But the practice of making these assessments a personal charge against resident owners has been almost universal. The English statutes go so far as to make them a personal charge against the present or future owner of the property assessed until paid. In the United States personal assessments of this nature have been enforced in a great number of

cases. How much of this may be due to the fact that the right to make a personal assessment was not contested can only be a matter of conjecture; but at present it must be conceded the overwhelming weight of the authority is in favor of the right.' In support of this view many authorities are cited, in some of which, at least, the question under consideration was directly raised. We are content to follow what we recognize as the decided weight of authority, without attempting to vindicate its correctness."

A somewhat similar line of reasoning was employed in *Atchison etc. R. Co. v. Peterson*, 5 Kan. App. 103, 48 Pac. 877. In *Gest v. Cincinnati*, 26 Ohio St. 275, the court, in declining to overrule an earlier case upholding the constitutionality of a statute authorizing a personal judgment against the property owner for such an assessment, said: "The decision in *Hill v. Higdon* [5 Ohio St. 243, 67 Am. Dec. 289] has been followed in numerous subsequent cases, and is in accordance with the current of authority in other states. We have examined the two cases cited in argument to the contrary—*Taylor v. Palmer*, 31 Cal. [240] 241, and *St. Louis v. Allen*, 53 Mo. 44—and we discover nothing in them to justify the overruling of the former decisions of this court. In *Taylor v. Palmer* there were two dissents. The learned and able opinion of Sawyer, J., is found separated from the report of the case, on page 666 of the volume.

"It does not follow from the fact that if a personal liability for the assessment may be imposed on the owner, which may be enforced against his other property, that such liability will be unlimited, and may exceed the value of the property assessed. Nor does it follow from the fact that the assessment is authorized that it may be enforced to the full value of the property to which it relates. Neither the constitutional provision nor the legislation on the subject contemplates such a result. The constitution requires the power to be restricted so as to prevent its abuse; and present legislation restricts its exercise to twenty-five per centum of the value of the property assessed."

Doubtless, if the point is suggested, many of the courts which uphold the rule of personal liability would not extend such liability beyond the value of the property taxed for the improvement: *Moale v. Baltimore*, 61 Md. 224. But the power to impose such personal liability in respect to the excess of the value of the property assessed was asserted in *Dewey v. Des Moines*, 101 Iowa, 416, 70 N. W. 605. This case was, however, reversed by the United States supreme court upon another ground, namely, that the personal judgment was rendered against a nonresident without personal service of process: *Dewey v. Des Moines*, 113 U. S. 193, 19 Sup. Ct. Rep. 379, 43 L. ed. 665. In *Norwood v. Baker*, 172 U. S. 269, 19 Sup. Ct. Rep. 187, 43 L. ed. 443, the court said: "In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation. We say 'substantial excess,' because exact equality of taxation is not always attainable, and for that reason the excess of cost over special benefits, unless it be of a material character, ought not to be regarded by a court of equity when its aid is invoked to restrain the enforcement of a special assessment."

But in *French v. Barber Asphalt Pav. Co.*, 181 U. S. 324, 21 Sup. Ct. Rep. 625, 45 L. ed. 879, the court, in explaining the effect of the rule announced in the case last cited with respect to legislation of the character under consideration, said: "It may be conceded that courts of equity are always open to afford a remedy where there is an attempt, under the guise of legal proceedings, to deprive a person of his life, liberty or property, without due process of law. And such, in the opinion of a majority of the judges of this court, was the nature and effect of the proceedings in the case of *Norwood v. Baker*, 172 U. S. 269, 19 Sup. Ct. Rep. 187, 43 L. ed. 443."

IV. Rule Under Special Circumstances.

a. Where Improvement is Made Under the Police Power.—In a few instances a personal liability has been recognized for the construction of sidewalks under proceedings in the form of tax proceedings, but the enforcement of the cost of the improvement was sustained as an exercise of the police power rather than of the power of making assessments based on benefits: *Palmer v. Way*, 6 Colo. 106; *State v. Newark*, 37 N. J. L. 415, 18 Am. Rep. 729; *Washington v. Nashville*, 1 Swan (Tenn.), 177; *Franklin v. Mayberry*, 6 Humph. 368, 44 Am. Dec. 315.

b. Where Property Owner has Agreed to Pay for Improvement.—Property owners are sometimes held personally liable for an assessment for a local improvement where they have promised to pay its costs in order to induce its construction, or have by some agreement with other property owners agreed to pay their proportion of the expenses. Their liability in such cases is based, however, on their special contracts in the matter: *Nome v. Lang*, 1 Alaska, 593; *Edward C. Jones Co. v. Perry*, 26 Ind. App. 554, 57 N. E. 583; *Wayne Co. Sav. Bank v. Gas City Land Co.*, 156 Ind. 662, 59 N. E. 1048; *Talcott v. Noel*, 107 Iowa, 470, 78 N. W. 39; *Sleeper v. Bullin*, 6 Kan. 300; *Clemens v. Baltimore*, 16 Md. 208; *Gould v. Baltimore*, 58 Md. 46; *Boston v. Brazer*, 11 Mass. 447; *Adkins v. Case*, 81 Mo. App. 104; *Moore v. Barry*, 30 S. C. 530, 9 S. E. 509, 4 L. R. A. 294.

c. Where Sale of the Property Assessed Would be Against Public Policy.—Where land is owned by a governmental body and used for such public purposes as naturally suggest the idea that no sale of it under the lien of an assessment for a local improvement was intended by the legislative body authorizing the assessment, it has been held by some courts that the amount of the assessment is collectible from the general treasury of the governmental body. Under this rule the collection of the assessment cannot naturally be enforced by a suit as against such bodies which cannot be sued without their consent, but the allowance of such suits against counties and similar bodies has been suggested as a proper method of procedure: *McLean Co. v. Bloomington*, 106 Ill. 209; *Big Lake Special Drainage Dist. v. Commissioners of Highways*, 199 Ill. 132, 64 N. E. 1094; *State v. Thompson*, 109 Ind. 533, 10 N. E. 305; *Chicago v. Chicago*, 207 Ill. 37, 69 N. E. 580; *Pleasant Tp. v. Cook*, 160 Ind. 533, 67 N. E. 262; *Edwards etc. Const. Co. v. Jasper Co.*, 117 Iowa, 365, 94 Am. St. Rep. 301, 90 N. W. 1006; *Franklin Co. v. Ottawa*, 49 Kan. 747, 33 Am. St. Rep. 396, 31 Pac. 788; *Barber Asphalt Pav. Co. v. St. Joseph*, 183 Mo. 451, 82 S. W. 64; monographic note to *Herrick v. Sargent*, 132 Am. St. Rep. 303 et seq.

In Texas an assessment against a homestead is enforceable only personally against its owner: *Storrie v. Cortes*, 90 Tex. 283, 38 S. W. 154, 35 L. R. A. 666; *Lovenberg v. Galveston*, 17 Tex. Civ. 162, 42 S. W. 1024.

Where the property against which the assessment is made is used for railroad purposes, a personal liability against its owner has been allowed because of a supposed public inconvenience in the sale of the property to enforce the collection of the assessment. Thus in *Lake Erie etc. R. Co. v. Walters*, 9 Ind. App. 684, 37 N. E. 295, it was said: "The proceeding to enforce a lien for an assessment on account of street improvements is in rem, and ordinarily no personal judgment may be rendered against the owner in such proceedings. The only reason why a personal judgment may become a proper and available remedy in certain cases of this character, where the proceeding is against a railroad company to enforce a lien upon its railroad property and franchises, is that it would be contrary to public policy to decree the sale of the specific property to which the lien has attached; and, as the lienor might otherwise be left without any remedy whatever, equity will, in a proper case, award such lienor the right of collecting the amount due him by virtue of the lien, in the way of such personal judgment: See *Lake Erie & W. R. R. Co. v. Bowker* (decided by this court March 15, 1894), 9 Ind. App. 428, 36 N. E. 864, and authorities there cited and reviewed. The fact, however, that this remedy may, in proper instances, be invoked, will not change the character of the action from one in rem to one in personam. The lien is still the only basis of the right of action, and, in an action to enforce his rights under such lien, the plaintiff is required to show, not only that he has a lien, but also that he would be entitled to a decree foreclosing the same, except for the fact that it is upon railroad property, the sale of which might interfere with the rights of the public."

Such personal judgments against the railroad companies owning the railroad property assessed were allowed in *Pittsburgh etc. Ry. Co. v. Tabor*, 168 Ind. 419, 77 N. E. 741, 11 Ann. Cas. 808; *Atchison etc. Ry. Co. v. Peterson*, 5 Kan. App. 103, 48 Pac. 877; *Missouri etc. Ry. Co. v. Cambern*, 66 Kan. 365, 71 Pac. 809; contra, *Heman Const. Co. v. Wabash R. Co.*, 206 Mo. 172, 121 Am. St. Rep. 649, 104 S. W. 67, 12 L. R. A., N. S., 112, 12 Ann. Cas. 630. A personal judgment cannot, however, be rendered against the lessee of a railroad merely because it has agreed with the lessor to pay all assessments: *Chicago etc. R. Co. v. Ottumwa*, 112 Iowa, 300, 83 N. W. 1074, 51 L. R. A. 763.

HAWGOOD v. EMERY.

[22 S. D. 573, 119 N. W. 177.]

MINING—Work on One Claim for Benefit of Others.—Where a person or persons hold several adjacent claims, work may be done on one claim and be credited on the others. (pp. 942, 943.)

MINING—Work Done Outside the Limits of a Claim may be credited thereon if beneficial to it, and this is true even if there are several claims for which credit is asked for outside work, provided they are held in common. (p. 943.)

MINING—Work on One Claim for Benefit of Others.—Where there are several adjacent claims held by different persons, development work may, under an agreement between the owners, all be done on one claim and credited to the several claims, such work being beneficial to all the claims and a part of the general plan or scheme for their development. (p. 943.)

MINING—Work on One Claim for Benefit of Others Owned in Common.—One of the owners in common of two mining claims cannot prevent the forfeiture of his rights therein by his co-owner, by performing work on adjacent claims in which his co-owner has no interest, in the absence of any agreement between them for the doing of such work or of any showing that it was part of a general plan for the development of the mines in question in connection with those on which the work was done. (p. 943.)

McLaughlin & Ogden, for the appellant.

Chambers Kellar, for the respondent.

573 **WHITING, J.** This cause comes before the court upon an appeal from the judgment of the circuit court of Lawrence county; the errors complained of being in the rejection of certain testimony offered by the appellant on the trial in said circuit court.

It appears that the plaintiff and defendant were the owners in **574** common of two certain adjacent mining claims involved in this action; that the defendant and respondent claiming that the plaintiff and appellant had not performed his share, or any part thereof, of the work required under section 2324 of the Revised Statutes of the United States (U. S. Comp. Stats. 1901, p. 1426), the said defendant had proceeded to give notice of forfeiture of the plaintiff's rights to said claims under the statutes of the United States relating to such forfeiture. The plaintiff brought this action to restrain the defendant from filing the necessary papers in the office of the register of deeds in Lawrence county, and to restrain him from asserting the right, title or interest in and to the undivided interest in said claims claimed to be held by said plaintiff, and also asking for a decree of court quieting in said plaintiff title to the undivided interest in said claims. Plaintiff in his complaint set out that he had fully complied with the requirements of law as regards the representation and develop-

ment of said claims. The defendant, answering, admits that he was in the act of taking steps to declare a forfeiture of plaintiff's title to said mining claims, and sets forth the fact that he, the said defendant, had performed the labor and made the improvements on said claims for the years in question that were necessary for their representation and development, and alleged that the plaintiff had wholly failed in performing assessment work upon the said mines or lodes for years in question, and had failed to pay to defendant for his (plaintiff's) proportionate part of the work done by defendant within ninety days after demand so to do.

Upon the trial plaintiff offered evidence to show that he performed work on certain adjacent claims, for which work he claimed he was entitled to receive credit on the claims in litigation, for the reason that such work was beneficial to and naturally tended to the development of the claims in question. He offered to show that he posted notices in conspicuous places on the claims in litigation, notifying the world that development work for said claims was being done on the said adjacent claims, and also offered to prove that notices were posted conspicuously at the entrances of the workings on said adjacent claims notifying the world that said workings were being carried on in part for the benefit of the claims ⁵⁷⁵ in litigation. It appears by the evidence that the parties to this action, while partners as regards the claims in question, had not been on speaking terms during the years when it is claimed by each that they did the work they base their rights on. It also appears that the defendant had no interest whatsoever in either of the claims upon which plaintiff claims to have done the work for which he should receive credit, and it does appear that, as regards two of these adjacent claims, the plaintiff was the sole owner thereof and the owner in common with other parties in the three other claims upon which said work had been done. There is no claim made that the defendant ever entered into any agreement for the doing of the development work on the claims held by the plaintiff, and these third parties. It will be seen, therefore, that the rulings of the court in excluding the testimony sought to be introduced by the plaintiff was error, providing that, under the facts above set forth, the plaintiff would have any right to have his work credited on the claims in litigation.

I think it is well settled both by the decision of this court found in *Godfrey v. Faust*, 20 S. D. 203, 105 N. W. 460, and under the holdings in 2 *Lindley on Mines and Mining* sections 630, 631, together with the long line of authorities cited by our court, and also by *Lindley*, as well as the authorities cited by both parties on this appeal, that, where a person or persons hold several claims that are adjacent, work can

be done on one claim and be credited on the other claims; also, that work can be done outside of the limits of the claim, and have it credited on such claim, where such work is beneficial to the claim, and that this is true even if there are several claims for which credit is asked for said outside work, provided said several claims are held in common; also, that, where there are several claims adjacent held by different persons and work beneficial to all of said claims can best be done on one of them, then, under a proper agreement between the owners of said claims, development work can all be done on one claim, and be credited to the several claims, such work being a part of the general plan or scheme for the development of the several claims.

As we understand the case at bar, it is under this last proposition that the appellant contends that he should be allowed to introduce ⁵⁷⁶ the evidence rejected; his contention being that said evidence would have shown that the work done was beneficial to the claims in litigation. We think, however, that the rulings of the circuit court were correct, for the following reasons: It does not appear that said work was any part of a general plan or scheme for the development of the mines in question in connection with the mines upon which the work was done. Furthermore, this was an attempt of one partner to enter into a scheme whereby, without any agreement therefor with his partner, he would perform work upon property of which he was the sole owner, and upon property of which he was part owner with third parties, and hold the defendant liable therefor. The claim of plaintiff cannot be upheld, unless the court would be willing, in case this was an action of plaintiff against defendant for an accounting, to allow plaintiff a money judgment for said work. And upon what theory could that be done? It would certainly throw the doors open to fraud if one member of a partnership, regardless of the wishes of his copartner, could do work upon his individual property beneficial to the same, and afterward recover from his partner therefor on the theory that his partner was benefited, especially where, as in this case, there was no agreement or understanding in existence under which the defendant or any purchaser of his right could have held or claimed an easement in the premises upon which this work was being done, such as would follow the claims upon which such work was being done, provided said claims were sold to parties strangers to this transaction.

One illustration, it would seem, would show the weakness of plaintiff's contention. Suppose plaintiff owned a string of six claims adjacent one to the other such that work on any one of them could be credited in his behalf on all of them. Then suppose that said plaintiff had a half interest

in six other claims, all of which were adjacent to the first-mentioned claims, the other half interest in said claims being held separately by six individuals, and all the claims, both those owned in common with the other persons and those owned by plaintiff, should be so situated that the work done by plaintiff on one of his claims could be held to be beneficial to the six claims in which he held half interest. Would anyone claim ⁵⁷⁷ that, if these owners of the other half interest in these claims each of them did the full amount of work necessary to hold their claim, that the plaintiff, without their consent and without any arrangement or agreement whatever, could put in a claim against these several persons for a share of the money he had expended on his sole property upon the contention upon his part that the work he had done was done as a general plan or scheme for the development of all these claims. Such a claim as that would seem to us out of reason. And let us suppose that each of the owners of a half interest in a claim had each a claim adjacent to their said partnership claim, and that work on each partnership claim would benefit the claim held by such partner in severalty, and also the claims held in partnership, then, under the contention of plaintiff herein, the plaintiff's interest in the partnership claims would be subject to all of the work done on the six claims held in severalty by his partners. To complete the illustration, let us suppose that all of the workings on plaintiff's own claim and upon each of his partners' claims were of the same nature and would benefit the partnership claims in exactly the same way, and all seven of said workings were, as far as the partnership claims were concerned, of no more benefit than any one of said workings would have been. Under these facts, could each of the partners credit himself up as against the partnership property for a share of the work done on his individual property? We think not.

In the discussion of this case, we have considered it as if the parties hereto were copartners in said claims; it having been so alleged and admitted in the pleadings. We do not, however, want to be understood as holding that two persons who unite in establishing a mining claim are more than cotenants or co-owners without some special agreement making them partners.

We therefore think that, under the facts as they appeared at the time the rulings were made by the circuit court, the court was correct in its rulings excluding the evidence offered.

The judgment of the lower court is sustained.

Work on One Mining Claim for the Benefit of Other Claims is discussed in the note to *McKay v. McDougall*, 87 Am. St. Rep. 411, and in the recent case of *Copper M. M. & S. Co. v. Butte*, 39 Mont. 487, ante, p. 595.

KELLOGG v. FINN.

[22 S. D. 578, 119 N. W. 545.]

BOUNDARIES.—The Government Surveyor's Field-notes giving the trend of boundary lines, together with the distances run, are material and competent evidence where the location of a quarter section corner is in dispute; and their exclusion is not cured by the testimony of a surveyor, called by one of the parties, of what his survey disclosed and that it agreed in a material part with the field-notes. (pp. 946-948.)

EVIDENCE—Judicial Notice of Facts Generally Known.—Courts usually take notice of whatever should be generally known within the limits of their jurisdiction. (p. 948.)

EVIDENCE—Judicial Notice of Federal Officers.—Courts take judicial notice of the more important federal officers, no matter where located, and of inferior federal officers located within the state. (p. 948.)

EVIDENCE—Certificate of Officer in Custody of Records.—A copy, from the records of the land office, of the government surveyor's field-notes required by law to be there recorded, certified to by the surveyor general, is admissible in evidence without being sworn to and without the testimony of witnesses that they have compared it with the original and found it a true copy. (p. 948.)

A NEW TRIAL for Newly Discovered Evidence Should be Granted, in case the location of a quarter section corner is in dispute, such evidence being that of the government surveyor who made the survey and who at the time of the trial was a government official in Alaska, but has since returned and states that his survey was made exactly as set forth in his field-notes. (p. 949.)

A. Sherin, for the appellant.

George W. Case, for the respondent.

579 WHITING, J. This matter comes before the court upon an appeal from the judgment of the lower court, and from the order of said court denying an application for a new trial; said application for a new trial being made both upon errors which it is claimed occurred at the trial, and also upon newly discovered evidence.

This action is one brought by the plaintiff to recover of the defendant the possession of a certain piece of farm land; the said plaintiff being the owner of the northwest quarter of section 15, and the defendant being the owner of the northeast quarter of that section. The sole question in dispute is the true location of the boundary line between these two quarters; it being claimed by the plaintiff that the quarter corner on the north line of this section is to the east and south of the point claimed by the defendant, and also that the center of the section is a few feet to the east of the point as claimed by the defendant. Upon the trial of this case the evidence established without any question the location of the government ⁵⁸⁰ mounds and stakes on

the southeast corner of said northeast quarter and the southeast corner of the section, the quarter corner on the south side of the section and the southwest corner of the section, and the quarter corner on the west side of the section. There does not appear to be much dispute as to the exact location of the northeast corner of this section. At the northwest corner of the section there appears to be a lake-bed, and one which was in such condition as to prevent the locating of the exact corner by mound at the time of the government survey. There was some evidence offered to show that mounds had been placed by the surveyor at the shore line of this lake-bed to indicate where the lines of this section struck such lake-bed.

Quite a number of exceptions were taken by the appellant upon the trial, but from the view we take of this case we deem it necessary to treat of but two matters; the first relating to the objections to what is known as "Exhibit 3," when the same was offered in evidence, and the other relating to the question of newly discovered evidence upon which a new trial is asked.

Exhibit 3 was a certified copy from the records of the Huron land office, being a copy of the government surveyor's notes required by law to be recorded in such land office records, certified to by party claiming to be the surveyor general; the part contained in Exhibit 3 being the notes in relation to the survey of the several boundary lines of this section 15, and it gave the trend of said lines as they varied from east and west and from north and south, together with the distances run. Said notes also showed that the north line of this section was straight. If the plaintiff was right in his contention, and the disputed corner where he claimed, then this north line was far from straight, as the corner as claimed was quite a number of feet south of the point it would be if in a direct line between the northeast corner of this section and the established points at the western side of the section and on the north line of section 16. It is therefore apparent that unless the disputed corner could be otherwise established, beyond a doubt, these notes would be very material. Each plaintiff and defendant had as a witness a local surveyor. The one called by plaintiff testified to finding what he took to be the mound marking the disputed corner, and ⁵⁸¹ claims to have discovered this mound several years before the trial of this action, and claims that he found a stake there; and the point that he testified as being this mound is the point claimed by plaintiff as the rightful location of the disputed corner. The surveyor on behalf of the defendant claims to have run the several lines in accordance with the methods pursued by the government, and that to assist in establishing the disputed corner, he went

to adjoining sections, and found undisputed government mounds at points on these sections from which he claims he had a right to determine where the disputed corner was, and he testified that he followed the field-notes of the government surveyor, and that he located the disputed corner where the defendant claims it should be located. We would say in passing that the location of the center of the section depends entirely upon the location of the disputed corner above referred to, because it seems admitted that the proper boundary lines between these farms would run from whatever is the true location of the disputed corner to the undisputed quarter corner on the south line of the section. There were witnesses, called by both parties, from the older residents still living in this vicinity, to show, in so far as possible, whether there had ever been a well-established government mound at the quarter corner on the north line of this section, and these witnesses differed very materially in their testimony. Some of the testimony would tend to show that the surveyor called by the plaintiff was mistaken in believing that the mound he discovered was a government mound.

Exhibit 3 was offered in evidence at the time the defendant was introducing his original case. Several objections were made thereto, including the objection that a proper foundation had not been laid for the admission of this instrument. This objection, of course, would go to the question of the identity of the party who signed the certificate to said Exhibit 3, and to the proof of his signature. There was no evidence on either of these points, and, unless this court will take judicial notice of who occupies the office of surveyor general in this state, and of his signature, the objection was good. Previous to this offer the defendant had offered Exhibit 3 in evidence, and the sole objection at that time was upon the ground that said exhibit was incompetent. The court excluded ⁵⁸² the exhibit both times the same was offered. There can be no question but what, if the proper foundation was laid, this exhibit was competent, it being strong proof as to where the original corner was located. If such corner was located in accordance with said field-notes, it could not have been at the point claimed by the plaintiff. The respondent claims that, even if this exhibit should have been received in evidence, its exclusion was unprejudicial, for the reason that the surveyor called by the defendant was allowed to testify fully in relation to the manner he surveyed this land, that he testified that the line he ran for the north boundary of the section was a straight line entirely across the north side of the land, and that he further testified that this agreed with the field-notes, and that for that reason the material part of the field-notes was before the jury uncontradicted. We do not think, how-

ever, that it can be claimed that the exclusion of this evidence, so strongly corroborative of the contention of the defendant, was cured by this secondary proof of what the field-notes showed. Certainly the defendant must have been injured by the exclusion of this exhibit.

This leaves the one question as to whether it was wrongful to exclude the exhibit on the ground that no proper foundation had been laid. While no hard-and-fast rule has been laid down as to what officers the courts should take judicial notice of, especially as regards officers other than those of the state or of the county wherein the court is holden, yet the authorities seem to be unanimous that the more important federal officers will be taken judicial notice of by the court, and we believe the rule laid down in 1 Greenleaf on Evidence, section 6, is fully sustained by the authorities, which rule is: "Courts will generally take notice of whatever ought to be generally known within the limits of their jurisdiction." This rule was quoted and approved in the case of *Wetherbee v. Dunn*, 32 Cal. 106, and seems to be upheld in 1 Elliott on Evidence, section 53, and in 7 Encyclopedia of Evidence, 977. In the case of *Lerch v. Snyder*, 112 Pa. 161, 4 Atl. 336, as well as in some of the authorities above cited, the court holds this rule should extend to those federal officers located in, and whose duties pertain to, the territory comprised within the jurisdictional limits of the court; or, when applied to our circuit courts, that such circuit courts ⁵⁸³ should take judicial notice of those federal officers located within the borders of our state, but not of the lesser federal officers located within other states. And in the case of *Lerch v. Snyder*, 112 Pa. 161, 4 Atl. 336, applying this rule, the court held that judicial notice could be taken of the internal revenue collector, both as regards his official character and also as regards his official acts. We feel that this is a safe rule to follow: That when it comes to the question of federal officials, the courts should take judicial notice of all persons occupying the more important positions, no matter where said officials are located, and that as relates to the inferior federal officials, the court should take judicial notice of who occupies the federal offices located within the limits of our state.

The respondent claims in his brief that Exhibit 3 was properly rejected because it was neither sworn to, nor were there witnesses to testify that they had compared it with the original record and found it a true copy. Neither of these grounds is tenable. The law seems to be well established that a mere certificate from an official having the custody of records is sufficient where the instrument is otherwise admissible, and upon this point we would cite 1 Greenleaf on Evidence, sections 483-485, 493.

The motion for new trial was also based on the ground of newly discovered evidence, shown by the affidavit of several persons, which evidence would consist of the testimony of several persons who had formerly lived near this land but had since removed from the neighborhood, but the most important piece of evidence being that of the government surveyor who made the original survey, and who at the time of the trial was a government official in Alaska, but who had since returned to his home in Sioux Falls in this state, and who states in his affidavit that his survey was made exactly as set forth in his field-notes, and that the north line of this section was straight. If the jury should believe this statement from a witness upon the stand, or should believe the field-notes, then the disputed corner could not possibly be where claimed by respondent. We fully recognize the rule laid down in the case of *Scheffer v. Corson*, 5 S. D. 233, 58 N. W. 555, to the effect that it is only under exceptional or unusual circumstances that a new trial will be granted on the ground of newly ⁵⁸⁴ discovered evidence going only to discredit or impeach a witness, or which is merely cumulative, but we think this case fairly illustrates a proper exception to this rule. This evidence is more than cumulative. It seems to us to be almost absolutely conclusive, and when we consider the further fact that this motion for new trial was urged before the judge who succeeded the trial judge, and who did not have the knowledge of this case that the trial judge had, and who perhaps would feel some hesitancy in granting a new trial when he had not presided at the trial, we think it is clear that to promote the ends of justice a new trial should be granted herein.

It is therefore the judgment of this court that the judgment of the lower court and the order denying a new trial be reversed.

For the General Rules for the Location of Boundaries, see the note to *Matheny v. Allen*, 129 Am. St. Rep. 990. Suits to ascertain and declare boundaries are discussed in the note to *Hays v. Bouchelle*, 119 Am. St. Rep. 66. And the conclusiveness of established boundaries is the subject of a note to *Washington Rock Co. v. Young*, 110 Am. St. Rep. 677.

Facts of Which Courts will Take Judicial Notice are discussed in the note to *Green v. Lineville Drug Co.*, 124 Am. St. Rep. 20. Judicial notice of boundaries is the subject of a note to *Gunning v. People*, 82 Am. St. Rep. 439.

CASES
IN THE
COURT OF CRIMINAL APPEALS
OF
TEXAS.

HARE v. STATE.

[56 Tex. Cr. 6, 118 S. W. 544.]

CRIMINAL LAW—Comment on Failure of Accused to Testify.

Where one on trial for felony testifies in his own behalf, it is error to permit the district attorney to bring out on cross-examination, and then comment on the fact in his argument, that the accused did not take the stand on a former trial of the case. (p. 951.)

CRIMINAL LAW—Comment on Failure of Accused to Testify.

A statute providing that the failure of a defendant to testify in his own behalf shall not be taken as a circumstance against him nor be referred to by counsel, is mandatory, and covers the proceedings on a former trial. (p. 952.)

E. T. Branch and A. C. Van Velzer, for the appellant.

F. J. McCord, assistant attorney general, and W. G. Love, district attorney, for the state.

7 RAMSEY, J. Appellant was convicted in the criminal district court of Harris county on the fifteenth day of March, 1909, on a charge of burglary, and his punishment assessed at confinement in the penitentiary for a period of three years.

1. There is no statement of facts in the record, but it appears by proper bill of exceptions that the evidence was sufficient to show that W. D. Allison was the special owner of the car alleged to have been burglarized, and that same had been burglarized in Harris county, Texas, and certain cigars of the "Optimo" brand taken therefrom, each box bearing the brand, "Rotan Grocery Company, Cigar Department, Waco, Texas. Distributors." That no eye-witness testified to the burglary, but the evidence as to the breaking was wholly circumstantial. That on the next day appellant was shown to be in possession of such cigars, of the market value of six and one-half cents each, and to be selling them for one cent

each, and that he had signed a fictitious name to a receipt to a party to whom he had sold some of the cigars, and that he had sold and offered for sale said cigars to several parties, the state's evidence being prima facie sufficient to show him guilty by circumstances. The bill also recites that at a former term of this court in December, 1908, the appellant had been tried for the same offense, and at said trial had been convicted, ⁸ and a new trial thereafter granted, and had not on such trial become a witness in his own behalf, and that on the trial from which this appeal results he was placed on the stand as a witness in his own behalf, and testified in substance that he had been employed to sell said cigars by one Buck Moore, Jr., and that he did not break into said railway car, but was in bed at the time same was broken into, and was not present at such breaking. There was no additional testimony adduced by him or further questions asked him by his counsel. Thereupon the district attorney asked appellant the following question: "You did not take the stand on the former trial of this case at the December term, did you?" To which question and answer sought to be elicited thereby his counsel objected, on the ground that it was a reference to his failure to testify on said former trial, and could not be taken as a circumstance against him. The court overruled the objection and the witness answered in the presence of the jury "No," such evidence and answer being offered by the state to show that appellant's testimony was false and a recent fabrication. A somewhat similar bill appears in the record, and complains of the argument of the district attorney in discussing the fact of the failure of appellant to take the stand in his own behalf on the former trial. This argument was to the effect, in substance, that the failure of appellant to take the stand on the former trial showed that his claim was a fabrication. We think the action of the court in permitting the question to be asked and requiring appellant to answer thereto was erroneous, and that the discussion of this testimony and answer of appellant by the district attorney was also erroneous, for which the case must be reversed. Article 770 of our Code of Criminal Procedure provides that "Any defendant in a criminal action shall be permitted to testify in his own behalf therein, but the failure of any defendant to so testify shall not be taken as a circumstance against him, nor shall the same be alluded to or commented on by counsel in the cause." It has been uniformly held by this court that this statute is broad enough to cover, and does cover, the proceedings on a former trial. From this ruling there has been no exception in the cases, and we have no doubt that this is a correct construction of the statute: See *Richardson v. State*, 33 Tex. Cr. 518, 27 S. W. 139; *Dorrs v. State* (Tex. Cr.), 40 S. W. 311; *Bradburn v. State*, 43 Tex. Cr. 309, 65 S. W.

519; *Pryse v. State*, 54 Tex. Cr. 23, 113 S. W. 938; *Wilkins v. State*, 33 Tex. Cr. 320, 26 S. W. 409; *Templeton v. People*, 27 Mich. 501; *Miller v. State*, 45 Tex. Cr. 517, 78 S. W. 511. It is urgently contended by the state that this statute should have no application in any case where on any trial the defendant takes the stand in his own behalf, and the proposition submitted by our assistant attorney general is as follows: "When a defendant at any trial during the progress of any criminal action takes the stand as a witness in his own behalf, he takes himself out of the protection ⁹ of the statute which forbids reference to the failure of the defendant to testify in a criminal action, and occupies the position of any other witness, and may be cross-examined and subjected to the same tests and rules affecting his credibility and the weight of his evidence as would apply to any other witness." We have, indeed, in many cases stated and held that when a defendant takes the stand, he is subject to the same rules on cross-examination that all other witnesses are subjected to: *Mirando v. State* (Tex. Cr.), 50 S. W. 714. This language, however, is always subordinate, and to be read in harmony with the other decisions which prevent and condemn a violation of a statutory right. There is no conflict between the ordinary rule and the rule to be applied in a case like the one at bar. We think the contention of appellant, stated in his brief, is manifestly correct, and that to construe the statutory inhibition as applying only to the present trial would render it dangerous to any citizen's case if his counsel decided not to put him on the stand; when, if a subsequent trial was had, the state's case might be stronger and require defendant's testimony, and his previous silence (when he had a right to be silent) be used as an indication of fabrication. Such a construction would destroy the presumption of innocence. The matter has been so frequently discussed by this court, and is so firmly fixed as the unbroken rule of the decisions of this tribunal, that it requires no further discussion.

2. Nor can we accede to the suggestion that because there is no statement of facts in the record, that appellant may not avail himself of this invasion of his rights. The bill of exceptions contained in the record states, in general terms, the proof on the part of the state and the nature and character of appellant's defense, and is sufficient to illustrate the contention of the respective parties, and is, as we believe, rather to be commended than condemned. It is the rule of this court, settled beyond dispute, that the statute above quoted is mandatory. Such, also, is the rule in other tribunals. It is thus stated in 12 Cyc. 576: "A statute which provides that the neglect or refusal of the accused to testify shall not be commented upon by the prosecuting attorney is usually mandatory." Again, if it was thought that a state-

ment of facts was essential to a proper review of a case, and that the matter was not fairly or fully stated in the bill of exceptions and could not be so stated, it would become the duty of the prosecuting officers to bring up the statement of facts on appeal.

For the reasons stated we think that the judgment of conviction must be reversed, and it is so ordered.

Reversed and remanded.

The Failure of the Accused to Take the Witness-stand in a criminal trial is not a fact upon which unfavorable inferences are to be predicated: See People v. Seaman, 107 Mich. 348, 61 Am. St. Rep. 326; Ferguson v. State, 52 Neb. 432, 66 Am. St. Rep. 512. As to when it is reversible error for the district attorney to comment in his argument upon the failure of the accused to take the stand in his own behalf, see Sample v. State, 52 Tex. Cr. 505, 124 Am. St. Rep. 1103; State v. Weaver, 165 Mo. 1, 88 Am. St. Rep. 406; McDonald v. People, 126 Ill. 150, 9 Am. St. Rep. 547. It is error to permit the defendant to be questioned, on his cross-examination as a witness, as to whether he testified at his former trial, because it is equivalent to a comment on his failure to appear as a witness at such former trial: Smith v. State, 90 Miss. 111, 122 Am. St. Rep. 313.

ELLIS v. STATE.

[56 Tex. Cr. 14, 117 S. W. 978.]

WITNESS—Discrediting by Showing Prior Conviction.—Where a witness is asked on cross-examination if he has not been convicted of "various offenses," the character of the offenses not being stated, an objection to the question is properly sustained. (p. 954.)

WITNESS—Discrediting by Showing Conviction for Vagrancy. The offense of vagrancy is not one of the violations of law which justifies the introduction of a conviction as a matter of impeachment. (p. 954.)

WITNESS—Discrediting by Showing Want of Chastity.—The general reputation of a witness for truth and veracity cannot be impeached by showing her general reputation for chastity. (p. 954.)

COURTS.—The Death of a Trial Judge does not end the term of court; and if his successor signs all the papers and acts upon the motion for a new trial, it will be presumed that he was appointed within term time. (p. 955.)

Phillips & Bledsoe, for the appellant.

F. J. McCord, assistant attorney general, for the state.

¹⁴ DAVIDSON, P. J. Appellant was convicted for selling whisky in violation of the local option law.

1. The witness Willie Pollard was asked, on cross-examination by ¹⁵ appellant's counsel, the following question: "Is

it not a fact that, during the past two years, you have been arrested for various offenses by the officers of Johnson county, Texas, and tried and convicted of said offenses?" The county attorney interposed objections, which were sustained by the court. Appellant's counsel stated that they expected to prove by said witness that she had been frequently arrested and convicted of various offenses during said time, and that, if said witness would not so testify, then said questions were asked for the purpose of laying a predicate for the purpose of impeaching said witness. We are of opinion that, as the bill presents the matter, there was no error in the ruling. The character of the offense for which she was arrested or convicted is not stated. There is nothing in the bill to show that the offenses mentioned were of such character as would be permissible as a matter of impeachment, and this is the purpose stated in the bill.

2. The same witness mentioned above was further asked by appellant's counsel as follows: "Is it not a fact that, during the last two years, you have been frequently arrested and charged with being a vagrant, to wit, a common prostitute, and that you have, when so arrested, pleaded guilty to such charge in the courts of the city of Cleburne and Johnson county?" The court sustained the county attorney's objection to this question, whereupon appellant's counsel stated they expected to prove that said witness had been so arrested and prosecuted, and had pleaded guilty to such charge on various occasions; and that if the witness would not so testify, then they expected by said question to lay a predicate for impeaching said witness. We are of opinion that the court's ruling was correct. The offense of vagrancy is not one of those violations of the law which would justify the introduction of a conviction as a matter of impeachment.

3. Another bill is reserved to the refusal of the court to permit appellant to prove by the witness Rogers the general reputation of Willie Pollard, in the community in which she lived, for chastity and virtue, and that it was bad. This is a similar question to that mentioned in the preceding bill of exceptions. The general reputation of a witness for truth and veracity cannot be impeached by showing her general reputation for chastity is bad, or that she was a prostitute: *McCray v. State*, 38 Tex. Cr. 609, 44 S. W. 170; *Hall v. State*, 43 Tex. Cr. 479, 66 S. W. 783; *Carter v. State*, 45 Tex. Cr. 430, 76 S. W. 437; *Brittain v. State*, 47 Tex. Cr. 597, 85 S. W. 278; *Woodward v. State*, 42 Tex. Cr. 188, 58 S. W. 135.

4. Appellant moved in arrest of judgment upon the following grounds: First. That the Hon. F. E. Adams tried the case about the seventeenth day of December, 1908; that he was judge of the county court of Johnson county when the

case was tried. That on or about the 25th of December, 1908, while motion for new trial was pending, Judge Adams died, and that thereafter there was no judge of the county court of Johnson county authorized to act upon the motion ¹⁶ pending for a new trial, or to pass upon the motion, or to assist in preparing the necessary and proper statement of facts or bills of exception to enable defendant to appeal. This motion is signed by attorneys for appellant. There was no affidavit made and no bill of exceptions reserved verifying the matter. The matters are simply stated as grounds upon which the arrest of judgment should be sustained. The death of Judge Adams, it seems, was supplied by the appointment of his successor, who passed upon the questions involved and signed up the papers necessary for the appeal. We cannot concur with counsel in their contention. The death of Judge Adams did not end the term of court, but held that matter in abeyance until there could be a successor appointed. It is not shown or stated that the successor was not appointed during the term of court allowed by law or fixed by the commissioner's court. We therefore presume the successor of the deceased judge was appointed within term time, inasmuch as he signed all the papers and acted upon the motion for a new trial. The notice of appeal itself was given while the successor of Judge Adams was upon the bench, and after the overruling of the motion for new trial. If the successor of Judge Adams was not authorized to enter orders, the notice of appeal would be invalid, and the jurisdiction of this court would not attach, and this appeal would not be legal. We are of opinion that there is no merit in this position.

As the record is before us, we are of opinion that the judgment should be affirmed, and it is accordingly so ordered.

The Impeachment of a Witness by showing his prior conviction of crime is discussed in the note to *Lodge v. State*, 82 Am. St. Rep. 34, and in the recent case of *Commonwealth v. Racco*, 225 Pa. 113, ante, p. 872. Want of chastity in a witness cannot be investigated for the purpose of impeachment, except in rape cases. There is authority, however, to the contrary: See *Kolb v. Union R. R. Co.*, 23 R. I. 73, 91 Am. St. Rep. 614; note to *State v. Sibley*, 53 Am. St. Rep. 479-482; *State v. Tuttle*, 67 Ohio St. 440, 93 Am. St. Rep. 689; *State v. Williamson*, 22 Utah, 248, 83 Am. St. Rep. 780.

SCHOENFELD v. STATE.

[56 Tex. Cr. 103, 119 S. W. 101.]

PERJURY.—An Indictment for Perjury Should in Terms Set Out and charge the substance of the testimony upon which the perjury is assigned, and not the conclusion of the pleader or the meaning of the testimony. (p. 961.)

PERJURY.—Whether Assignable upon Construction of Contract.—Perjury cannot be assigned on the testimony of the accused of his interpretation as to the legal effect of an alleged agreement, oral or written, between himself and another. (pp. 961, 962.)

No brief on file for the appellant.

F. J. McCord, assistant attorney general, for the state.

104 RAMSEY, J. Appellant was convicted of perjury and his punishment assessed at two years in the penitentiary.

This is a very interesting case, and as the question is one of first impression in this state, we shall make a fuller statement of it than might ordinarily seem either necessary or desirable. The case is fairly well stated in appellant's brief, and for the purposes of this opinion, though not stated with entire exactness, it is hereby adopted. It is as follows: "At the fall term of the district court of Karnes county an indictment was presented against F. A. Schoenfeld, charging him with the offense of perjury. At the spring term of the court the appellant, F. A. Schoenfeld, presented to the court a motion to quash the indictment, which was overruled and to which ruling appellant excepted. The indictment assigns the alleged perjury upon the testimony given by appellant in a civil suit in the county court of Karnes county, in which suit appellant, F. A. Schoenfeld, was plaintiff and Karnes City Independent School Corporation was defendant. After setting out the pendency of the suit, jurisdiction of the court, and that appellant was sworn, etc., the indictment charges: 'Whereupon it then and there became and was a material inquiry . . . whether there had been an understanding and agreement by and between said F. A. Schoenfeld and said Karnes City Independent School Corporation . . . at the time and before the execution of a certain written contract to the effect that said F. A. Schoenfeld bound and obligated himself to place in each window of a certain addition to the public school building then located in Karnes City, Texas, for the erection of which said addition said written contract was made, inside blinds which should slide up and down in grooves, similar to the blinds on the windows of the aforesaid public school building then located and in use in said Karnes City, Texas, and to which public school building said addition was to be made; and the said F. A. Schoenfeld did then

and there willfully and deliberately state and testify in substance that there had not been any understanding or agreement by or between said F. A. Schoenfeld and said Karnes City Independent School Corporation or the authorized representatives thereof at the time or before the execution of a certain written contract to the effect that said F. A. Schoenfeld bound and obligated himself to place in each window of a certain addition to the public school building then located in said Karnes City, Texas, for the erection of which said addition said written contract was made, inside blinds which should slide up and down in grooves similar to the blinds on the windows of the aforesaid public school building then located and in use in said Karnes City, Texas, and to which public school building said addition was to be made, and which said statement was material to the issue in said cause; whereas in truth and in fact there had been an understanding and agreement by and between said F. A. Schoenfeld and said Karnes City Independent ¹⁰⁵ School Corporation and the authorized representatives thereof at the time and before the execution of a certain written contract to the effect that said F. A. Schoenfeld bound and obligated himself to place in each window of a certain addition to the public school building, then located in said Karnes City, Texas, for the erection of which said addition said written contract was made, inside blinds which should slide up and down in grooves, similar to the blinds on the windows of the aforesaid public school building then located and in use in said Karnes City, Texas, and to which public school building said addition was to be made; which said statement was willfully and deliberately false and said F. A. Schoenfeld knew the same to be false when he made it.' Upon a trial had at the fall term, 1908, there was a verdict of guilty fixing the punishment at confinement in the penitentiary for the period of two years. A motion for a new trial was presented and overruled, and the case appealed to this court.

"In May, 1907, there was pending in the county court of Karnes county a civil suit in which F. A. Schoenfeld was plaintiff and Karnes City Independent School Corporation was defendant. The case was tried on May 24, 1907, said court having jurisdiction of the case. F. A. Schoenfeld was legally sworn as a witness and testified upon the trial. On June 12, 1906, the parties had entered into a written contract by which the appellant, F. A. Schoenfeld, was to 'provide all material and perform all work mentioned in the specifications and as shown on the drawings for a three room addition to the public school building of the town of Karnes City, Texas, which said drawings and specifications have been heretofore agreed upon and identified by the signatures of the parties.' The contract by article 3 recited: 'No

alterations shall be made in the work shown or described by the drawings and specifications except upon a written order of the president of the board of trustees.' On the question of blinds for the addition the original typewritten specification was as follows: 'Victoria Venetian Blinds. Place and hang on all windows inside. Venetian Blinds with rolling slats. Put on attachment and fasteners to leave the blinds in good working order.' The above specification was scratched out by running over it a lead pencil, and in its place was written in lead pencil the words, 'All windows to have Venetian Blinds.' Prior to the signing up by the parties appellant and the members of the board of trustees met in the office of the county judge in the courthouse at Karnes City, and we will let the different witnesses show what occurred: C. H. Baxter, a trustee, after naming different trustees, testified, we met in the county judge's office in this building on Saturday, we did not complete the details and we were to meet Monday at Dr. Pickett's residence to complete the contract. In county judge's office we discussed specifications, and alterations were made; when we got to the blinds it was read off, 'Victoria Venetian ¹⁰⁶ Blinds.' Someone asked Mr. Schoenfeld what kind of blinds those were, and he pointed to the blinds in Judge Parker's office and said, 'They are like them.' Some member of the board said we don't want them; we want blinds that fit inside of the windows in sections and that move up and down. We did not know the name of the blinds at all; we told him we wanted blinds that move up and down in grooves, and they were to be in three sections. Schoenfeld said he understood the kind we wanted, and he erased the original specification and made an alteration which was to cover the blind we wanted. The alteration is, 'all windows to have Venetian Blinds.' J. P. Rhodes testified he was a member of board of school trustees and was present at discussion of specifications in Judge Parker's office, and when the blinds were discussed. When we came to Victoria Venetian Blinds we did not know what they were, and we told Schoenfeld we wanted blinds like those in the old schoolhouse, and then Shoenfeld checked that 'Victoria Venetian Blinds' out and wrote it 'Venetian Blinds'; he wrote into the specifications, 'All windows to have Venetian Blinds.' Schoenfeld said the blinds we wanted were Venetian Blinds. We told him we wanted blinds that run up and down in a frame like those in the old schoolhouse. There was no more said on that subject. Mr. Lou Bailey, one of the trustees, testified he was present at conversation between Schoenfeld and board of trustees at Judge Parker's office when Schoenfeld called Victoria Venetian Blinds; he said something about their being like those on the courthouse, and Dr. Pickett stopped him and told him

it was not the kind we wanted, that we wanted blinds like those in the school building, and Schoenfeld said 'All right,' and erased that Victoria and just left Venetian Blind. He made no objection at all, just said, 'All right, gentlemen,' or something like that, and put it down. Dr. King, superintendent of board of trustees, testified Schoenfeld explained that Victoria Venetian Blinds was the kind then in the courthouse—this was in office of county judge; the board all objected to that kind of blinds and explained what we wanted; we told him we wanted blinds in sections that slide up and down in grooves like the ones in the old building; Schoenfeld then erased the typewritten specification and wrote in 'all windows to have Venetian Blinds.' Dr. W. S. Pickett testified he was president of the board of trustees on May 24, 1909. Prior to execution of contract was present at a conference in Judge Parker's office between the board and Schoenfeld. When we reached the specification relative to Victoria Venetian Blinds some member asked Schoenfeld what kind of blinds they were, and he pointed to the blinds in Judge Parker's office and said they were Victoria Venetian Blinds (slats fastened together with tape and raised and lowered by a string). I stopped him and said, 'We don't want that; we want the same blinds that we have in the old building, which sets in a frame, in three sections and works in grooves, each blind separately, you can ¹⁰⁷ let it down from top, bottom or middle.' I explained that we did not want Victoria Venetian Blinds; that it was not a duplicate of the blinds we had, and Schoenfeld said, 'Very well,' and he just marked out Victoria Venetian Blinds and wrote above it Venetian Blinds; we did not know those terms, but knew what we wanted and told him what we wanted; we described the blinds we wanted to him.

"The above is about all of the testimony as to the alleged understanding and agreement before the execution of the written contract 'to the effect that F. A. Schoenfeld was bound,' etc. Upon the trial of the civil suit Schoenfeld testified as a witness. As to what his testimony was, let the witness speak. Judge A. J. Parker, the county judge, says: 'One of the issues in the case was with reference to the kind of blinds that were put in the schoolhouse.' The defendant here took the stand and testified that he had a contract to put in Venetian Blinds that rolled up with a string and which were made up of slats fastened on strips of cloth to be drawn up and let down with a string. The defendant, the corporation, in that case claimed that the contract called for inside, three section, sliding blinds that worked in grooves. J. L. Brown, attorney for corporation, upon the trial in county court testified, Mr. Schoenfeld testified that some members of the board wished him to agree to put in a sliding

blind, and that he absolutely refused, positively refused, to agree to any such thing. I think that his language was that he told them he would throw up his contract before he would agree to do it. Schoenfeld said the discussion about the blinds did not occur in Judge Parker's office, but at the residence of Dr. Pickett. J. Albert King, an attorney for the school corporation, upon trial in the county court, testified, Mr. Schoenfeld testified that when the discussion of the blinds came up when they were going over the specifications the board of trustees told him they wanted three section, sliding blinds that worked in grooves, and that he told them he would not put in that kind of a blind, and that he would throw up his contract before he would agree to it. He said he never did agree to put in the three section sliding blind. Dr. W. S. Pickett testified, I heard the testimony on trial of the case in the county court. He testified that he did not make the contract to furnish the sliding blinds. He said he was to furnish Victoria Venetian Blinds. He denied having agreed to the blinds in Judge Parker's office. He said when he met in my house after the meeting in Judge Parker's office that he told us positively that he would throw up his contract before he would put in sliding blinds. He said he did not agree to put in the blinds we had in the old building as we expected."

A number of errors are assigned, but it becomes unnecessary in our view of the case to notice more than one question which is presented in several forms. The general proposition is submitted ¹⁰⁸ that perjury cannot be assigned upon the construction of a contract, either oral or written, and that the court erred in overruling appellant's motion to quash the indictment because in fact the pretended perjury is assigned upon the construction by defendant of an oral understanding and agreement. The claim is made that the indictment charges substantially that appellant willfully and deliberately testified that there had not been any understanding or agreement at the time or before the execution of a certain written contract or agreement to the effect he had bound and obligated himself to place in each window of a certain addition, for the erection of which said addition said written contract was made, inside blinds which should slide up and down in grooves, etc. In other words, that appellant swore that the "understanding and agreement" did not have the effect, nor did it mean that he had so bound and obligated himself. It will be noticed that the indictment does not allege that appellant denied that he had made any certain statement, or that he had in terms promised to do any certain thing, nor did he testify that he had made any particular statement, but seems to be based on a statement of testimony as to his understanding or agreement. It

will be noticed that the indictment does not pretend to set out the language used by appellant, the members of the board of trustees, or either of them in arriving at the alleged understanding and agreement, nor does it pretend to set out the substance of what was said and done to constitute the agreement and understanding, but merely the testimony of the appellant with reference to there being an understanding and agreement to the effect that appellant was bound and obligated to do certain things. We think the rule is well settled, and correctly settled, that an indictment for perjury should in terms set out and charge the substance of the testimony upon which the perjury is assigned and not the conclusion of the pleader or the meaning of the testimony. The general rule is thus stated in 30 Cyc. 1405: "Where the statement which is the basis of the accusation is a matter of construction, or a deduction from given facts, the fact that it is erroneous, or is not a correct construction, or is not a logical deduction from all the facts, cannot constitute it perjury or false swearing. A witness cannot be guilty of perjury in giving his opinion as to the legal effect of facts about which he is required to testify. Thus a misconception or mistake in swearing to the construction of a written instrument is not sufficient to warrant a conviction of perjury." To the same effect is Mr. Bishop, volume 2, section 1040, where he says: "Growing, it may be, out of the difficulty of proof, the doctrine is laid down that perjury cannot be committed in testimony to the legal construction of a written instrument." The most recent case discussing this matter and which clearly supports appellant's contention, is that of *Commonwealth v. Bray*, 123 Ky. 336. 96 S. W. 522. In that case the court of appeals of ¹⁰⁹ Kentucky held that on a prosecution under Kentucky Statutes of 1903, section 1174, defining the offense of false swearing as willfully and knowingly swearing to that which is false, an indictment charging that defendant swore that he never "made any trade" with a certain person was demurrable as not charging that defendant swore falsely to any fact as distinguished from a conclusion. In the course of the opinion, among other things, the court say: "Whether the accused and Morris had made a 'trade' depended upon whether they had had such negotiations as resulted in a legal contract between them. The result of such negotiations is a question of law. Whether that result is a binding legal contract is therefore a matter of opinion concerning the legal effect of what had transpired. False swearing, as a crime, is a name given by the statute to the act of willfully and knowingly deposing falsely in a sworn statement before some officer authorized to administer an oath, concerning some fact. Our statute reads (section 1174, Kentucky Statutes of 1903): 'Shall willfully and knowingly swear, depose or give

in evidence that which is false.' It is true that opinions are sometimes evidence, so are belief and knowledge—all mental acts. And a witness may swear falsely or commit perjury with reference thereto, in stating on oath that such and such was his opinion concerning a matter about which his opinion became a fact, and was receivable as such as a matter of evidence, when in truth such was not his opinion, and he willfully, knowingly, and corruptly falsely stated that as his opinion which was not his opinion: *Commonwealth v. Edison*, 10 Ky. Law Rep. 340, 9 S. W. 161; *Commonwealth v. Thompson*, 3 Dana, 301. But where the statement which is the basis of the accusation is a matter of construction, or a deduction from given facts, that it is erroneous, or is not a correct construction, or is not a logical deduction from all the facts, cannot constitute it false swearing. The aim of the statute was not to repress freedom of thought, or to in anywise control the exercise of the judgment. But it was to prevent the giving in evidence of sworn statements, a verity of facts which did not exist, upon which judgment and mental speculation were to be indulged. The accusation in this indictment does not charge that appellee swore falsely as to any fact. The demurrer was therefore properly sustained." Such also is the holding of the supreme court of the state of Indiana in the early case of *State v. Woolverton*, 8 Blackf. 452, where it was held that an indictment for perjury cannot be maintained where the supposed perjury depends upon the construction of a deed. The opinion in that case is as follows: "The indictment charges that a suit was pending before two justices of the peace wherein Stephen S. Collett was plaintiff and Abel Woolverton was defendant, in which suit said Woolverton, who is the defendant to the indictment, filed the following plea: 'And for a further and second plea the said defendant says that the title of lands is in controversy in this cause; ¹¹⁰ that a deed of defeasance was made to this defendant by the said plaintiff, Collett; and that by the outstanding title in this cause, he will be enabled to show that said Collett has no right to the possession of the lands set forth in said Collett's complaint; and that the title to lands is in issue in this cause; and this he is ready to verify. Abel Woolverton.' This plea is charged to have been sworn to before competent authority. The assignment of perjury upon it is as follows: 'Whereas, in truth and in fact at the time the said Abel Woolverton took his oath and made his affidavit as aforesaid, the title of lands was not in issue in the said cause, nor was the title of lands in controversy in the said cause at the time of making the affidavit and taking the said oath by the said Abel Woolverton,' etc. It will be observed that the existence of the deed of defeasance is not denied, and it is very clear to us that the assertions in the

plea upon which the jury assigned, 'that the title of lands is in controversy' and 'that the title to lands is in issue in this cause,' are but mere opinions of Woolverton as to the legal effect of said deed of defeasance, and being so, they will not support an indictment for perjury. The case of *Rex v. Crespigny*, 1 Esp. 280, is directly in point. That was an indictment for perjury, founded upon an affidavit of Crespigny, that he had not authorized one Dickinson to use his name in suing one Utterson, upon a claim which, among many others, he, Crespigny, had transferred by a certain deed of assignment to said Dickinson. Whether he had authorized such use of his name depended upon the construction given to that deed of assignment, and Lord Kenyon held that an indictment for perjury depended upon the construction of a deed, and directed the jury to acquit the defendant.

"In this case, the whole of the affidavit being set forth in the indictment, the question on the construction of the oath is presented upon the motion to quash." It is a fact that all these decisions as well as the declarations or testimony cited are based upon the decision of *Rex v. Crespigny*, in the court of king's bench, common pleas of England, delivered in 1799, 1 Esp. 279. As this case is not readily accessible to the profession, and as it is the leading case on this question, for their benefit we copy it entire. It is as follows: "This was an indictment against the defendant for perjury. Plea of not guilty. The case stated on the part of the prosecutor was, that in the year 1783, the defendant being procurator general of the court of admiralty, resigned that office to a person of the name of Heseltine, reserving to himself the emoluments of all such suits as had been commenced during his time, and which were then depending. Soon after this transaction, wishing to retire from all concern with the business, he treated with the prosecutor, Mr. Dickinson; and by deed between him and Dickinson he assigned over all his right before reserved in his agreement with Heseltine, giving to Dickinson, by the same deed, a power ¹¹¹ to prosecute all actions then pending in his name; but to receive the profits on his own account.

"One Utterson having become indebted to Dickinson, for business done in the court of admiralty, was sued by him in the court of common pleas, in Crespigny's name.

"In that suit, on a motion to stay proceedings, Crespigny made an affidavit, wherein he swore that in the year 1783 he had resigned his place to Heseltine; and that from that period he had not authorized any person to sue in his name; and that the action then depending against Utterson was brought in his name without his authority. Upon this affidavit the perjury was assigned. Lord Kenyon, on this statement being made, asked Garrow (who led for the prosecu-

tion) if the perjury did not turn on the construction of the deed, as to what passed under it from the defendant to Dickinson?

"Garrow admitted that in a great measure it did.

"His lordship then said that the indictment could not be maintained; that if the defendant had in any manner acted inconsistently with the obligation entered into by his deed, it was the object of a civil action; but that where the injury arose from a misconception or mistake in the construction of a clause in a deed for such an injury, an indictment for perjury could not be supported. His lordship therefore directed a verdict of acquittal."

We think that a fair analysis of the indictment in this case brings it well within the rule laid down in the cases cited, and that no conviction could be predicated either on the indictment or on the state of facts contained in the record. Without discussing the other questions contained in the record, it is ordered that the judgment of conviction be set aside, reversed and the prosecution ordered dismissed.

The Sufficiency of Indictments for Perjury is the subject of a note to *Moore v. State*, 124 Am. St. Rep. 654.

EX PARTE McCARTY.

[56 Tex. Cr. 209, 119 S. W. 682.]

EXTRADITION—Change of Government from Territory to State.—The right of a state to extradite a fugitive from justice is not affected by its transition from a territory to a state government between the time of the commission of the offense and the arrest of the prisoner. (p. 965.)

No brief on file for the appellant.

F. J. McCord, assistant attorney general, for the state.

²⁰⁹ **DAVIDSON**, P. J. Relator was arrested under authority of a warrant issued by the governor of Texas honoring a requisition made upon said governor by the governor of Oklahoma for the return of relator to the state of Oklahoma to answer a charge preferred by indictment charging him with selling a false and forged check. Relator was arrested in Amerillo, Potter county, in ²¹⁰ pursuance of the warrant issued by the governor of Texas, and resorted to writ of habeas corpus for his discharge.

Relator relies, first, on the proposition that the offense having been committed before Oklahoma became a state in the federal Union, and while it was a territory, that the governor of Oklahoma was without authority under the stat-

utes to issue a warrant for relator's arrest or to make a demand upon the governor of the state of Texas for his return to that state for trial. Second proposition is that the statutes of the United States did not authorize the governor of Oklahoma to make requisition for a person charged with having committed an offense, when such offense was committed prior to the time when such territory was declared to be a state by Congress. The two propositions are practically the same. We are of opinion that relator's contentions are unsound. Under the acts of Congress authority is provided for the extradition of fugitives from justice taking refuge in the territories, as well as authority for the territories to make the demand for fugitives from such territories to any state in the federal Union where the fugitive has made his asylum. It would hardly be contended at this late day that the mere change of the form of government by peaceful, revolutionary or by any violent means, would in and of itself change the rights of the sovereignty or of the citizenship. It would take an affirmative act on the part of the sovereignty changing the form of government to affect the previous conditions of things or the attitude of the government toward the citizenship, either as to rights of person, things or property. The contention of relator here seems to be centered in the thought that a mere change of form of government from territorial to state would so alter the rights of the state or of the relator that an offense committed under the territorial laws would not be subject to extradition if the indictment was not returned until after the territory became a state. Before this proposition could be sound or urged the evidence would have to show that in changing the form of government, the offense of which relator stands indicted had been abrogated under the new form of government. The mere transition of the form of government from territorial to state would not of itself abolish the crime imputable to relator, if the act committed constituted a crime under the territorial law. There is nothing to indicate that the acts charged in the indictment were not criminal at the time they were committed and while Oklahoma was a territory, as well as at the time the indictment was presented.

As this record presents the matter, we are of opinion that the trial court correctly remanded relator to the custody of the officer to be returned to Oklahoma, the demanding state, for trial under the indictment set out in the transcript; and it is ordered that this judgment be affirmed.

The Law of Extradition is the subject of a note to *Farrell v. Hawley*, 112 Am. St. Rep. 103. For recent decisions on this subject, see *In re Collins*, 153 Cal. 340, 129 Am. St. Rep. 122; *In re Moyer*, 12 Idaho, 250, 118 Am. St. Rep. 214; *Dennison v. Christian*, 72 Neb. 703, 117 Am. St. Rep. 817; *Farrell v. Hawley*, 78 Conn. 150, 112 Am. St. Rep. 98, and note.

HIGHTOWER v. STATE.

[56 Tex. Cr. 248, 119 S. W. 691.]

HOMICIDE—Instruction as to Provocation or Adequate Cause.

Where a statutory ground of "provocation or adequate cause" is shown by the evidence, it is the duty of the court to inform the jury that such cause is adequate, leaving to the jury the determination as to whether or not there was sudden passion engendered by reason of adequate cause. (p. 968.)

ASSAULT TO MURDER—Instruction as to Adequate Cause.—

In a prosecution for assault to murder, where the evidence shows that the wife and mother in law of the accused threw him down and were beating him at the time of the alleged offense, the court should not leave to the jury to determine under the facts what is provocation or adequate cause, when the statute provides that an assault creating pain or bloodshed is adequate cause. (pp. 967, 968.)

ASSAULT TO MURDER—Use of Weapon—Intent.—In a prosecution for assault to murder, where the evidence shows that the wife and mother in law of the accused threw him down and were beating him when he used on them a pocket knife with a blade some two and a half inches long, the jury should be instructed that unless there was a specific intent to kill they should acquit him of assault to murder. (pp. 968, 969.)

ASSAULT TO MURDER—Prior Threats of the Injured Person.

On the trial of a man for assault to murder his wife and mother in law, where there is evidence of their previous threats to kill him, and of their having assaulted him, whereupon his alleged offense was committed, the instruction to the jury should be based not on the knowledge of the accused of the threats, but on his belief that such threats had been made, and that acting on such belief he had defended himself from the attack made on him. (pp. 967, 969.)

ASSAULT TO MURDER—Instruction Limiting Self-defense.—

Where the state's evidence in a prosecution for assault to murder is to the effect that the accused made an assault upon his wife and mother in law, while his evidence shows that they threw him down and were beating him and calling for a near-by gun, whereupon he used a pocket-knife to free himself, wounding the wife to some extent, it is error in charging self-defense to instruct the jury that if he exercised more force than was necessary to protect himself, then he would be the aggressor and guilty of an assault to murder or an aggravated assault. (p. 970.)

J. H. Turner and R. T. Brown, for the appellant.

F. J. McCord, assistant attorney general, for the state.

249 DAVIDSON, P. J. This conviction was for assault with intent to murder, the punishment being assessed at five years' confinement in the penitentiary.

The issues of assault to murder, aggravated assault, and simple assault were submitted by the court in his charge to the jury. Quite a number of errors are assigned in reference to the court's charge and refusal to give appellant's requested instructions. Briefly stated, the evidence for the prosecution is to the effect that appellant and his wife had separated. They had one child, which was kept by the wife.

There had been a division of the property between them under an oral agreement. On the day of the difficulty appellant had gone, in pursuance to an agreement with his wife, near the house where she was residing, the home of her father and mother, to see the child. He did not go to the house, but stopped a short distance away. The wife brought the child out to see him and he took the child and played with and fondled it for a little while. The mother in law appeared upon the scene and trouble began. It is contended by the state that appellant sought to carry the child away over the protest of the mother and mother in law. That the wife had the child by the head or body and appellant by the feet. Finally he relinquished his hold, got out his knife and began cutting his wife, inflicting upon her several wounds. That he also made an assault upon his mother in law. The state further introduced evidence in regard to statements made at the time expressing his intention to kill his wife. The knife used was a pocket-knife with a big blade broken out or gone, leaving two small blades, one of which was used by appellant. The blade is shown to be two or two and one-half inches in length. His version of the matter is that his wife and mother in law made an assault upon him; had him down and were beating him; that he got his knife and cut himself loose.

1. The court charged the jury in reference to manslaughter and adequate cause, in substance, as follows: That if the jury should believe beyond a reasonable doubt that defendant cut Mattie Hightower, but at the time he did so his mind was aroused to such a degree of passion, known as anger, rage, sudden resentment or terror, as to render him incapable of cool reflection, and that such state of mind was produced by acts, words and conduct or either acts, ²⁵⁰ words or conduct, if any, on the part of Mattie Hightower and Melissa Waldon, or either of them, and that these acts, words or conduct "were sufficient to arouse passion, known as anger, rage, sudden resentment or terror in the mind of a person of ordinary temper sufficient to render it incapable of cool reflection, and that the defendant's mind was thereby rendered incapable of cool reflection, and while in this state of mind he cut, stabbed or struck Mattie Hightower with a knife, and that said knife was a deadly weapon, then you will find defendant guilty of an aggravated assault, and in determining the condition of defendant's mind and the adequacy of the provocation to arouse it to such passion as above explained, you will take into consideration the relation of the parties to each other, their acts and conduct and words, and all the facts and circumstances offered in evidence. As to what would be sufficient provocation, and as to whether or not the defendant's mind was by passion rendered incapable of cool reflection and as to whether the assault, if any, was committed under the influence of sudden passion are questions of fact

for the determination of this jury." It is urgently insisted this charge is error, in that it submits to the jury the legal right to determine under the facts of this case what is provocation or adequate cause. In other words, it authorized the jury to determine the fact whether or not there was adequate cause. We believe appellant's contention is well taken. The evidence introduced by appellant was to the effect, as above stated, that the two women made an assault upon him and had him down and were beating him. The statute provides an assault creating pain or bloodshed is adequate cause. This is made so by the statute. Wherever a statutory ground of adequate cause is shown by the evidence, it is the duty of the court to inform the jury that such cause is adequate, leaving to the jury the determination as to whether or not there was sudden passion, engendered by reason of adequate cause. Where the statute makes the adequate cause, and provides that particular facts shall constitute adequate cause, the court must so instruct the jury, and not leave it to them to determine the adequacy of the cause. There are decisions to the effect that where there may be adequate cause from a combination of circumstances not enumerated in the statute, the question may be left to the jury to determine whether or not such combination of facts or circumstances is sufficient to render his mind capable of cool reflection, but that rule does not obtain where the statute has provided the ground of adequate cause. It becomes a matter of law where the statute provides it, and the court must so instruct the jury. This portion of the court's charge is not correct, and as it instructed the jury in reference to what might authorize them to acquit of an assault to murder and convict of an aggravated assault, it bore upon a serious question in the case, and the error was material.

2. It is also contended that the court was in error in failing to ²⁵¹ give in charge article 717 of the Penal Code. The evidence in the case in regard to the knife as stated shows the blade to be from two to two and one-half inches in length, and there being a conflict in the evidence as to the purpose and intent with which the knife was used, the court should have given this article in charge to the jury. The failure of the court to so charge is emphasized in the sixth division of the charge as follows: "A deadly weapon is one capable and likely to produce death or serious bodily injury, considering the manner of its use, and you will take into consideration in determining the question in this case as to whether or not the knife was a deadly weapon, that is, its size, shape, its physical condition and the manner of its use, and if you find from the evidence that the said knife was not a deadly weapon, then the law would raise no presumption that the assault, if any was made, was not done with the specific intention to kill." The court should have charged the jury

under article 717 unless there was a specific intent to kill they should acquit of assault to murder. That article reads as follows: "The instrument or means by which a homicide is committed are to be taken into consideration in judging of the intent of the party offending; if the instrument be one not likely to produce death, it is not to be presumed that death was designed, unless from the manner in which it was used such intention evidently appears." Article 719 of the Penal Code provides that "Where a homicide occurs under the influence of sudden passion, but by the use of means not in their nature calculated to produce death, the person killing is not deemed guilty of the homicide unless it appears that there was an intention to kill, but the party from whose act the death resulted may be prosecuted for and convicted of any grade of assault and battery." The presumption of innocence obtains until the case has been made out beyond reasonable doubt. There is no evidence offered in the case in regard to the deadly character of the knife further than as stated, to wit, that it was an old pocket-knife with two blades, the one used estimated to be from two to two and one-half inches in length. This may or may not be a deadly weapon; that would be owing largely to the attendant circumstances of the case as shown by the facts. Here the court charges the jury not the presumption arising from the two statutes quoted, but exactly the converse to it, which is stated by the court that if they should find that the knife was not a deadly weapon, then the law would raise no presumption that the assault, if any was made, was not done with the specific intent to kill. The very converse of the law. This exception to the charge is well taken.

3. In regard to threats, the court charged the jury that if previous to the time of cutting, Malissa Waldon and Mattie Hightower had made threats to take the life of the defendant and defendant knew of them, etc., it is contended that the court should have instructed the jury that if defendant believed that such threats had been made ²⁵² and acting under that belief defended himself from the attack made on him, etc. Upon another trial this defect in the charge should be remedied.

4. The court also in charging self-defense instructed the jury that if appellant exercised more force than was necessary to protect himself, then he would be the aggressor, and would be guilty of an assault with intent to murder, or an aggravated assault, according as the jury might find the facts to be. The contention here is that this charge was a limitation on his right of self-defense, and practically eliminated the defensive theory. We are of opinion that this criticism is correct. The defensive theory was based upon the fact or facts that appellant's assailants had him down and were beating him, and that he used the knife to free himself from this

attack, and that he succeeded in doing so after inflicting some wounds at least upon his wife. If the parties had him down under the circumstances, beating him and calling for a gun, as the testimony indicates, and it was near the house where the gun was kept, appellant certainly had the right, under the circumstances, to act in self-defense, and this right should not have been limited under the facts of this case to the use of excessive force. The state's case did not authorize such a charge, because the testimony introduced by the prosecution was to the effect that he made a direct assault upon his wife and mother in law, and they did not assault him. His testimony and theory is directly the converse, that he made no assault, but they assaulted him, got him down and were beating him and calling for a gun, and that he used his knife to free himself, and he succeeded, and that he did not prosecute the difficulty after they got off of him. We are therefore of opinion that this limitation on the right of self-defense was such a one as was not justified, and was harmful: See *Terrell v. State*, 53 Tex. Cr. 604, 111 S. W. 152.

5. It is contended that the court erred in limiting appellant's right of self-defense in coupling all the acts that his assailants did before he would be entitled to defend against their assault, when the law would justify him in defending against any one of the acts. Upon another trial this trouble should be avoided.

6. Upon another trial the court, in submitting the issue of aggravated assault and in defining adequate cause as a predicate for aggravated assault, should inform the jury what it takes to constitute an assault under the manslaughter law, which forms a basis of passion which will reduce a killing to manslaughter. If the parties made an assault upon appellant which produced either pain or bloodshed, then the jury should be instructed that such adequate cause would be predicate for sudden passion.

For the errors discussed, the judgment is reversed and the cause is remanded.

Ramsey, J., concurred in the result.

The Law of Self-defense is discussed in the notes to *State v. Sumner*, 74 Am. St. Rep. 717; *State v. Gordon*, 109 Am. St. Rep. 804.

The Admissibility in Evidence of Threats in prosecutions for homicide is the subject of a note to *State v. Nelson*, 89 Am. St. Rep. 691.

HARTNETT v. STATE.

[56 Tex. Cr. 281, 119 S. W. 855.]

EMBEZZLEMENT—Funds Received by Officer Without Authority.—Since a policeman assigned to the position of jailer has no authority to receive money in payment of fines assessed in the corporation court of the city, he cannot be convicted of misappropriation of such funds under a statute making it a crime for any officer of a city to convert money belonging to the city and coming into his possession by virtue of his office. His authority in such a case is defined by law, not by custom; and the principle of estoppel cannot be invoked against him. (pp. 972-974.)

F. J. Duff and Robt. A. John, for the appellant.

F. J. McCord, assistant attorney general, for the state.

283 RAMSEY, J. The charging part of the indictment against appellant is in these words: "That Eugene Hartnett on or about the third day of March, One Thousand Nine Hundred and Eight (1908) and anterior to the presentment of this indictment in the county of Jefferson, and State of Texas, Eugene Hartnett was then and there a police officer of the incorporated city of Beaumont, which said city was then and there duly and legally incorporated under the laws of Texas, and was then and there acting and serving as such police officer, and as such police officer and by virtue of his said office there had come into his hands and was in his charge, custody and possession the sum of two hundred and eighty-one dollars and fifty cents, lawful and current money of the United States of America, and of the value of two hundred and eighty-one dollars and fifty cents, a better description of which said money is to the grand jurors unknown, which said money was then and there the property of said incorporated city of Beaumont, and the said Eugene Hartnett did then and there unlawfully and fraudulently take, misapply and convert to his own use the said money against the peace and dignity of the State." The indictment so returned against him ²⁸⁴ and the prosecution which ensued were based on article 103 of our Penal Code. This article is as follows: "If any officer of any county, city or town in this State, or any clerk or other person employed by such officer, shall fraudulently take, misapply or convert to his own use any money, property or other things of value, belonging to such county, city or town, that may have come into his custody or possession by virtue of his office or employment, or shall secrete the same with intent to take, misapply or convert it to his own use, or shall pay or deliver the same to any person knowing that he is not entitled to receive it, he shall be punished by confinement in the peni-

tentiary for a term not less than two nor more than ten years.”

Many questions were raised in the court below which have also been urged in this court, as grounds for reversal of the judgment of conviction. We think the case must be reversed, because under the uncontradicted evidence the conviction cannot stand, for the reason the moneys appropriated must be public funds, owned by the city, and must come into the possession of the officer by virtue of his office, and his duties must be defined by law and cannot be created by custom or usage. The evidence in brief showed that appellant was a policeman in the city of Beaumont, and that he was assigned to the position of jailor, and that the moneys, the embezzlement of which is charged herein, came into his possession in payment of fines assessed (quite irregularly) against various defendants in the corporation court of Beaumont. There was absolutely no evidence in the record that by law he was authorized to receive such moneys. This authority by law was vested in the city marshal, and he was required to make payments monthly to the city treasurer. While it is possible that appellant might have been indicted and convicted as an employé of the marshal, it is certain that as here charged, where the conviction is sought by reason of misappropriation of funds received by him as an officer and by virtue of his office, that under the authorities a conviction cannot be sustained. This question is, we think, definitely settled beyond serious doubt by the decision of this court in the case of *Warswick v. State*, 36 Tex. Cr. 63, 35 S. W. 386. It was there held in substance that an indictment based upon article 103, Penal Code, will not lie against a county judge for a misapplication or conversion of county school funds, because such funds cannot come into his hands by virtue of his office; and the law does not authorize a county judge, as such officer, to receive county school moneys. The suggestion is made, however, by Judge Henderson that the court should not be understood as holding that the commissioner's court might not empower the county judge or any other person to receive money coming to the county for and on behalf of the county, but in such contingency the money or property would come to such person, not by virtue of his official capacity, but on account of his employment or agency. A quite similar question ²⁸⁵ came before the supreme court of Missouri and was decided in the case of *State v. Bolin*, 110 Mo. 209, 19 S. W. 650. Their statute is somewhat similar, though rather broader than ours. It is as follows: “If any officer, appointed or elected by virtue of the constitution of this state, or any law thereof, including as well all officers, agents, and servants of incorporated cities and towns, or municipal

townships or school districts, as of the state and counties thereof, shall convert to his own use, in any way whatever, or shall use by way of investment in any kind of property or merchandise, or shall make way with or secrete any portion of the public moneys, or any valuable security by him received for safekeeping, disbursement, transfer, or for any purpose, or which may be in his possession, or over which he may have the supervision, care or control, by virtue of his office, agency or service or under color or pretense thereof, every such officer, agent or servant shall, upon conviction, be punished by imprisonment in the penitentiary not less than five years." Passing on this statute the supreme court of Missouri say: "No provision of the statute is pointed out or found which directs or authorizes the public school money of the state or county to be placed in the possession or under the supervision, care or control of a justice of the peace, for safekeeping, disbursement, transfer or other purpose, and we are unable to see how he, as a public officer, can be guilty of embezzling funds which never came into his possession under any authority of law by virtue of his office. If he had no right to the possession or control of this public money as an officer, he would have no greater right when acting merely under color or pretense of office. We do not think the language of the statute 'under color or pretense' of an office can be construed to apply to an officer who, having in fact no right to the custody of public money, obtains the possession of it by falsely representing that he is entitled to its custody by virtue of his office. The statute was only intended to make one acting officially, under color of office only, equally liable for the misappropriation of the public money coming into his possession by virtue of his supposed official right to receive it, as he would have been had the title to his office been perfect." The doctrine laid down in the Warswick case (36 Tex. Cr. 63, 35 S. W. 386) was affirmed by the supreme court of Nebraska in the case of Moore v. State, 53 Neb. 831, 74 N. W. 319, where the matter is exhaustively considered. See, also, San Luis Obispo County v. Farnum, 108 Cal. 562, 41 Pac. 445. In the Moore case the court say: "That where an officer receives money which he is not by law authorized to receive, such money is not received by him in his official capacity, and that any duty which he may owe of paying the money is only that which rests upon any debtor or bailee, is established by many cases." It is suggested in the brief of our learned assistant attorney general that by the circumstances of this case appellant cannot defend on the ground that his acts were not within the limits of his legal authority, and the suggestion ²⁸⁶ is made that appellant is estopped from denying the fact that his act was authorized. This position

is not, we believe, sound. In the case of *Moore v. State*, 53 Neb. 831, 74 N. W. 319, on this question the supreme court of Nebraska say: "Nor do we think that there is any principle of estoppel whereby the defendant is forbidden to deny that he is within the class against which the penalties of the statute are denounced. For the purposes of this case we need not inquire whether the same rules apply as to estoppel in civil and in criminal cases, or whether a man may ever be estopped to plead the law. The cases cited as applying estoppels are for the most part cases where an officer charged by law with the duty of collecting taxes has actually collected them and then refused to turn them over because illegally levied. There the general duty of collecting the money was imposed by law on the officer. The money was paid. The legality of the tax was a question solely between the public and the taxpayer, and the latter having voluntarily paid the tax, it was no affair of the collector whether he might have resisted the payment or not. The matter was not one of an estoppel. The issue was merely immaterial. No one could defend a charge of embezzlement as the agent of an individual, on the ground that a third person had paid money which he did not owe and could not have been compelled to pay; but there is a multitude of cases holding that he may defend if he had no authority to receive payment at all. Akin to these cases are those where a foreign corporation is prohibited from doing business except on compliance with certain requirements, and an agent embezzles its funds, and alleges in defense that the principal had no right to make the contracts leading to the collection of the money. This is really a case of an immaterial issue, or if it be one of estoppel, it is an estoppel to deny the facts giving the principal a right to do business. Where a criminal statute applies only to persons of a certain class, the doing of the acts which the statute forbids does not estop the defendant from denying that he belongs to the class which is alone subjected to the penalties. Yet that is at the last analysis the argument of the state on this branch."

This case is, as we believe, readily distinguishable from the ruling of our supreme court in the case of *State v. Brooks*, 42 Tex. 62, upon which our assistant attorney general so much relies. It was there held, and correctly, that a deputy sheriff is an officer authorized to collect taxes, and as such is liable to indictment for embezzling money collected by him as taxes. The statute at the time of the prosecution of the case against Brooks was as follows: "If any officer of the government who is by law a receiver or depository of public money, or any clerk or other person employed about the office of such officer, shall fraudulently take or misapply or convert to his own use any part of such pub-

lic money, or secrete the same with intent to take, misapply, or convert to his own use, or shall ²⁸⁷ pay or deliver the same to any person, knowing that he is not entitled to receive it, he shall be punished by confinement in the penitentiary for a term not less than two nor more than ten years." The indictment charged Brooks in the language of the statute. Exceptions were presented to the indictment alleging its insufficiency, because, among other reasons, Brooks was not shown to be such an officer of the government as was included in the terms of the statute defining and punishing embezzlement. This motion prevailed in the court below and an appeal was prosecuted, as was then allowed, by the state to test the sufficiency of the indictment. The argument was made that the deputy sheriff is appointed by the sheriff and gives bond to him, and not to the state; that the sheriff, on the other hand, is designated by the constitution and the law as the person to collect taxes, and that the deputy sheriff did not bear such relation to the matter as constituted him under the law an officer charged with this duty. It was held, as stated above, that he was such an officer, and the court called attention to the fact that by law the sheriff was authorized to make appointments of deputies, and that the statute authorizing such appointments provided that every deputy shall have the like authority in regard to collecting taxes within that portion of the county which may have been allotted to him, which the sheriff would have: Paschal's Digest, art. 7615. It was also pointed out that the statute requires the deputy to take the same oath as required by the sheriff faithfully to discharge the duties required of him (Paschal's Digest, arts. 7608, 7615), and that in case of disability, death or removal of the sheriff, the deputies are required to proceed in the collection of taxes until the vacancy is filled: Paschal's Digest, 7616. It was said: "In various other sections of the law the deputy is recognized as authorized to collect taxes": Paschal's Digest, arts. 7619-7621. It was held that "it is clear that the deputy sheriff has both the actual and legal possession of the taxes which he collects, and is not subject to indictment for theft." In that case it will be observed that the duties of the deputy sheriff were defined and fixed by law. He was authorized to collect taxes, and in the absence or during the disability of the sheriff was charged with the duty of so doing. In a sense he took the place of and acted instead of his principal, clothed with his duties and charged with his responsibilities, and this as a matter of statute. These elements are conspicuously wanting in this case, where no ordinance clothed appellant with the authority or placed upon him the responsibility of receiving and collecting fines.

The indictment charges an offense; it follows the language of the statute. As we believe, however, under the law the facts do not support a conviction. In this attitude of the record, and in view of the fact that the indictment does charge an offense against the law, it results that the prosecution cannot be dismissed, but the ²⁸⁸ judgment of conviction is reversed and the cause remanded for proceedings in accordance with this opinion.

Brooks, Judge, absent.

The Law of Embezzlement is the subject of a note to *Eggleston v. State*, 87 Am. St. Rep. 19. Recent decisions on the subject are *Milbrath v. State*, 138 Wis. 354, 131 Am. St. Rep. 1012; *State v. Casey*, 207 Mo. 1, 123 Am. St. Rep. 367; *McCrary v. State*, 51 Tex. Cr. 496, 123 Am. St. Rep. 903; *State v. Carmean*, 126 Iowa, 291, 106 Am. St. Rep. 352.

EX PARTE SMYTHE.

[56 Tex. Cr. 375, 120 S. W. 200.]

ABANDONMENT OF WIFE—Constitutionality of Statute.—

A statute directing that a fine imposed upon a man for abandoning his wife shall be paid to her violates the constitutional prohibition against appropriations for private purposes. (p. 977.)

ABANDONMENT OF WIFE—Suspension of Sentence.—

A statute authorizing a court to release from custody a man convicted of abandoning his wife upon his entering into a recognizance to pay her a certain sum weekly violates the constitutional prohibition against the suspension of any law except by the legislature. (p. 978.)

ABANDONMENT OF WIFE—Deprivation of Right to Jury

Trial.—A statute authorizing a court, instead of imposing the punishment therein provided, or in addition thereto, to release from custody a man charged with abandoning his wife, upon his entering into a recognizance to pay her a certain sum weekly, deprives him of his constitutional right to a trial by jury. (p. 978.)

K. C. Barkley, for the relator.

F. J. McCord, assistant attorney general, for the state.

375 **BROOKS, J.** Relator was arrested on a capias issued upon an indictment returned into the criminal district court of Harris county, wherein relator was charged, in substance, with unlawfully and willfully and without cause abandoning his wife. He made application for writ of habeas corpus to Honorable J. K. P. Gillaspie, judge of said court, which, having been refused by him, relator filed his petition in this court seeking release.

We do not deem it necessary to state seriatim the insistences upon ³⁷⁶ which relator predicates his release in this case, but suffice it to say that all of his positions raise the

question as to the constitutionality and validity of the abandonment of wife or children statute to be found in the act of the thirtieth legislature, page 133. We hold that said act is totally invalid. It will be seen from an inspection of said act that after relator is fined under the same, said fine shall be paid into court for the benefit of the wife, or to the guardian or custodian of the minor child or children. Section 6, article 16 of the state constitution, reads as follows: "No appropriation for private or individual purposes shall be made." Then the article goes on and provides for a regular statement, under oath, and an account of the receipts and expenditures of all public money. The first clause cited of said section is the one that we hold absolutely invalidates the penal clause in the statute under consideration, since it provides that, when the relator is fined, that said fine shall be paid to the wife or the minor child or children. However beneficent the purpose of this legislation, all of which we readily and cheerfully concede, yet we must hold that no penal statute can be passed in this state, in the light of the provision of the constitution quoted, which statute permits the fine after collection to be paid to the individual, whoever that individual may be. It clearly follows that, when the fine is imposed, that said fine becomes the money of the state of Texas. Then, for the law to provide that that money must be paid to the party injured by the violation of the law, is a direct appropriation of public funds for private or individual purposes. Suppose the legislature had provided that, where a man beats another with a stick, or offers him any other unlawful violence other than death, that the fine that should be collected for said unlawful act should be turned over to the victim of said assault. Certainly it could not be insisted that this character of law would not infringe the provision of the constitution cited. Nor would the fact that the husband is under moral and civil liability to support the wife and child render the act less obnoxious to the provision under consideration. The constitution of this state does not, nor can it be, bent to meet beneficent purposes, however noble the design may be, because to appropriate this money of the state of Texas to support the wife and child would be equally in violation of the letter and spirit of the law as it would be to appropriate money for any other character of fine to the party who was injured by the violation of the law under which the fine was imposed.

The abandonment statute under consideration further provides: "That before the trial (with the consent of the defendant), or after conviction, instead of imposing the punishment hereinbefore provided, or in addition thereto the court, in its discretion, having regarded the circumstances

and financial ability of the defendant, shall have the power to pass an order, which shall be subject to change by it from time to time, as the circumstances may require, directing the defendant to pay a certain sum weekly to the wife, guardian or custodian of the minor ³⁷⁷ child or children, and to release the defendant from custody, on probation, during the time of the imprisonment upon his entering into a recognizance, with two good and sufficient sureties in double the amount of the fine imposed, payable to the county judge." The condition of the bond, in substance, is that the defendant shall make his personal appearance in court, when ordered to do so by the court, during the suspension of imprisonment or probation, and shall further comply with the terms of the order, then the recognizance shall be void; otherwise in full force and effect. Section 28, article 1, of the state constitution, provides: "No power of suspending laws in this state shall be exercised except by the legislature." The clause of the statute under consideration, last cited, clearly authorizes the county judge to suspend the law in that he suspends the punishment. A law without a punishment, especially a penal law, has no validity or force whatever, and when one suspends the penalty he suspends the law. Therefore, we hold that this section of the act in question violates the section of the constitution last quoted.

Without passing upon the other questions in the other sections of the act, we will say that the bond authorized to be executed might be two thousand dollars, since the maximum fine could be one thousand dollars. In the light of this suggestion, it occurs to us that, even conceding the validity of the bond, which we do not, it should be made within the jurisdiction of the county court. Furthermore, this statute is invalid, since it deprives the defendant of the right of trial by jury, which is also guaranteed by the constitution. The first clause of the act, in defining the offense, says: "That every person who shall, without good cause, abandon his wife, and neglect and refuse to maintain and provide for her," etc. This section of the act might be upheld on the theory that by the words "good cause" the legislature intended to say "lawful cause"—that is, further to say, those causes enumerated under the divorce law, and hence might be upheld on the theory that the legislature did not intend to punish the husband for failing to support or for having abandoned the wife, except for those causes expressly decided in the divorce law of this state. If this is the meaning of the legislature in the act under consideration, then, if this legislation is re-enacted, or similar legislation is passed, the basis for a prosecution should be succinctly and clearly laid down.

Relator is accordingly discharged.

Judge Ramsey Dissented and said: "The act under which the indictment was returned is chapter 62, page 133, of the acts of the thirtieth legislature. Section 1 of this act, which undertakes to define the offense, is as follows:

"That every person who shall, without good cause, abandon his wife, and neglect and refuse to maintain and provide for her, or any person who shall abandon his or her minor child or children, under the age of twelve years, in destitute or necessitous circumstances, and willfully neglect or refuse to maintain or provide for such child or children, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars, or by imprisonment in the county jail, not less than one year nor more than two years, or by both such fine and imprisonment; and should a fine be imposed, it shall be paid into court for the benefit of the wife, or to the guardian or custodian of the minor child or children; provided, that before the trial (with the consent of the defendant), or after conviction, instead of imposing the punishment hereinbefore provided, or in addition thereto the court in its discretion, having regard to the circumstances and financial ability of the defendant, shall have the power to pass an order which shall be subject to change by it from time to time as the circumstances may require, directing the defendant to pay a certain sum weekly to the wife, guardian or custodian of the minor child or children, and to release the defendant from custody, on probation, during the time of the imprisonment upon his entering into a recognizance, with two good and sufficient sureties in double the amount of the fine imposed, payable to the county judge. The conditions of the recognizance shall be such that if the defendant shall make his personal appearance in court whenever ordered to do so by the court during the suspension of imprisonment or probation, and shall further comply with the terms of the order, then the recognizance shall be void, otherwise in full force and effect. If the court be satisfied by information and due proof, under oath, that at any time during the suspension of imprisonment or probation that the defendant has violated the terms of such order, the court may forthwith proceed with the trial of the defendant under the original indictment, or sentence him under the original conviction, as the case may be. In case of forfeiture of recognizance and enforcement thereof by execution, the sum recovered shall be paid to the wife, guardian or custodian of the minor child or children.' The grounds urged as reasons for holding this act unconstitutional are as follows:

"1. That such act is void because it deprives the defendant of a speedy public trial, and in support of this proposition the following authorities are cited: Tex. Const., art. 1, sec. 10; Code Crim. Proc., art. 4; *Waldon v. State*, 50 Tex. Cr. 512, 98 S. W. 848, 14 Ann. Cas. 342.

"2. The act is unconstitutional because it gives the court power to suspend the law, and on that question the following authorities are cited: Texas Const., art. 1, sec. 28; *Burton v. Dupree*, 19 Tex. Civ. App. 275, 46 S. W. 272; *Jannin v. State* (Tex. Cr. App.), 51 S. W. 1126; *San Antonio & A. P. Ry. Co. v. Lester*, 99 Tex. 214, 89 S. W. 752; *Coombs v. State*, 38 Tex. Cr. 648, 44 S. W. 854; *Curtis v. Gulf, C. & S. F. Ry. Co.*, 26 Tex. Civ. App. 304, 63 S. W. 149; *Sutherland on Statutory Construction*, sec. 69.

"3. That the act is unconstitutional in that it deprives defendant, in part, of the right of trial by jury.

"4. That such act is unconstitutional because in effect it gives the court the right to imprison for debt.

"5. That the act is invalid in that it is void for uncertainty because it defines no offense.

"Elaborating these positions somewhat, the argument of appellant is: The constitution provides that in all criminal prosecutions the accused shall have a speedy public trial, whereas this act undertakes to suspend an indictment over appellant indefinitely, in that it provides that 'before the trial, with the consent of the defendant, or after conviction, instead of imposing the punishment hereinbefore provided, or in addition thereto, the court in its discretion, having regard to the circumstances and financial ability of the defendant shall have the power to pass an order which shall be subject to change by it from time to time, as the circumstances may require, directing the defendant to pay a certain sum weekly to the wife . . . and to release the defendant from custody on probation.' The act also, it is stated, provides for the defendant entering into recognizance, and further states: 'The condition of this recognizance shall be such that if the defendant shall make his personal appearance in court whenever ordered to do so by the court during the suspension of imprisonment or probation and shall further comply with the terms of the order, then the recognizance shall be void, otherwise in full force and effect.' 'If the court be satisfied . . . that at any time during the suspension of imprisonment or probation that the defendant has violated the terms of such order, the court may forthwith proceed with the defendant under the original indictment or sentence him under the original conviction as the case may be.' The argument is made that the act is unconstitutional in that it deprives defendant, in part, of the right of trial by jury, and we are reminded that the Texas constitution, article 1, section 15, provides: 'The right of trial by jury shall remain inviolate,' yet this law says: 'Instead of imposing the punishment herein provided, or in addition thereto . . . the court in its discretion, having regard to the circumstances and financial ability of the defendant, shall have the power to pass an order which shall be subject to change by it from time to time as the circumstances may require, directing the defendant to pay a certain sum weekly to the wife . . . and to release the defendant from custody on probation.' It is urged that the effect of this provision deprives the defendant of the right of trial by jury as to whether he shall pay this sum weekly or monthly to his wife or in lieu thereof go to jail. That this, in effect, gives the court the right to try him and impose this obligation upon him, which is in fact a criminal sentence, without the right of trial by jury.

"On the proposition that the act is unconstitutional because in effect it gives the court the right to imprison for debt, we are referred to article 1, section 18, of our constitution, which provides, 'No person shall ever be imprisoned for debt,' and yet this law, it is urged, seeks to compel the defendant to pay a certain sum weekly for the support of his wife, and says, in effect, 'If you pay this debt we have imposed upon you, you may remain at liberty, but if you fail to pay it, the court will imprison you under the provisions of this act.' This, it is urged, in letter and in spirit, is a violation of this safe-

guard of liberty which is written in every constitution of the English speaking race.

"Finally, the argument is made that this act defines no offense, as no person could tell what would constitute 'good cause,' as named therein, and as the Penal Code, article 3, shows that neither layman nor judge is permitted to go outside of the Penal Code for the definitions of offenses. That it is not the aim of the law to try a man for the violation of a law written nowhere except in the minds of the trial judge or jury. We have thus set out at length the positions of counsel, with a statement of the arguments and reasons, as well as a collection of the authorities which it is contended support them. In addition to the reasons urged by appellant why this law should be held invalid, it is also suggested in the opinion of the majority of the court that it is in contravention of section 6, article 16, of the state constitution. This entire article is as follows: 'No appropriation for private or individual purposes shall be made. A regular statement, under oath, and an account of the receipts and expenditures of all public money shall be published annually in such manner as shall be prescribed by law.'

"There are a number of these cases pending in this court involving the validity of this statute. For the reason that the question is so clearly presented in the brief filed by relator and inasmuch as the sole question here presented is the constitutionality of this measure, I have deemed it appropriate to write my views in this case, although cases involving the same matter have been pending in this court before this appeal was filed. I shall discuss all the matters urged why the act is unconstitutional though somewhat in the reverse order.

"It is contended that the act does not define an offense in plain and intelligible language, and therefore is invalid, and relator is entitled to a discharge. If the statement and proposition is correct the result must follow, but I cannot accede to the contention that the act does not define an offense and provide an appropriate penalty therefor. The act does provide that every person who shall without good cause abandon his wife and neglect and refuse to maintain and provide for her, or any person who shall abandon his or her minor child or children under the age of twelve years, in destitute or necessitous circumstances and willfully neglect or refuse to maintain or provide for such child or children, shall be deemed guilty of a misdemeanor. This, I think, defines the offense, and such is the uniform holding of all the courts where the question has arisen so far as I have been able to discover. This precise question came before the supreme court of Missouri in the case of *State v. Davis*, 70 Mo. 467. The statute construed in that case is, so far as relates to the definition of the offense, almost a literal copy of our statute. It is as follows: 'Every husband shall be deemed guilty of a misdemeanor who shall without good cause abandon his wife and fail and neglect or refuse to maintain and provide for her, or who shall without good cause abandon his child or children under the age of twelve years born in lawful wedlock and fail, neglect or refuse to maintain and provide for such child.' In discussing the case the court say: 'The abandonment of a child is a statutory offense and the language of the statute is sufficient in an indictment to charge the crime. Abandonment does not mean a mere temporary absence from home, or temporary neglect of parental duty. Bouvier defines abandonment

thus: "The act of a husband, or wife, who leaves his or her consort, willfully and with an intention of causing perpetual separation." Webster defines it as "a total desertion; a state of being forsaken." Additional words in the indictment would have been but definitions of the term "abandonment," in words which perhaps would equally require definitions.' This act is very similar in many ways to our statute in reference to negligent homicide, which statute has been sustained almost from the foundation of the government. Articles 683, 684, 685, 686 and 687 are as follows:

"Article 683: 'Homicide by negligence is of two kinds—1. Such as happens in the performance of a lawful act; and 2. That which occurs in the performance of an unlawful act.'

"Article 684: 'If any person in the performance of a lawful act shall, by negligence and carelessness, cause the death of another, he is guilty of negligent homicide of the first degree.'

"Article 685: 'A "lawful act" is one not forbidden by the penal law, and which would give no just occasion for a civil action.'

"Article 686: 'To constitute this offense there must be an apparent danger of causing the death of the person killed, or some other.'

"Article 687: 'The want of proper care and caution distinguishes this offense from excusable homicide. The degree of care and caution is such as a man of ordinary prudence would use under like circumstances.'

"It is true that article 687 undertakes to define what is meant by the degree of care and caution as those words are used in the statute, and it is defined to be such as a man of ordinary prudence would use under like circumstances. But it is not believed that this definition is important as affecting the validity of the statute or more than a declaration of what would be implied in the law in the absence of such a definition. It will thus be seen by an inspection of these acts that negligent homicide of either the first or second degree is not fully defined except such homicide as occurs through negligence of the party charged and as may happen in the performance of a lawful act, or as may occur in the performance of an unlawful act. It is clear that such homicide may occur in any one of a thousand ways, and that no man born of woman has written or would ever be able to write in the statute every circumstance or state of case under which a killing might occur. And so in construing this statute the law undertakes to visit punishment upon and create an offense in the act and out of the fact of abandonment of the wife or child without good cause. What is good cause in a case must depend upon the facts and circumstances of each particular case, judged by all the surroundings. It would be impossible in the nature of things to define the offense further, nor do we think it essential to its validity that it should be further defined. The grounds and causes of abandonment, the facts and circumstances surrounding such environments are as various and innumerable as the emotions of men or their shifting environments and as many sided and complex as the shades and shadows of life and as abounding as the 'multitudinous laughter of the seas.' Again, we think it perhaps correct to say that the statute may be sustained on the proposition and theory suggested by Judge Brooks in the majority opinion, that the term 'good cause' is synonymous with the term 'lawful cause.' If it can in fairness

be held that the terms are synonymous, it will not, as I believe, change the rule as to the validity of the statute.

"Again, I think the statute is not obnoxious to the claim and contention that it warrants an imprisonment for debt. It no more does this than does any other article of our criminal statute, which provides for the confinement of a defendant on conviction in default of the payment of the fine assessed against him. It may be that some features and provisions of the act are not warranted under our constitution, and that it should be held that it is not competent to permit the court in its discretion 'to pass an order which shall be subject to change by it from time to time as the circumstances may require, directing the defendant to pay a certain sum weekly to the wife, guardian or custodian of the minor child or children, and to release the defendant from custody, on probation.' It may be that this provision ought to be held obnoxious to and in contravention of article 1, section 28, of the constitution, depriving the court of the power to suspend the law, and it may be that this provision is not in consonance with the spirit of article 1, section 18, which provides that the right of trial by jury shall remain inviolate. I am not prepared to agree that the act is in contravention of article 16, section 6, of our constitution, quoted above. It occurs to me that the intent and purpose of that provision of the constitution was to prohibit the legislature from making appropriations out of funds raised by public taxes as gratuitous, to private individuals and was not meant to lay an embargo or inhibition on the disposition to be made of mere penalties for the violations of our criminal law. However, this becomes unimportant for the reason that if the provisions affecting the remedy and enforcement of the fine provided for in this act are for any reason invalid, these provisions, so far as they contravene the constitution, must fail. I am inclined to think personally that it is within the power of the legislature to provide that when the fine is paid into court that the same should be for the benefit of the wife or in a proper case for the benefit of the minor child or children. I am inclined to believe that the fine assessed against relator is subject to the control and disposition of the legislature, and they may make such direction and provision for its disposition as it sees proper. This, as I understand, is the rule both at common law and in this state. Nor is it certain that provision cannot be made by bond or recognizance for the payment of the fine assessed (none other) in installments and for security to be taken therefor by an instrument in the nature of a recognizance. However, I am clear that if for any or all of the reasons suggested above the provisions for the collection and payment of the fine should be declared to be unconstitutional, that it does not and cannot in the slightest manner affect the validity of this act. To my mind it is demonstrably clear that we have a statute in which an offense is defined and in which a penalty is named. This portion of the act is complete and perfect in itself, and if the mere process by which the payment of such fine shall be provided for should be held to be invalid and nugatory, it cannot affect the result. It is the uniform rule that where a part of an act is valid and part invalid, if the valid provisions are separable, that the act may be sustained and the invalid portion fail. Such is the rule laid down by Mr. Cooley in his work on Constitutional Limitations, pages 209-211: 'It will sometimes be found that an act of the

legislature is opposed in some of its provisions to the constitution, while others, standing by themselves, would be unobjectionable. So the forms observed in passing it may be sufficient for some of the purposes sought to be accomplished by it, but insufficient for others. In any such case the portion which conflicts with the constitution, or in regard to which the necessary conditions have not been observed, must be treated as a nullity. Whether the other parts of the statute must also be adjudged void because of the association must depend upon a consideration of the object of the law, and in what manner and to what extent the unconstitutional portion affects the remainder. A statute, it has been said, is judicially held to be unconstitutional, because it is not within the scope of legislative authority; it may either propose to accomplish something prohibited by the constitution, or to accomplish some lawful, and even laudable object, by means repugnant to the constitution of the United States or of the state. A statute may contain some such provisions, and yet the same act, having received the sanction of all branches of the legislature, and being in the form of law, may contain other useful and salutary provisions, not obnoxious to any just constitutional exception. It would be inconsistent with all just principles of constitutional law to adjudge these enactments void because they are associated in the same act, but not connected with or dependent on others which are unconstitutional. Where, therefore, a part of a statute is unconstitutional, that fact does not authorize the courts to declare the remainder void also, unless all the provisions are connected in subject matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning, that it cannot be presumed the legislature would have passed the one without the other. The constitutional and unconstitutional provisions may even be contained in the same section, and yet be perfectly distinct and separable, so that the first may stand though the last fall. The point is not whether they are contained in the same section; for the distribution into sections is purely artificial; but whether they are essentially and inseparably connected in substance. If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained.' And such is the holding of this court. This rule will be recognized by every lawyer. Ought it to be applied, and can it in fairness be applied, to this question? It is undeniable if my view is correct that the act defines an offense. It is undeniable that it fixes in definite and clear terms a penalty. If the act had stopped there it would not be questioned that it would be valid. All that follows is merely directory and has reference to the manner and means of enforcing the penalty imposed by law. If these regulations fail, the validity of the act is not affected because in the absence of such regulations other provisions of law are provided for the collection of fines and their enforcement. How can it be said that the act would be valid if these matters of detail in reference to the collection of a fine were omitted and yet invalid because of their insertion. If they fail it is as if they had not been written in the act. If they had not been written in the act the court would apply the orderly processes which the law gives for the collection of the penalties. When they do fail the law will supply and apply the provision

and the same result would ensue. In practically all new offenses created by our legislature no provision is made for the enforcement of the penalties provided by law. None is required and if these provisions fail we have a perfect act and a law from which relator cannot escape punishment because he may object merely to the methods of enforcing the penalties that are denounced by law. It is a well-settled rule that we ought if possible to sustain this law and every law passed by the legislature unless it is clearly unconstitutional. The main purpose of this law was to discourage wife and child abandonment. These are matters in which the state has an interest. It prevents mendicancy, prostitution and illiteracy, and the throwing upon the public burdens which husband and parent ought to bear. It is the undoubted purpose of the legislature, in the interest of the helpless women and dependent children of this state, with a view of discouraging vicious and profligate husbands and fathers for abandoning their wives and offspring, to make it an offense and thus deter and prevent such deplorable conditions, and if still committed, to visit the offender with appropriate punishment. The incidental fact that in their zeal the legislature go beyond the constitutional limits imposed on them as to the mere regulation of the method of payment, and the beneficent intent in its payment, ought not to undo this much-needed legislation—legislation, to borrow a phrase from my Brother Brooks, as beneficent as the angels ever smiled upon. I believe the law is valid and ought to be sustained, and in view of the importance of the question to the public and society at large, I have thus in some detail written out my views."

The Constitutionality of the Statute involved in the principal case was also denied in *Adams v. State*, 56 Tex. Cr. 199, 120 S. W. 208; *Burch v. State*, 56 Tex. Cr. 200, 120 S. W. 206; *Phillips v. State*, 56 Tex. Cr. 220, 120 S. W. 207, Justice Ramsey dissenting in each case. For authorities upholding the constitutionality of statutes making it a crime for a man to abandon his family, see the note to *Booth v. People*, 78 Am. St. Rep. 240. A statute providing that, upon conviction for abandoning his wife, a man shall be punished by not exceeding one year's imprisonment in the state prison, or in the county jail not more than six months nor less than fifteen days, ten days of which imprisonment in the county jail may, in the discretion of the court, be upon a diet of bread and water only, is not unconstitutional as inflicting cruel and unusual punishment: *Spencer v. State*, 132 Wis. 509, 122 Am. St. Rep. 989. And under a statute making criminal the unreasonable neglect to provide for the support of one's minor child, a father may be convicted for failure to support his child, though he and the mother, being domiciled within the state, are aliens, and the child has never been therein: *Commonwealth v. Acker*, 197 Mass. 91, 125 Am. St. Rep. 328.

DERDEN v. STATE.

[56 Tex. Cr. 396, 120 S. W. 485.]

CRIMINAL TRIAL—Presence of Accused When Verdict Received.—In a felony case the accused is entitled to and must be present when the verdict is received, unless his absence is voluntary or willful. The word "voluntary," as thus used, implies that the absence must result from choice or exercise of the will. An unavoidable absence is not voluntary, nor is an unintentional absence, where, under the circumstances, his presence could not be reasonably required. Even an absence, though in somewhat serious negligence, which is neither purposeful, deliberate, nor under circumstances for which an intention can be presumed, is not voluntary. (pp. 991-993.)

CRIMINAL TRIAL—Presence of Accused When Verdict Received.—Where the accused in a felony case, while the court is not in session but the jury is deliberating, is at his boarding-place within two blocks of the courthouse, and immediately starts for the courthouse when notified by telephone that the jury has reached a verdict, but while on the way the verdict is received and the jury discharged, his absence is not voluntary, nor willful, and the reception of the verdict under such circumstances is reversible error. (pp. 991-993.)

CRIMINAL TRIAL—Res Gestae—Declarations After Separation of Parties.—In a prosecution for homicide, where it appears that the parties separated after the combat in which the deceased was mortally wounded, but shortly afterward again met at a drug-store where they had gone to have their wounds dressed, their acts and declarations there in the course of a second altercation are admissible. (pp. 993, 996.)

CRIMINAL LAW—Self-defense.—An Instruction that "where a party is assaulted, and his adversary apparently abandons the difficulty, he has no right to pursue or fire upon him, unless it is necessary to do so in order to protect himself from a renewal of the unlawful attack," is not erroneous in using the word "apparently," when it is evident that the court used it in the same sense of "evidently," "obviously," or "clearly." (pp. 996, 997.)

Richardson & Watkins, Faulk & Faulk and Johnson & Edwards, for the appellant.

F. J. McCord, assistant attorney general, and John S. Prince, for the state.

398 RAMSEY, J. Appellant was indicted on the seventh day of September, 1907, in the district court of Henderson county charged with the murder of one John R. Mitcham. The case was thereafter transferred on a change of venue to Smith county. A trial had in said court on October 11, 1908, resulted in a conviction of the offense of manslaughter, with the punishment assessed at four years' confinement in the penitentiary.

Appellant and deceased had been partners for about a year before the homicide, and their relations up to a short time before the killing had been friendly. The deceased made a dying statement, which was admitted in evidence, and ac-

cording to his version of the matter the appellant was the aggressor and brought about the difficulty—called him a liar, and pulled his pistol on him out of his inside pocket, seeing which he reached on his desk and hit appellant over the head with a notary seal, when appellant jerked loose from him and told him he was going to kill him right there, and he ran, and appellant shot at him several times, hitting him the third shot, which took effect in his back, and from which he shortly thereafter died. Appellant gave a wholly different version of the matter, and states that he had gone to deceased's office to secure a settlement, and that deceased was the first to get mad, and that, seeing his growing anger, he looked off to keep from getting mad himself, and as he looked back he saw the seal in the hands of deceased descending, and that deceased was at the time in the act of striking, accompanied with the statement, "I will kill you"; that deceased inflicted a severe blow upon him, from which he staggered against the door, and that during the encounter deceased hit him several times, which stunned or dazed him; that about the time of the infliction of the last blow he had somewhat recovered; that up to this time he had not drawn a pistol; that he was a right-handed man, but drew his pistol with his left hand, and that it went off while he was in the act of getting it out; that about the time the second shot was fired he was going through the door, and deceased went out on the gallery. From this time on he gives a somewhat confused account of the shooting, claiming not to remember, or know very well, the details. He makes by his testimony a case of self-defense, whereas the state's testimony, if believed, would tend strongly to show, in the first place, that appellant provoked the difficulty, was the aggressor, and was not acting in self-defense, and that in any event, at the time of the fatal wound, deceased had abandoned the difficulty, and appellant was in no danger from him. We have not sought to more than state the relative contentions of the respective parties, so that the opinion may be readily understood.

1. The first question presented was almost the last to arise on the trial, and relates to the action of the court in receiving the verdict of the jury in the absence of appellant. We think the action of the court in this respect was erroneous, and without reference to the other questions presented must result in a reversal of the judgment. The ³⁹⁹ matter is very fully stated in the bill of exceptions, which is not modified in any respect by any statement or explanation of the court. As the question is somewhat new, under our present statute, we set out the facts as preserved in the bill in their entirety. They are as follows: "This cause was submitted to the jury on Saturday night, October 10, 1908; when the

cause was submitted to the jury the court suggested to them that they do not consider the case or attempt to arrive at a verdict that night, but that he would not return to his home in Gilmer, but would remain in Tyler over Sunday for the purpose of receiving the verdict in the event the jury should come to an agreement during Sunday. And that they would be permitted to return a verdict on Sunday if they came to a verdict. The court was not opened on Sunday, nor did the court convene or assemble in session on Sunday, until the jury were ready to return their verdict, which was done Sunday afternoon, October 11th, about 4 o'clock. The defendant was on bond at the time of his trial; and when the court adjourned Saturday night defendant went to his boarding-house in Tyler, where he was stopping, about two blocks from the courthouse, and there spent the night. On Sunday forenoon the defendant came to the courthouse, and remained at and about the courthouse and courthouse yard until about 11 o'clock in the forenoon. The court was not in session at that time, nor was the judge present at the courthouse at that time, and defendant returned to his boarding-house and there remained, and was at his boarding-house when the jury sent word to the judge that they were ready to report. When the jury arrived at a verdict they had the sheriff to notify the judge, the judge at that time being in his sleeping-room in the third story of the courthouse, and at this time the defendant had no knowledge, nor had he been informed, that the jury had reached a verdict or desired to report. When informed that the jury desired to report, the judge came into the courtroom, and defendant's counsel, being in the courthouse yard at that time, was notified that the jury were ready to report, and came into the courtroom just as the jury filed in, and thereupon defendant's counsel notified the court that defendant was at his boarding-house, and that he would notify him at once, and have him to come to court. Defendant's counsel left the courthouse for that purpose, and was informed by the sheriff that he had telephoned to defendant that the jury was ready to report, and defendant's counsel returned immediately into the courtroom and notified the court that the defendant had been notified, and would be in court presently. The defendant was at his boarding-house when telephoned to by the sheriff, and started immediately to the courthouse. Upon being informed by defendant's counsel that defendant had been notified, and was on his way to court, the court said that the presence of the defendant was not necessary or required, and that the verdict could be received in defendant's absence, and had the jury to hand their verdict to the clerk, and the same was received and read before the defendant reached the courthouse,

and ⁴⁰⁰ while he was on his way from his boarding-house to court, and in his absence, and thereupon the jury were discharged and dispersed. Defendant reached the courthouse yard as the jury were dispersing, and was then informed for the first time of the verdict and action of the jury, and he continued directly to the courthouse, and delivered himself to the sheriff, at which time the jury were dispersing. The verdict was read and received in the defendant's absence, and while he was making his way from his boarding-house to court. One of his counsel was present at the time the verdict was received, and did not consent to the verdict being received or read in the absence of defendant, nor did he waive his presence, nor did he at that time make any objection to the action of the court, the facts with reference to the action of defendant's counsel being as above stated.

"In his motion for new trial, filed herein on October 12, 1908, the action of the court in receiving said verdict and having the same read in his absence was set up as a ground for new trial, and in arrest of judgment, as will fully appear from said motion now on file in this case, and upon the hearing of said motion for new trial and in arrest of judgment, the defendant introduced evidence in support thereof, which evidence was to the effect as above stated, and which evidence is directed to be included in the statement of facts in this case, and when so included may be considered as part of this bill of exception." The articles of our Code of Criminal Procedure relating in any way to this matter are (until lately modified) articles 633, 748 and 749. They are as follows: Article 633: "In all prosecutions for felonies, the defendant must be personally present on the trial, and he must likewise be present in all cases of indictment or information for misdemeanors where the punishment or any part thereof is imprisonment in jail." Article 748: "It is the right, either of the state or of the defendant, to have the jury polled, which is done by calling separately the name of each juror, and asking him if it is his verdict. If all, when asked, answer in the affirmative, the verdict shall be entered upon the minutes; but if any juror answer in the negative, the jury shall retire again to consider of their verdict." Article 749: "In cases of felony the defendant must be present when the verdict is read, unless he escape after the commencement of the trial of the cause; but in cases of misdemeanor it may be received and read in his absence." From the earliest days these statutes have been required to be followed with great strictness. It has been held that it is an improper practice to take any step, or have any proceeding in the case, however trivial, formal or unimportant it may appear to be, when the defendant is not present; and it is material error,

and will render the proceeding absolutely void, where such proceeding is had during the trial of the case in the absence of the defendant: *Mapes v. State*, 13 Tex. App. 85; *Rudder v. State*, 29 Tex. App. 262, 15 S. W. 717; *Madison v. State*, 17 Tex. App. 479; *Conn v. State*, 11 Tex. App. 390. It is said it is not sufficient that the defendant should be within the ⁴⁰¹ walls of the courthouse, but he should be present where the trial is conducted, that he may see and be seen, hear and be heard, under such regulations as the law has established: *Brown v. State*, 38 Tex. 482. It is said, further, that he has a right to be present when his motion for new trial is being heard and determined, and that, on appeal, if the record affirmatively shows that his motion for new trial was heard in his absence, and that he subsequently objected thereto in the court below, the conviction shall be set aside and the cause remanded for a new trial: *Gibson v. State*, 3 Tex. App. 437; *Gonzales v. State*, 38 Tex. Cr. 62, 41 S. W. 605. It has been uniformly held that the defendant must be present in a felony case when the verdict is received: *Beaumont v. State*, 1 Tex. App. 533, 28 Am. Rep. 424; *Summers v. State*, 5 Tex. App. 365, 32 Am. Rep. 573; *Richardson v. State*, 7 Tex. App. 486; *Huffman v. State*, 28 Tex. App. 174, 12 S. W. 588; *Mapes v. State*, 13 Tex. App. 85. In the last-named case, speaking for the court, Judge White says: "We deduce from these decisions that it is an improper practice to take any step, or have any proceeding, however trivial, formal or unimportant it may appear to be, when the defendant is not present, and that it is material error, which will render the proceeding absolutely void, where such proceeding is had during the trial of the case in the absence of the defendant." That this was the law before the passage of the act of the thirtieth legislature does not admit of dispute. That act, page 31 of the laws of the thirtieth legislature, provides as follows: "In all prosecutions for felonies, the defendant must be personally present at the trial, and he must likewise be present in all cases of indictment for misdemeanors where the punishment, or any part thereof, is imprisonment in jail; provided, that in all cases the verdict of the jury shall be received by the court and entered upon the records thereof in the absence of the defendant, when such absence on his part is willful, or voluntary, and when so received it shall have the same force and effect as if received and entered in the presence of such defendant." This statute, in so far as it relates to the presence of a defendant during the trial, was considered by this court in the case of *Hill v. State*, 54 Tex. Cr. 646, 114 S. W. 117, where we said: "This being a felony case, it devolves upon the state to confront the defendant with the testimony during the progress of the trial. This can-

not be done if the defendant is not personally present. Furthermore, the statute explicitly says the defendant must be personally present, and, waiving any constitutional question, the action of the court is in the face of the statute." In that case counsel undertook to waive the presence of the defendant, with the assurance that no advantage would be taken of it, and the action of the court there related to the matter of reproducing the testimony of certain witnesses, which the record shows was a literal reproduction of the testimony theretofore given by them. So it is obvious the act of the thirtieth legislature must be construed with reference to the law ⁴⁰² aforesaid, and in the light of the uniform holding of this court, and should not be extended beyond the plain import of the statute. It is contended that, by no fair rule, can it be said in this case that the appellant was willfully or voluntarily absent. It is apparent, too, that the action of the trial court was not placed on the ground that his absence was either willful or voluntary, but the verdict seems to have been received in the belief that his presence under the statute was not required, and that it was unimportant how such absence was occasioned. The record shows, as stated, that when the court adjourned on Saturday it did not adjourn to any stated time or hour; that court was not assembled or convened during Sunday; that appellant spent a large part of that day in attendance at and about the courtroom; that his boarding place was only two blocks away. He could not, in the nature of things, know when the jury were likely to agree on a verdict. It seems, however, that he was reached by telephone immediately after the jury sent word that they were ready to report, and evinced his desire and intention of being present by immediately starting to the courthouse. The bill further shows that the judge knew he was on his way to the courthouse, and would arrive almost immediately, and that he did arrive immediately after the jury were dispersed. If the court had adjourned for any stated time, or had been in session, there might be some reason to hold that he should attend all the ordinary sittings of the court, and hold himself in readiness at any time to hear the judgment of the twelve. But the record shows that the judge himself was not in the courtroom, and had not appeared in the courtroom during the day. It would be a harsh construction to say that the appellant should be more diligent in his attendance upon the court than the judge presiding. Under the uniform holding of this court we are not permitted to inquire as to how far appellant was injured by being deprived of the right to be present. It is sufficient to say that he had a right to be present, and that he must be present, when the verdict was received, unless his absence is voluntary or will-

ful. The statute gives the accused the right to witness the proceedings, to hear the verdict, to poll the jury, and he has as well the right to inspect such verdict and make any legal objection to it. If we should undertake to sustain the proceedings of the court below on the proposition that no harm was done, and that appellant's counsel were able to represent and do all for him that he could himself do, if present, this would be equally available in every case, and would have the effect to absolutely nullify the statute. That appellant was willfully absent is not seriously contended; that he was voluntarily absent we cannot get our consent to hold. We do not believe he was voluntarily absent, whether we accept the ordinary meaning of the word or its legal signification. "Voluntary" is thus defined by Mr. Webster: "1. Proceeding from the will; produced in or by an act of choice. 2. Unconstrained by the interference of another; unimpelled by the influence of another; not prompted or persuaded by another; done of his or its own accord; spontaneous; ⁴⁰³ acting of one's self or itself; free. 3. Done by design or intention; intentional; purposed; intended; not accidental; as, if a man kills another by lopping a tree, it is not voluntary manslaughter. 4. Of or pertaining to the will; subject to, or regulated by, the will; as, the voluntary motions of an animal, such as the movements of the leg or arm (in distinction from involuntary motions, such as the movements of the heart); the voluntary muscle fibers, which are the agents in voluntary motion." In 29 American and English Encyclopedia of Law, page 1072, "voluntary" is thus defined: "A voluntary act proceeds from one's own free will; done by choice, or of one's own accord; unconstrained by external interference, force or influence; not prompted or suggested by another. Voluntary means by the free exercise of the will; done by design, purposely." This definition just quoted is taken almost literally from the decision of Judge Hurt in the case of *Thompson v. State*, 24 Tex. App. 383, 6 S. W. 296, where, in discussing manslaughter, Judge Hurt adopts a portion of the definition of Mr. Webster, in this language: "Webster defines the word 'voluntary' thus: 'Done by design, or intention; purposed; intended; as, if a man kill another by lopping a tree, it is not voluntary manslaughter.'" Under any possible definition of the word it is implied of necessity that the absence must have resulted from choice or exercise of the will. An unavoidable absence would not be voluntary; an unintentional absence, where, under the circumstances, his presence could not be reasonably required, would not be voluntary. Even an absence, though in somewhat serious negligence, which was neither purposeful, deliberate or under circumstances from which such an intention could be presumed,

would not be voluntary. So that, under any view of the case, as we believe, the absence of appellant in this case was not a voluntary absence. It is not such absence as would have justified the court in receiving the verdict of the jury, and, while the result may seem to be based upon slight substantial ground, it is a provision of law, and it does not lie within our province to deny to a citizen of this state a right which in express terms the law gives him. To do so would be the grossest usurpation.

2. Another very difficult question arose in this way. After the fatal encounter, deceased and appellant met in a drug-store, where an effort was made on the part of appellant to assault deceased. This matter is also well stated in the bill, and with a view of insuring accuracy we copy practically the entire bill. It is as follows: "The evidence in the case showed that after deceased was shot he went into the store of C. A. Riddlesperger, about ninety feet from the scene of the shooting; that he remained in this store for a short time, and then went into a drug-store near by; that the defendant, when the shooting was over, turned and went down the walk, or galleries of the stores, and then turned north and went into the store of Thompson Brothers, where he remained for one or two minutes, and then was carried or led by Mr. Thompson, into the drug-store; that defendant reached the drug-store ⁴⁰⁴ before the deceased came in, and was in the drug-store waiting to have his wounds dressed, and for the arrival of a doctor, who had been telephoned for; that while he was in the drug-store thus waiting the deceased came in, as above stated; that the defendant at that time had several wounds on his head, which had been made by the seal in the hands of deceased, and that he was bleeding from these wounds.

"The state offered to prove by C. A. Riddlesperger and Roy Weir, witnesses for the state, that when the deceased came in the drug-store he came on down into the store, and to a point near where defendant was; that he walked up to a chair some eight or ten feet from the defendant, and stopped, and placed his hands upon the back of the chair, as if to lean or rest his weight upon it; that thereupon the defendant took hold of another chair, and started to raise the same as if to use it on deceased, and that he called deceased a damned son-of-a-bitch, and says, 'I will kill you'; that some one took hold of defendant and made him put down the chair, and that defendant then walked around the table and started to pick up another chair, and some one took hold of defendant and made him put it down; that when the defendant took hold of the chair and cursed the deceased, and said he would kill him, the deceased said to

the defendant, 'I did not come in here for any trouble; I am looking for a doctor.'

"To all of which testimony thus offered by the state the defendant objected, upon the grounds that same was irrelevant and immaterial; that at the time the same occurred the original difficulty had wholly ceased, and the parties had separated, and that said evidence had no relation to the original difficulty, and shed no light upon the same, and did not tend to show who was the aggressor in said difficulty, nor the mind or motive with which defendant fired the fatal shot, and that said testimony was prejudicial to the defendant and his case. Which objections were by the court overruled, and said testimony admitted, and said witnesses were permitted to testify to the facts as above stated." Under their assignment questioning the correctness of the court in admitting this testimony, the appellant submits this proposition: "Where the difficulty had ended, subsequent acts or conduct on the part of the accused toward his antagonist is not admissible either as *res gestae* nor as the declaration of the accused, unless the same are related to or explains the conduct of the party at the time of the difficulty. To constitute a part of the same transaction, though occurring shortly afterward, the subsequent conduct must distinctly and palpably proceed from the same motive as the main transaction. Nearness in time is immaterial, the test being in the subsequent conduct explanatory of the issue being investigated." The writer is inclined to think this proposition is correct for these reasons: Mr. Rice, in his valuable work on Evidence, quotes approvingly a statement by Chief Justice Beasley, of New Jersey, to the effect "that there are few problems involved in the law of evidence more unsolved than what things are to be embraced in those occurrences that are designated in the law as the *res gestae*." 405 "I can readily find," he says, "judicial rulings by force of which this testimony would be excluded; but I can as readily find other rulings of equal weight that would sanction its admission. This result has grown out of the difficulty of applying, with anything like precision, general rules to a class of cases of infinite variety. In the well-considered case of *Lund v. Tyngsborough*, 9 Cush. 36, it is said: 'The *res gestae* are different in different cases, and it is, perhaps, not possible to frame any definition which would embrace all the various cases which may arise in practice. It is for the judicial mind to determine upon such principles and tests as are established by the law of evidence what facts and circumstances in particular cases come within the import of the terms. In some instances the test indicated will be found in the rule that such declarations are admissible, because they are so connected with an act, itself admissible as

part of the *res gestae*, as to have become incorporated with it. The declaration and the act must make up one transaction. The theory justifying this course is that, when such declarations are thus coupled with a probable act, they receive confirmation from it; but if they stand alone, without such support, they depend altogether for their credence on the veracity of the utterer, and, thus conditioned, they are pure hearsay, and inadmissible.' " Alluding to the rule that excludes hearsay, Mr. Starkie (1 Starkie on Evidence, p. 65), says: "The principle does not extend to the exclusion of any of what may be termed real or natural facts and circumstances in any way connected with the transaction, and from which any inference as to the truth of the disputed fact can reasonably be made: *Hunter v. State*, 40 N. J. L. 495": See 3 Rice on Evidence, p. 128. On a full discussion of the whole matter, Mr. Rice finally says: "The rule is, as we have seen, that the whole transaction may be given in evidence. But it is impossible to deduce, from the authorities, an available rule as to what shall be deemed of the transaction and what shall not. The subsidiary act need not transpire at the same instant with the main one, or always even on the same day; and in reason, as well as in accordance with the current of the authorities, the time which divides the two is not the controlling consideration, though it may be taken into the account. Is it presumable that, distinctly and palpably, it influenced, or was influenced, by the main act, or produced from the same motive? If so, it is admissible, otherwise not. Such is the doctrine in reason; and it is submitted the current of authority is, at least, not adverse: *Bishop on Criminal Procedure*, sec. 1085."

Now, let us apply this doctrine to the facts here. Under the proof above admitted, at the time of the transaction above referred to, the death wound had been inflicted; appellant was guilty then or not guilty at all. Of course, every fact and circumstance antecedent to this transaction which would pertinently throw light on the issue was admissible. Certainly, as well, every subsequent act and declaration of the appellant which would pertinently disclose his motive, intent, attitude, malice or other state of mind illustrative of the question at issue, would be admissible. But ⁴⁰⁶ do these facts so admitted come within this rule? The evidence showed the difficulty was over, the parties separated, going in different directions; that appellant had gone to the store of one Thompson for assistance, and had surrendered his weapon; that they met in the drug-store by accident. There is some question as to whether, at that time, appellant knew that Mitcham was wounded. He testifies that he did not know this fact. There is some testimony indicating that he did. It is undoubtedly true that

he did not know, and could not, in the nature of things, have known how seriously he was wounded. One of the witnesses, Thompson, testified that he thought that Mitcham was intending to use the chair to assault appellant when he took hold of it. Now, was there anything in this testimony explanatory of any part of the difficulty in which Mitcham was shot? What was it that appellant said or did that related to this difficulty? What was said or done that could throw any light on the shooting, or which would indicate who was the aggressor, how it arose, or who was to blame? It is obvious that, in view of the desperately wounded condition of the deceased, that the admission of this testimony was calculated to arouse the prejudice and inflame the passions of the jury. The testimony showed he was badly hurt, was looking for a doctor, had stated before he reached the drug-store that he was going to die, and the anger and rage of appellant, and his effort to do him violence, were calculated seriously to prejudice appellant. Now, Mr. Rice says the rule is, "Is it presumable that, distinctly and palpably, it influenced or was influenced by the main act, or proceeded from the same motive?" Is it not clear that, from the demonstration of the deceased, the acts and declarations of the defendant, in view of deceased's seriously wounded condition, were just as consistent with his innocence as with his guilt, and they are as naturally attributable to a feeling of outrage on his part from a serious, and, as he claimed, unjust attack on him by Mitcham, as to any other motive, and where, as in this case, he neither did anything or said anything which could in any just or proper sense be said to have any proper relation to what had occurred in the first difficulty, as explanatory of its origin, or as indicative of who was the aggressor, or who was to blame, but was rather the expression of his then state of mind attributable to the fact that he had been assaulted by deceased, and received serious and dangerous wounds? The majority hold, however, that the evidence was admissible, and that, in connection with the special charge given at request of counsel for appellant, there was no error committed in respect to this matter.

3. Complaint is made of the following portion of the court's charge: "Where a party is assaulted, and his adversary apparently abandons the difficulty, he has no right to pursue or fire upon him, unless it is necessary to do so in order to protect himself from a renewal of the unlawful attack. In such a case he may lawfully pursue, and his right to pursue continued as long as the necessity continues, and ceases when the necessity ceases. In other words, if it is necessary for the assailed ⁴⁰⁷ to pursue and shoot in order to protect himself from a renewal of the unlawful attack,

he may lawfully pursue and shoot, and his right to do so continues as long as this necessity continues, and ceases when the necessity ceases, and the test of the necessity is the reasonable belief of the person assailed." This charge is complained of, and it is urged that the use of the word "apparently" was calculated to lead the jury to believe that a mere retreat on the part of deceased, apparently abandoning the difficulty, would cut off appellant's right to continue to shoot; and it is subject to the further objection that the retreat must be for the purpose of procuring another weapon with which to return to the difficulty, before such retreat will constitute an abandonment. Considering the charge here criticised in connection with the whole charge, it is evident that the court used the word "apparently" in the same sense of "evidently," "obviously" or "clearly." In a latter paragraph the court thus instructed the jury, in connection with this same matter: "If you find from the evidence that John R. Mitcham made an unlawful assault upon the defendant with a notary seal, and that said Mitcham in good faith abandoned the difficulty, and retreated in good faith, and defendant so understood it, and followed, and shot and killed said Mitcham, he, the defendant, would not be guilty of any higher offense than manslaughter. On the other hand, if it reasonably appeared to defendant, as viewed from his standpoint at the time, that said Mitcham was not retreating in good faith, but that by retreating he was seeking a vantage ground or a weapon to renew the attack, then defendant would have the right to pursue and to shoot deceased as long as it reasonably appeared to defendant to be necessary for his own self-defense, and if, under such circumstances, defendant shot and killed deceased, you should return a verdict of not guilty." Here in express terms the jury are required to find that Mitcham in good faith abandoned the difficulty, and retreated in good faith, and defendant so understood it. The charge was probably so framed as not to have been right readily understood by the jury, and we suggest on another trial that it be so phrased as not to be open to criticism or objection.

4. There are a great many other questions arising in the case which seem to have been contested with great vigor and zeal on both sides, and which we have carefully considered, and it is our judgment that, except in the respects above noted, appellant has received a fair and impartial trial, and that there was no error in the ruling of the court in respect to any of the other matters called to our attention.

For the error pointed out the judgment is reversed and the cause is remanded.

The Question Whether the Presence of the Accused is Necessary when the verdict or judgment is rendered in a criminal case is considered in the note to *Warren v. State*, 68 Am. Dec. 219; and in the subsequent cases of *Bond v. State*, 63 Ark. 504, 53 Am. St. Rep. 129; *Summeralls v. State*, 37 Fla. 162, 53 Am. St. Rep. 247; *French v. State*, 85 Wis. 400, 39 Am. St. Rep. 855; *State v. Kelly*, 97 N. C. 404, 2 Am. St. Rep. 299. Where a defendant charged with misdemeanor has waived his right of presence at the rendition of the verdict, the failure of the deputy sheriff to intimate to him when the jury were ready to report is immaterial to the legal rendition of the verdict in absence: *State v. Waymire*, 52 Or. 281, 132 Am. St. Rep. 699.

DUPREE v. STATE.

[56 Tex. Cr. 562, 120 S. W. 871.]

FORMER JEOPARDY—Effect of Pending Appeal.—A Former Conviction for unlawfully selling liquor, from which an appeal is pending, is not a bar to another prosecution for the same offense, since the appeal deprives the judgment of its character of finality. (pp. 999, 1001.)

EVIDENCE—Judicial Notice of Former Conviction.—In a prosecution for unlawfully selling liquor, the court will take judicial notice that an appeal is pending on its former judgment convicting the accused of the same offense. (pp. 999, 1000, 1003.)

Harrison & Wayman, for the appellant.

F. J. McCord, assistant attorney general, for the state.

564 RAMSEY, J. This is an appeal from a judgment of conviction had in the county court of Brown county, on October 13, 1908, convicting appellant of unlawfully selling intoxicating liquors in said county and assessing his punishment at a fine of fifty dollars and thirty days' confinement in the county jail.

In this case a statement of the facts was filed which was duly approved by the court, and in the case there is properly raised the issue and question as to the validity of appellant's plea of former conviction. This plea in substance contained averments that appellant had heretofore been convicted of the same offense, is well drawn, and is, we think, sufficient if sustained by the evidence, in that it in terms avers a conviction had in the county court of Brown county, on the twenty-eighth day of July, 1907, convicting appellant of the sale of intoxicating liquors on a sale to the witness Couch on a general charge, and is followed by the allegation that the "offense for which he is now being prosecuted is, under the law, one and the same transaction and offense as that for which he has heretofore been convicted, and that

said judgment has not been set aside or reversed, but remains in full force and effect, and that he, affiant, is one and the same person who was thus tried and convicted, and against whom the judgment aforesaid was rendered in said court, and, further, that the evidence of the witness Couch upon which the judgment aforesaid was predicated was to the substance and effect that he bought various and sundry drinks of whisky and intoxicants from appellant on or about the day alleged in this case, all of which was before the jury in the cause in which he was convicted. On the trial appellant offered in evidence in support of his plea of former conviction the indictment in said cause No. 2989, on which he had theretofore been convicted, which charges the sale of intoxicating liquor by appellant to J. C. Couch on or about the tenth day of April, 1907. The judgment of conviction had thereon in the county court of Brown county, Texas, on the twenty-eighth day of July, 1907, and the charge of the court submitting this issue to the jury wherein the court gives this charge: "Now, if you believe from the evidence beyond a reasonable doubt that the defendant in Brown county, Texas, on or about the tenth day of April, 1907, and since the sixteenth day of November, 1906, next before the filing of the indictment herein, did unlawfully sell one drink of whisky, the same then and there being intoxicating liquor, to J. C. Couch, as charged, and that the sale of intoxicating liquor had theretofore ⁵⁶⁵ been and was then and there prohibited in said Brown county, under and by the laws of this state, then you will find defendant guilty, and assess his punishment by a fine of not less than twenty-five nor more than one hundred dollars and imprisonment in the county jail for not less than twenty nor more than sixty days." There was no proof offered as to what had become of this judgment, as to whether it was final, had been set aside or appealed from. As a matter of fact, it had been appealed from, the appeal was then pending, and is to-day before this court. Appellant relies to sustain his plea upon the decisions of this court in the case of Piper v. State, 53 Tex. Cr. 550, 110 S. W. 899, and Alexander v. State, 53 Tex. Cr. 553, 110 S. W. 918. As applied to the facts of those cases there is and can be no doubt about the correctness of the decisions therein rendered. It is our judgment that plea of former conviction in this case should not have been submitted at all, and furnishes absolutely no protection to appellant. The court below, as all the courts of record, was authorized, and indeed required, to take notice of his own proceedings and records. The court and judge presiding knew, and was charged by law with knowing, that the conviction in the original case, the basis of the plea, had been appealed from, and on such appeal the judgment and its

effect suspended. It was held in the case of *Maines v. State*, 37 Tex. Cr. 617, 40 S. W. 490, that on a plea of former conviction, where it appeared that defendant's motion for a new trial, in the case in which the conviction was had, was still pending, it was his duty to ask for a postponement of his trial; and it was his right to have a final disposition of the first case, before being forced to trial in the second, in order that he might avail of such disposition on his plea of former conviction. In discussing the case, Judge Henderson says: "In our opinion, it was the duty of appellant when he was placed on trial, in view of the fact that a motion for a new trial was pending in said former case, to have asked that the case then called for trial be postponed until the former case should be finally disposed of. It was his right to have a final disposition made of said other case before he was forced to trial in the last-mentioned case, in order that he might set up such final disposition. This was not done. The record shows that there was really no final judgment against the appellant when he set up his special plea, and it further shows that while a new trial was then pending, before the record was made up and the bill of exceptions approved by the court in this case, a new trial was granted." To the same effect, see *Brown v. State*, 43 Tex. Cr. 272, 64 S. W. 1056; *Washington v. State*, 35 Tex. Cr. 156, 32 S. W. 694; *Powell v. State*, 42 Tex. Cr. 11, 57 S. W. 94. This question came before this court in the early case of *Thompson v. State*, 9 Tex. App. 649, in which Judge White says: "The position of counsel that the defendant had once before been placed in jeopardy and could not be again tried, though supported by an able and ⁵⁶⁶ingenious argument, in which numerous authorities are cited, is wholly untenable. The circumstances are briefly these: The defendant had previously been tried and convicted. On his own appeal the conviction was set aside, the judgment reversed, and the case remanded for a new trial: 4 Tex. App. 44. The effect of this action of the court of appeals from the defendant's case was to place his case in precisely the same condition as if the district court had granted a new trial and there had been no appeal: Code Crim. Proc., art. 876. In such a case the doctrine of former jeopardy has no application whatever, for the simple reason that there had been no final adjudication of the case: *Vestal v. State*, 3 Tex. App. 648, and authorities there cited; *Simons v. State*, 56 Tex. Cr. 339, 120 S. W. 208. The action of this court on the former appeal is known to us, and it is shown by the record that it was known to the court below on the present trial. The plea of former jeopardy was properly stricken out on the motion and demurrer of the county attorney."

It will be noted by the language of this case that an appeal had been had and a reversal obtained in this court. In many cases cited in the books—*Dubose v. State*, 13 Tex. App. 418, and *Parchman v. State*, 2 Tex. App. 228. 27 Am. Rep. 435—it appeared that a motion for a new trial had been granted, and for these reasons the plea of former conviction was held unavailable. It would, indeed, be a singular doctrine to hold that because in one case in prosecutions covering many months, a conviction for violating the local option law had been had, while contesting this conviction and resorting to all the means known to law to escape its result, the appellant would be able to use such conviction, while still denying its force and while suspending its effect, use it as a shield against prosecution for other sales. If this could be done, it might easily happen that while contesting the first of thirteen cases, an acquittal might be obtained in the remaining twelve cases on the ground of former conviction, and finally on appeal a reversal obtained in the first case and ultimately a judgment of acquittal therein secured. It would thus happen that appellant would secure the benefit of a former conviction in the twelve cases, whereas, it might result that in the case used as a shield he would go free, and we would have the strange anomaly of twelve acquittals by reason of a former conviction when finally it should be determined that the appellant was not guilty at all, and he would escape punishment in all thirteen cases, in some or all of which he might be guilty, on the ground of a conviction in the trial court, contested by him, in which it had been finally determined that in fact he was not guilty of any offense. Our ruling is directly in keeping with the rule laid down in our supreme court. It was held in the case of *Texas Trunk Ry. v. Jackson*, 85 Tex. 605, 22 S. W. 1030, that an appeal or writ of error, whether prosecuted under cost or supersedeas bond, during pendency, deprives judgment of finality of character to entitle it to admission ⁵⁶⁷ as *res judicata*. It was also held in the case of *Maxwell v. First Nat. Bank* (Tex. Civ. App.), 24 S. W. 848, that *res adjudicata* cannot be pleaded while judgment relied upon is pending on appeal in another suit. It was later held in the case of *Buckner v. Lancaster* (Tex. Civ. App.), 40 S. W. 631, that a judgment from which an appeal is pending is not admissible in evidence as conclusive of the issue it involves. It is urged, however, that to adopt this practice would involve the application of a rule that would delay proceedings in courts and cause much confusion. That this might result is undoubtedly true, but, at least, it would follow the rule everywhere adopted in this state, and would, while perhaps occasioning delay, result in the due administration of justice, and would not involve the absurd and

ridiculous result which the construction contended for by appellant would necessarily cause to apply.

Finding no error, the judgment is affirmed.

Brooks, J., absent.

ON REHEARING.

RAMSEY, J. In this case counsel for appellant have filed a very able, thoughtful and well-considered motion for rehearing, in which the correctness of the opinion of the court is questioned and its conclusion attacked with great vigor.

It is with entire candor admitted in the motion that the conclusion of the court in holding that an appeal from a judgment, during the pendency of such appeal, deprives same of the necessary character of finality before it can be pleaded in bar of another prosecution. This, it is conceded, is the rule of our supreme court, and is also the rule adhered to in very many of the other states of the Union. It is recognized that this is the first time the doctrine has been applied in this court, though the correctness of the doctrine laid down by us is substantially conceded. The conclusion of the opinion, with which issue is taken, is that part of same which holds, in substance, that a trial court would and should take judicial notice that an appeal was pending in this tribunal in the absence of any direct evidence to this effect. In the original opinion we made the following statement: "The court below, as all the courts of record, was authorized, and indeed required, to take notice of his own proceedings and records. The court and judge presiding knew, and was charged by law with knowing, that the conviction in the original case, the basis of the plea, had been appealed from, and on such appeal the judgment and its effect suspended." This statement was made on the assumption that the case from which the former conviction resulted was indeed the same case on which appellant was in the instant case being prosecuted. If the judgment introduced was in another case, ⁵⁶⁸ and in respect to a separate transaction, it could not avail appellant as basis of a plea of former conviction. By the words "in another case" we mean, of course, another separate and severable transaction. So that, it seems to us, that appellant's argument defeats itself. If, as a necessary result of his position, it is asserted that in the instant case the conviction could not be had for the reason that a former conviction in respect to the same matter had once been had against appellant, then where the parties were the same, the transaction the same, and before the same court, by all the rules of law the court must take cognizance of its own judgments in respect to such matter. If it be

conceded it is a different case and different transaction, then it is not available as a basis of a plea of former conviction at all. We do not attach any importance to the fact that the former conviction was had in a merely different numbered case. The true test is, as we understand, Were the parties the same? Was the transaction the same? To illustrate: If one should be indicted for murder, and on trial convicted of manslaughter, a new trial granted, and for any reason a new indictment found, the case docketed under a new number, could it be doubted that where pending in the same court, that the judge must take cognizance of the proceedings and judgments in the different numbered case against the same defendant? The statement in the original opinion was perhaps rather broader than should have been made, and not stated with that exactitude and accuracy which is always desirable in opinions of courts of last resort, but we assumed that it would be understood and read with reference to and in the light of the facts shown by the record. There are many authorities holding that the courts are not required to take judicial cognizance and notice of their own judgments in cases pending therein between other parties. This rule is well established and supported by the cases cited by appellant, and of this rule the case of *Slaughter v. Cooper* (Tex. Civ. App.), 107 S. W. 897, is an excellent illustration. In that case the judgment in the suit of *Cooper v. Hefner* was admitted in evidence, and it appeared on the face of judgment that notice of appeal was given, but it was not shown that the appeal was ever perfected so as to give it that finality necessary to make it admissible in evidence. And it was further objected because the appellant was not a party to the case and his rights were not concluded by reason thereof in this case. It was there held, following the case of *Rust v. Burke*, 57 Tex. 341, that the fact that an appeal was ever perfected cannot be presumed, and that the judgment must be held to be a subsisting and valid judgment until the contrary was shown. There, as will be noted, the judgment was between different parties and one to which appellant was in no sense a party, and by which, in the nature of things, he could not be bound. We think further, in any event, that appellant is without complaint, for the reason that the court did in an admirable charge submit the issue of former conviction to the jury. This matter was submitted to them in this ⁵⁶⁹ language: "In this case the defendant has pleaded specially that he has heretofore been tried and convicted of the same offense for which he is now being tried, and evidence has been introduced before you with regard to said plea.

"You are charged that, in order to sustain said plea, you must be satisfied from the evidence that the offense for which

the defendant was formerly convicted was the identical case for which he is now on trial before you; that is, that the evidence in the former case and that introduced in this case establishes one and the same state of facts and circumstances. Or if you find from the evidence and the former charge of the court the jury in former case could have convicted defendant of the charge for which he is now being tried, if you are so satisfied and so believe from the evidence, then the form of your verdict will be, 'We, the jury, find that the matters alleged in the defendant's plea of former conviction are true,' and you need not inquire any further into nor render or return any further verdict in the case.

"But should you not be so satisfied from the evidence, and upon further inquiry under the other instructions herein given you, you should find the defendant guilty, as charged in the indictment, then and in that event the form of your verdict will be, 'We, the jury, find that the matters alleged in the defendant's plea of former conviction are untrue, and we further find that the defendant is guilty as charged in the indictment and assess his punishment at fine and punishment as directed under the other instructions herein given you.' " It was, of course, under the well-settled rules incumbent on appellant to show a conviction for the same offense as that wherein he is here charged.

We have carefully considered the matter, and are clearly of opinion that appellant is without just cause of complaint, and that the judgment is correct.

The motion for rehearing is in all things overruled.

That the Accused may Waive the Constitutional Safeguard against being twice put in jeopardy by procuring a new trial on his own motion, see *Brantley v. State*, 132 Ga. 573, 131 Am. St. Rep. 218, and cases cited in the cross-reference note thereto.

CASES

IN THE

SUPREME COURT

OF

WASHINGTON.

MEISENHEIMER v. MEISENHEIMER.

[55 Wash. 32, 104 Pac. 159.]

JURISDICTION—Presumption in Favor of Service of Process. Where a decree is granted the plaintiff in an action of divorce based upon personal service, it must be presumed that the court considered and determined affirmatively the question whether due service was made. And its judgment, though erroneous, is not void. (p. 1010.)

JURISDICTION—Hearing of Motion by Judge in Another County.—Where the attorneys in divorce proceedings stipulate that a motion to vacate the decree therein shall be heard at the county seat of another county before the superior judge of a third county, the judges consenting thereto, the judge so sitting has jurisdiction (the parties appearing before him), and his order denying the motion is *res judicata*. (p. 1011.)

JURISDICTION—Estoppel of Party to Deny.—A Party cannot Appear before a superior judge or court acting at his instance, have a full and fair hearing upon the merits in a matter over which the constitution gives such court general jurisdiction, and afterward raise the question of jurisdiction. (pp. 1011, 1012.)

JURISDICTION—Judge at Chambers.—A Superior Judge has Jurisdiction at chambers to hear a motion to vacate a divorce decree, in view of the constitutional provision that the superior court shall always be open. (p. 1013.)

JUDGMENT—Motion to Vacate—Conclusiveness of Order.—Where one against whom a decree of divorce has been rendered seeks to vacate it by motion, that method is exclusive, and the same relief cannot again be sought in an independent suit upon facts which existed and were known when the former method was adopted. The decree on the motion becomes conclusive, if not appealed from. (p. 1013.)

JUDGMENT—Vacation for Fraud of Attorney.—A decree will not be vacated on the ground that the party's attorney conspired to defeat his client's rights in stipulating to dismiss an appeal when it appears that he simply erred in judgment and intended to bring another action. (p. 1014.)

ESTOPPEL.—A Man Who Successfully Defends a Prosecution for perjury in obtaining his decree of divorce on the ground that the decree is void for want of service of process is not thereby estopped from asserting the validity of the decree when it is questioned by the wife on motion or in a suit to vacate. (pp. 1006, 1015.)

DIVORCE.—Where a Husband Conceals a Large Amount of Community property in obtaining a decree of divorce, his wife may afterward institute proceedings to have her rights in the property determined. (p. 1015.)

Graves, Kizer & Graves and Merritt, Oswald & Merritt, for the appellant.

W. E. Southard, Southard & Southard and Robertson, Miller & Rosenhaupt, for the respondent.

33 GOSE, J. This action, instituted by the respondent to vacate a decree of divorce theretofore entered against her, resulted in a decree in her favor, from which this appeal was taken. The complaint, which is quite lengthy, in substance alleged that the appellant and the respondent were married on November 27, 1899; that because the appellant was then **34** engaged to marry another woman, the marriage was concealed from the public; that on December 27, 1904, the appellant, through fraudulent means, procured a decree of divorce to be entered in the superior court of Douglas county; that the fraud consisted in this, that at the time of the commencement of the action and the entry of the decree, the appellant was a resident of Adams county; that the decree was entered upon the service of a summons entitled in the superior court of Adams county; that the cause for divorce alleged in the complaint was abandonment on the part of the respondent, when, as the appellant well knew, there had been no abandonment; that the respondent, after the service of summons and complaint, relying upon the promise of the appellant and his attorney that he would protect her interests, and that no valid separation or divorce would be had, and that if necessary he would remarry her, neither employed counsel nor appeared in the action; that at the trial the appellant testified that the respondent had abandoned him, well knowing such evidence to be false and untrue; that the appellant was prosecuted on the charge of perjury in the superior court of Douglas county for giving false testimony therein; that upon the trial he and his counsel therein claimed that the divorce proceedings were void; that the court had no jurisdiction because no summons, other than the one entitled in the superior court of Adams county, was served, and upon the motion of the appellant the jury was instructed to that effect; that the appellant concealed from the court a large amount of community property held in trust by various parties, of the value of one hundred and fifty thousand dollars; that after the entry of the decree the appellant married one Maud Motley, who knew of the respondent's rights; that thereafter the respondent employed an attorney to procure the vacation of the decree, and that he conspired with the appellant to defraud her of her marital

and property rights; that the respondent had at all times a meritorious defense to the action, and that she did not abandon the appellant. The prayer is that the decree ³⁵ and the order of Judge Chadwick, hereafter spoken of, be vacated, and that the respondent be restored to her marital rights. The answer joined issue on all the allegations of fraud and want of jurisdiction.

On November 1, 1905, ten months after the entry of the decree and four months after the marriage of appellant to a third party, the respondent filed a motion in the original action to vacate the decree. The motion is as follows:

"Comes now the above-named defendant, Esta Meisenheimer, and appearing herein specially for the purpose of this motion and for no other purpose moves the court:

"(1) To quash, vacate, set aside and hold for naught the summons and proof of services thereof in the above-entitled cause.

"(2) To vacate, set aside, hold for naught and strike from the records herein the findings of fact and conclusions of law filed in the above court in the above-entitled action on the twenty-seventh day of December, 1904.

"(3) To vacate, set aside, hold for naught and strike from the files of said court the decree and judgment heretofore entered in the above-entitled court in favor of the plaintiff and against the defendant signed and entered on the twenty-seventh day of December, 1904.

"(4) To dismiss the above-entitled cause and action for the reason and on the ground that no service of the pretended summons on file herein was had or made upon the defendant as required by law or at all.

"All for the reason and on the ground that the court was without jurisdiction, for the reason that no summons in the above-entitled cause was served upon the defendant as required by law or at all.

"This motion is made upon all the papers, pleadings and files herein and upon the affidavit of the defendant hereto attached and the copy of the summons mentioned in said affidavit, the original of which defendant prays permission of this court to bring into court on the hearing of this motion and to exhibit same, and to have same read in and made of evidence and a part of the record on said hearing in support of this defendant's motion."

The motion was heard upon the record and the affidavits of ³⁶ the parties. The counter-affidavit of the respondent presented the principal facts pleaded in the complaint in the instant case in detail. Thereupon, the parties stipulated as follows: "It is hereby stipulated and agreed by and between the parties to the above-entitled cause, through their respective attorneys, that said cause may be heard before Hon. S.

J. Chadwick, judge of the superior court of the state of Washington, for Whitman county, provided the said Judge Chadwick will hear the motion to vacate the decree in said cause, in the city of Spokane, and it is stipulated and agreed that said motion may be heard in Spokane at any time to suit the convenience of the said S. J. Chadwick. It is further stipulated and agreed that for the purpose of carrying out this stipulation the clerk of the superior court of the state of Washington for the county of Douglas, shall transfer the original files to the clerk of Spokane county."

A copy of the stipulation with the following letter was then mailed to Judge Steiner, the superior judge of Douglas county:

"Spokane, Wash., March 17, 1906.

"Hon. R. S. Steiner, Wenatchee, Wash.

"My Dear Judge: For the convenience of parties and witnesses Mr. Belden and ourselves have stipulated that the motion in the Meisenheimer case might be heard before Judge Chadwick, he coming here to Spokane to hear it, and he has consented to do so. We do not change the venue of the case, but simply have Judge Chadwick act and hear the motion here. We enclose you a copy of the stipulation, the original having been sent to the clerk at Waterville. We desire very much that you approve this arrangement and direct the clerk to send the files to the clerk of Spokane county to be under his charge while this matter is being heard. Hoping that you will do this, we are,

"Yours very truly,

"Dic. J. W. M.

MERRITT & MERRITT."

Upon the stipulation and the letter, Judge Steiner made the following order:

"On reading the foregoing letter, and copy of stipulation therewith, it is ordered that the cause therein referred to be transferred to the superior court for Spokane county for the ³⁷ purpose indicated, and that the clerk of the superior court for Douglas county transmit the papers in said cause to the clerk of the superior court for Spokane county.

"Dated at Wenatchee, March 19, 1906.

"R. S. STEINER,

"Judge."

On June 15, 1906, Judge Chadwick, sitting in the city of Spokane, heard the motion, affidavits and argument of counsel; whereupon he made the following order:

"This cause coming on to be heard this fifteenth day of June, 1906, before the Honorable S. J. Chadwick, judge of the superior court of the state of Washington, for Whitman county, under the provisions of the stipulation herein, upon the motion of the defendants to vacate and set aside the decree entered in said cause, on the twenty-seventh day of

December, 1904, hereinbefore filed in said cause, and the plaintiff appearing by O. R. Holcomb and Merritt & Merritt, his attorneys, and the defendant appearing by E. H. Belden, her attorney, and before proceeding with the argument upon said motion the defendant in open court moves to strike from the said motion ground four (4) thereof, and no objection being made thereto, it was ordered by the court that said ground be stricken, and held as waived by the defendant, and the court having heard the argument of counsel upon said motion to vacate and set aside said decree, and being sufficiently advised in the premises, overruled the same. It is therefore ordered and adjudged that said motion to vacate the said decree be and the same hereby is overruled and denied, to which ruling of the court defendant excepts, and exception is allowed.

“S. J. CHADWICK,
“Judge.”

The order was filed in the superior court of Douglas county January 10, 1907, and an appeal taken therefrom February 26th following, which was dismissed on May 3d following, upon the stipulation of counsel for the respective parties. At the time of the hearing of the motion, the respondent knew and presented all the facts which she now urges in support of the decree in the instant case, except the alleged collusion between her then counsel and the appellant, and the estoppel hereafter noticed.

The respondent first urges with great zeal that the evidence ³⁸ discloses that the only summons served in the divorce action was one entitled in the superior court of Adams county, whilst, as we have seen, the decree was entered in the superior court of Douglas county; and that, for this reason, the court was without jurisdiction, and the decree is void. Conceding for the moment the service to be as the respondent states, the conclusion which she deduces does not follow. The record is regular. The original summons was properly entitled and fair upon its face. The return shows personal service in Adams county. Let us suppose that the respondent had appeared specially in the action, and moved to quash the service because the summons served upon her was entitled as she claims; that she had presented her evidence in that behalf, and that the appellant had supported the record, as he did in this case, with the evidence of Judge Holcomb and R. C. Holcomb, to the effect that she was served with a copy of the original summons as it appears in the record; that the court had denied her motion; that she had declined to plead further, and upon the hearing upon the merits the decree had been entered and no appeal taken. What, then, would have been the status of the case? Surely no one upon such a record would have the temerity to urge

that the decree would be void. The hypothesis would have presented primarily a question of fact, viz., which summons was served. An erroneous determination of a fact properly submitted cannot render a judgment void. The same is true as to every other fact relied upon for procuring the decree. The court necessarily found that there had been a proper service; that the parties were husband and wife; that the appellant was a resident of Douglas county, and that the respondent had abandoned the marriage relation more than a year before the filing of the complaint.

Mr. Black, in his work on Judgments, section 170, speaking of a void judgment, says: "It is not necessary to take any steps to have it reversed, vacated, or set aside." In *Wright v. 39 Douglas*, 10 Barb. 97, the court, in commenting on this question, said: "But when the jurisdiction depends on a fact that is litigated in a suit, and is adjudged in favor of that party who avers jurisdiction, then the question of jurisdiction is judicially decided, and the judgment record is conclusive evidence of jurisdiction, until set aside or reversed by a direct proceeding by appeal or a writ of error."

"In the case of an attempted service of process, the presumption exists that the court considered and determined the question whether the acts done were sufficient or insufficient. If so, the conclusion reached by the court, being derived from hearing and deliberating upon a matter which, by law, it was authorized to hear and decide, though erroneous, cannot be void": *Freeman on Judgments*, 3d ed., sec. 126.

"A judgment is not void in the legal sense unless its invalidity appears upon the record. It is voidable merely": 1 *Bailey on Jurisdiction*, sec. 136.

"The result deducible from a majority of the cases seems to be that it is only when the judgment appears upon its face to have been rendered without jurisdiction that it can be considered a mere nullity for all purposes": 1 *Black on Judgments*, sec. 218.

"A judgment rendered without in fact bringing the defendants into court cannot be attacked collaterally on this ground, unless the want of authority over them appears in the record; it is no more void than if it were founded upon a mere misconception of some matter of law, or of fact, occurring in the exercise of an unquestionable jurisdiction": *Freeman on Judgments*, 3d ed., sec. 116.

"By the filing of the complaint the court obtains jurisdiction of the subject matter, and by the service of the summons, of the person of the defendant: and every fact not negatived by the record will be presumed in aid of the judgment, and it will only be held void when it affirmatively appears from the record that the court had no jurisdiction to render it": *Munch v. McLaren*, 9 Wash. 676, 38 Pac. 205. See, also,

Rogers v. Miller, 13 Wash. 82, 52 Am. St. Rep. 20, 42 Pac. 525, and Kizer v. Caufield, 17 Wash. 417, 49 Pac. 1064.

⁴⁰ Did Judge Chadwick, sitting in Spokane county, have jurisdiction to hear and determine the motion to vacate the decree? It cannot be doubted that Judge Steiner, the parties consenting, could have done so. The stipulation was that Judge Chadwick, a superior judge of the state of Washington for Whitman county, should hear the motion in the city of Spokane. The order of Judge Steiner was that the papers be transferred to the superior court for Spokane county for the purpose indicated in the stipulation, viz., that the motion might be heard by Judge Chadwick for the convenience of the parties and witnesses. The venue of the case had not been changed. Our code (Ballinger's Code, sec. 4766, Pierce's Code, sec. 3188) provides that an attorney has authority "to bind his client in any of the proceedings in an action or special proceeding by his agreement duly made, or entered upon the minutes of the court." Pierce's Code, section 4380 (Ballinger's Code, sec. 4668), provides that the judge of a superior court of one county, when requested by the judge of the superior court of another county, may "hold a session of the superior court of the county" whereof such request shall have been made, "at the seat of judicial business of such county." Pierce's Code, section 4378 (Laws 1901, p. 76, sec. 2), provides that: "Any judge of the superior court of the state of Washington who shall have heard any cause, either upon motion, demurrer, issue of fact, or other matter in any county out of his district, may decide, rule upon, and determine the same in any county in this state, which decision, ruling and determination shall be in writing, and shall be filed immediately with the clerk of the county where such cause is pending."

The order of Judge Steiner was, in substance and effect, when construed with the stipulation and letter of counsel, a request of Judge Chadwick to hear the motion in the city of Spokane, and was so construed by the parties. Broadly interpreted in the light of the record, with a view to effectuate the legislative intent, the several statutes conferred jurisdiction on Judge Chadwick to determine the motion, and the judgment entered by him was *res judicata*. The motion was ⁴¹ not determined until the judgment was filed with the clerk: Northern Counties Inv. Trust v. Hender, 12 Wash. 559, 41 Pac. 913.

Moreover, jurisdiction of the parties was obtained by their appearance, and the subject matter was one over which the superior courts have general jurisdiction derived from the constitution. This being true, a party cannot appear before a judge or a court acting at his instance, have a full and fair

hearing upon the merits, and then question jurisdiction because of an adverse decision.

In *Lillie v. Trentman*, 130 Ind. 16, 29 N. E. 405, at page 406, the court, in discussing this question, said: "A practice that would permit a party litigant to proceed for months before a *de facto* judge, to make issues, and obtain rulings upon legal questions involved in the controversy, and then, if not satisfied with some of his rulings, or not disposed to go into trial when the cause is ready for trial, to be able in a moment to arrest proceedings and oust the jurisdiction of the judge, cannot be tolerated. The whole tendency of the later cases in this court has been in the direction of requiring such objections to be promptly made, and to hold that, if not made promptly, they are to be deemed waived."

In *State v. Sachs*, 3 Wash. 691, 29 Pac. 446, a judgment entered by a judge *pro tempore* had been vacated because the judge had not been appointed by an agreement in writing signed by the parties or their attorneys and approved by the court. In reversing the judgment, it is said, at page 694: "He was estopped by his action in appearing and trying the cause before the judge *pro tempore*, without objection, and could not be heard to raise the question thereafter."

Speaking to this question, in *State v. Holmes*, 12 Wash. 169, 40 Pac. 735, 41 Pac. 887, at page 180, the court said: "The rule compelling the defendant to raise timely objection to the jurisdiction of the court is based upon principles of right and fair dealing. The statute is liberal in protecting the rights of a defendant in criminal actions, and ample opportunity is given him to present objections to anything⁴² which is prejudicial to his rights. Knowing the ineligibility of the judge who tries his case, and yet submitting himself to the jurisdiction, being ready to avail himself of the action of the court if the verdict should be in his favor, he should not in justice be permitted to object to such jurisdiction when it eventuates that the verdict is against him. Such a practice would tend to defeat justice rather than to secure to the defendant his substantial rights."

In *Smurr v. State*, 105 Ind. 125, at page 133, 4 N. E. 445, it is said: "We have many cases declaring that where a party goes to trial without objection before a judge assuming to act under color of authority, he cannot, after judgment or conviction, successfully make the objection that the judge had no authority to try the cause"; citing numerous cases.

In *Rogers v. Loop*, 51 Iowa, 41, 50 N. W. 224, it was held that, where the parties stipulated that a justice of the peace of one township should hear the case in another township, and appeared before him and had their cause heard and determined, the losing party could not thereafter be heard to raise the question of jurisdiction. In that case the court,

recognizing the fundamental principle that consent of parties cannot confer jurisdiction over the subject matter of an action where the law does not confer it, and by way of illustration, said a justice of the peace could not exercise jurisdiction by consent of the parties where the amount involved or the general question to be determined was not cognizable by such a court.

The respondent also urged that Judge Chadwick, sitting in chambers, was without jurisdiction to hear the motion. The constitution, article 4, section 6, provides that the superior court shall always be open except on nonjudicial days. Whether we treat the judgment as the act of the judge or the act of the court, the effect will be the same. Under our judicial system it cannot be successfully contended that an act done by a judge sitting on the bench where no jury is required has any ⁴³ greater legal force than the same act done by him in an adjoining room by courtesy styled his chambers. Moreover, he sat at the time and place agreed upon by the parties, and neither can now complain that he sat at a place in the city of Spokane other than the courtroom. These observations, of course, would not apply to a case where a superior court judge or a superior court undertook, without objection, to determine questions where the power to determine them had not been conferred by the constitution on superior courts.

The motion to vacate the decree was made in pursuance of the provisions of our code: Ballinger's Code, sec. 5153; Pierce's Code, sec. 1033. Such proceedings must be commenced within one year: Ballinger's Code, sec. 5156; Pierce's Code, sec. 1036. As we have seen, the motion, whether treated as a motion proper or an unverified petition, was supported by affidavits which presented all the questions of fact sought to be raised by the complaint in the instant case, except as herein noted. This is true with paragraph 4 eliminated, as will appear from reading the motion. The respondent attached an Adams county summons to her original affidavit, and the question of jurisdiction was therefore before Judge Chadwick. The respondent having sought to vacate the decree by a motion, that method is exclusive, and she cannot again seek the same relief in an independent suit upon facts that existed and were known to her when she adopted the former method. In discussing this question in *McCausland v. Bailey*, 51 Wash. 183, 98 Pac. 327, we said: "When the court refuses to vacate a judgment, the whole matter in controversy is ended; and upon the trial of the cause in the equitable action to set aside the judgment, the result is exactly the same. There were two modes of attack, either of which could have been adopted by the appellants in this case: to move directly in the tax foreclosure to vacate the

judgment, as in the case just cited, or to bring an independent suit in equity for that purpose, as the appellants here have done."

In *Chezum v. Claypool*, 22 Wash. 488, 79 Am. St. Rep. 955, 61 Pac. 157, in discussing the construction of the provisions of ⁴⁴ our code, Ballinger's Code, sections 5153 to 5162 (*Pierce's Code*, sections 1033, 1039), at pages 499 and 500, it is said: "As already said, the statute affords a full, complete and adequate remedy. Such being the case, it must be regarded as exclusive; and, having unsuccessfully sought to obtain a decision in their favor by resorting to that proceeding, plaintiffs are bound by such decision, and cannot avoid the effect of it by an action like the present."

In *McCord v. McCord*, 24 Wash. 529, 64 Pac. 748, a decree of divorce had been entered and a motion to vacate the decree denied. Later, a petition to the same effect having been denied, an appeal was taken. We held that the remedy was by an appeal from the order denying the motion to vacate, instead of by a petition based upon the same facts. In *Pierce County v. Bunch*, 49 Wash. 599, 96 Pac. 164, at page 604, we said: "It is therefore firmly established by the decisions of this court that an order denying a motion to vacate a judgment is a bar to any subsequent proceeding seeking the same relief"; See, also, *Wilson v. Seattle Dry Dock & Ship Bldg. Co.*, 26 Wash. 297, 66 Pac. 384; *Peyton v. Peyton*, 28 Wash. 278, 68 Pac. 757; *State v. Superior Court*, 31 Wash. 53, 71 Pac. 740. We have examined *Payette v. Ferrier*, 20 Wash. 479, 55 Pac. 629, *Long v. Eisenbeis*, 21 Wash. 23, 56 Pac. 933, *Bingham v. Keylor*, 25 Wash. 156, 64 Pac. 942, and *Snyder v. Harding*, 38 Wash. 666, 80 Pac. 789, cited by the respondent, and are not persuaded that they announce a different rule.

Two questions remain which were not presented at the hearing upon the motion. First, it is alleged that the respondent's attorney conspired with the appellant to defeat her rights. He stipulated to dismiss the appeal from the judgment entered on the motion to vacate the divorce decree. He testified that he did so because he "came to the opinion that Judge Chadwick's opinion was correct. . . . I intended to bring another action." Granting that he erred in ⁴⁵ judgment, the presumption is that the mistake was an honest one. Fraud and error are not synonymous terms. We have read all the evidence, and the charge finds no support in the record.

It is urged that the conduct of the appellant in the trial of the criminal case was not submitted to Judge Chadwick, and that it estops him from asserting the validity of the decision. The evidence shows that the perjury case was tried after the respondent filed her motion and affidavit to vacate

the decree. W. J. Canton, the prosecuting attorney of Douglas county, who tried the perjury case for the state, gave evidence that no witness, other than the respondent, testified to the service of the summons; that the Adams county summons was introduced in evidence by the appellant on cross-examination of the respondent, and as a part thereof. The evidence shows an utter absence of the essential elements of estoppel. A defendant in a criminal case has an undoubted right to have all the state's evidence and the applicable law submitted to the jury.

In *Butler v. Supreme Court of Foresters*, 53 Wash. 118, 101 Pac. 481, a husband had left his home on July 7, 1898, intending to return in a few days. His wife paid the dues on a life policy which he held in the defendant company until February 28, 1900. In April, 1900, the wife instituted proceedings for divorce, alleging her husband's desertion. In due time the decree of divorce was entered. In 1906, after the expiration of seven years, the wife commenced an action to recover on the policy, on the ground of the death of her husband. The defendant pleaded that she was estopped: that having brought her divorce action on the theory that her husband was alive, she could not later, in another action, contend that he was dead when the former action was commenced. In holding that there was no estoppel, at page 484, we said: "Estoppels operate only toward parties or privies, and the party who pleads an estoppel must be one who had in good faith been led to his injury."

⁴⁶ In the perjury case, it is obvious that the parties were the state and the appellant. The respondent was in no sense a party. Moreover, the respondent knew this fact when she presented her motion, and, as we have said, it was her duty to present all her facts at that time.

The complaint alleged that a large amount of community property, held in trust by various persons, was concealed from the court and not disposed of in the decree. If this is true, the property or its avails is now common property, and the respondent in a proper proceeding with proper parties can have her rights determined. This question was not litigated either before Judge Chadwick or here. The primary purpose of the action was to vacate the decree, leaving the parties husband and wife: *James v. James*, 51 Wash. 60, 87 Pac. 1113, 98 Pac. 1118; *Ambrose v. Moore*, 46 Wash. 463, 90 Pac. 585, 11 L. R. A., N. S., 103.

The view we have taken of the case makes it unnecessary to discuss other questions of law suggested by counsel based on a different theory of the law. The decree will be reversed with directions to enter a judgment for the appellant for

The Vacation of Judgments on Motion, when not specially authorized by statute, is the subject of a note to *Furman v. Furman*, 60 Am. St. Rep. 633.

The Vacation of Judgments Because of the Negligence or Inadvertence of Counsel is the subject of a note to *Peterson v. Koch*, 80 Am. St. Rep. 264.

Relief in Equity from Judgments is the subject of a note to *Little Rock etc. Ry. Co. v. Wells*, 54 Am. St. Rep. 218.

The Effect of Judgments in Criminal Cases as Res Judicata is the subject of a note to *Mitchell v. State*, 103 Am. St. Rep. 19.

QUINN v. REVIEW PUBLISHING COMPANY.

[55 Wash. 69, 104 Pac. 181.]

LIBEL—Charging Officer With Graft and Jobbery.—A newspaper article charging a sidewalk inspector with being part of a system of jobbery and graft in the management of city contracts is libelous per se. (p. 1019.)

LIBEL—Charge Against Officer.—*The Truth is a Defense* to a newspaper publication charging an officer with being part of a system of jobbery and graft. (p. 1019.)

LIBEL—Charge Against Officer.—*Though Made in Good Faith* a newspaper publication falsely charging an officer with being part of a system of jobbery and graft is not privileged. (p. 1019.)

LIBEL—Truth of Charge Against Officer, When not Established.—The truth of a charge that a sidewalk inspector is part of a system of jobbery and graft is not necessarily established by evidence that many sidewalks have been poorly constructed and not in accordance with the terms of the contracts, and that the inspector has been discharged for incompetency. (pp. 1019, 1020.)

WORDS AND PHRASES.—“*Graft*” is a Dishonest Transaction in relation to public or official acts, a word commonly used to designate an advantage which one person, by reason of his peculiar position or superior influence or trust, acquires from another. (p. 1020.)

EVIDENCE.—Error in Permitting the Plaintiff in a Libel Case to prove his reputation for honesty is cured by the court expressly withdrawing the evidence and instructing the jury not to consider it. (p. 1020.)

H. M. Stephens, for the appellant.

Alex. M. Winston, for the respondent.

70 MOUNT, J. The respondent brought this action to recover damages upon two causes of action, for alleged libels published against him in the regular issues of the “*Spokesman-Review*,” on June 6 and 7, 1908. The action was tried to the court and a jury. A verdict was returned in favor of the plaintiff on the first cause of action for nine hundred and ninety-nine dollars, and on the second cause for one dollar. The defendant has appealed.

It appears that the respondent was appointed inspector of sidewalks and cement and concrete work thereon for the city of Spokane, in May, 1904; that he continued as such inspector until July, 1905, when he became the chief inspector of such work until June 5, 1908, when he was discharged. It was respondent's duty to inspect all sidewalk work done under contracts with the city, and to see that the terms of such contracts were faithfully complied with by the contractors. While he was chief inspector he had several inspectors under him, and it was his duty to instruct these inspectors, and also to see that they performed their duty. On June 5, 1908, respondent was discharged for alleged incompetency, and the next day the "Spokesman-Review" published an article as follows:

"BLOW AT GRAFT AND JOBBERY.

"One by one facts are being disclosed by City Engineer Ralston which demonstrate that the management of the city ⁷¹ business under the old Daggett-Omo-Gill-McIntyre regime, now drawing slowly to an end, has been honeycombed with inefficiency, favoritism and graft. The domination of the board of public works by a majority of the members of the city council, and the presence until recently in the city engineer's office of an engineer who conducted that office with little regard for the efficiency in the service, together with the prevalence throughout of an iniquitous and corrupting system of political pull, have conspired to undermine the integrity of the business and of the city administration for the profit of favored contractors and others having business dealings with the city. Disclosures of the past few days have shown that appointments to places under the Omo board of public works have been made upon recommendation of members of the council with no regard for the fitness of the applicants; that specifications for contract work have been drawn carelessly in the interests of dishonest or careless contractors, that the system of inspection over street improvement contracts has consisted of one-half idle pretense and the other half deliberate favoritism, exerted in behalf of contractors who were influential with the political powers behind the foreman of inspectors, Ed. Quinn. City Engineer Ralston is to be heartily commended for his action in securing the removal of Foreman Quinn and thereby striking one effective blow at this system of graft and jobbery. Already the efforts of Mayor Moore to restore responsible government to the city hall in the interests of the taxpayers are beginning to bear fruit."

And on June 7, 1908, another article was published as follows:

“CAMERA CATCHES FALSE INSPECTORS.

“CIVILIAN SPIES ALSO AID IN DETECTING CITY SIDEWALK FRAUDS.

“A small army of volunteer civilian inspectors and a professional photographer were employed by City Engineer Ralston in procuring the evidence of the collusion of city inspectors through which cement contractors have been able to cheat the city in cement work by from 15 to 35 per cent of the amount of cement called for in their contracts and from 10 to 30 per cent of the actual cost of the work. As a result of the efficient employment of these agencies the engineer has made a case against some of the inspectors which is unshakeable, ⁷² and it was upon this evidence that he discharged a number of inspectors and procured the discharge of Foreman Quinn for inefficiency. Some of the disclosures obtained by the engineer prove the ingenuity of the contractors themselves, but others indicate that the skimping of cement work was accomplished through the frankly confessed negligence or collusion of the inspectors employed by the city to watch the contractors.”

It is argued by the appellant that these articles are not libelous per se, but, if libelous, are true, and that therefore the trial court erred in denying the appellant's motions made at the close of respondent's evidence, and again at the close of all the evidence, for a directed verdict. In the case of *Wofford v. Meeks*, 129 Ala. 349, 87 Am. St. Rep. 66, 30 South. 625, 55 L. R. A. 214, the supreme court of Alabama quoted from *Iron Age Publishing Co. v. Cradup*, 85 Ala. 519, 5 South. 332, as follows: “Generally, any false and malicious publication, when expressed in printing or writing or by signs or pictures, is a libel, which charges an offense punishable by indictment, or which tends to bring an individual into public hatred, contempt, or ridicule, or charges an act odious and disgraceful in society. This general definition may be said to include whatever tends to injure the character of an individual or blacken his reputation, or imputes fraud, dishonesty, or other moral turpitude or reflects shame or tends to put him without the pale of social intercourse.”

And then said: “This quotation clearly recognizes the principle that, if the words employed in the alleged libelous publication impute dishonesty or corruption to an individual, they are actionable per se—a principle well established in other jurisdictions: 13 Am. & Eng. Ency. of Law, 295, 296, and note 3. So, too, it is libelous to impute to anyone holding office that he has been guilty of improper conduct in office, or has been actuated by wicked, corrupt or selfish motives: *Newell on Defamation, Slander and Libel*, p. 69.”

Under this definition, which is no doubt correct, the publications in this case were clearly libelous per se. They ⁷³ charge that the management of the city business under the

old regime has been honeycombed with inefficiency, favoritism and graft; that the domination of the board of public works by a majority of the city council and the presence of an engineer, together with the prevalence throughout of an iniquitous and corrupting system of political pull, have conspired to undermine the integrity of business and of the city administration for the profit of favored contractors; that the system of inspection over street improvement contracts has consisted of one-half idle pretense and the other half deliberate favoritism, exerted in behalf of contractors who are influential with political powers behind the foreman of inspection Ed. Quinn. City Engineer Ralston is to be commended for his action in securing the removal of Foreman Quinn, and thereby striking an effective blow at this system of graft and jobbery.

It is plain that this article and the one published the next day, upon which the second cause of action is based, clearly charged the respondent with being part of the system of jobbery and graft in the management of city contracts, and the main one through whom such jobbery and graft were accomplished; and it was no doubt intended thereby to charge, and did charge, the respondent with being guilty of improper conduct in office, and that he had been actuated by wicked, corrupt and selfish motives. The articles were therefore libelous per se. If these charges were true, the newspaper was privileged to publish them.

“ ‘But the prevailing rule is that charges imputing a criminal offense or moral delinquency to a public officer cannot, if false, be privileged, though made in good faith, and this though the charge relates to an act of the officer in the discharge of his official duties’ ”: *Byrne v. Funk*, 38 Wash. 506, 80 Pac. 772, 3 Ann. Cas. 647.

If untrue, the newspaper must be responsible for the damages done in its publication: *Bourreseau v. Detroit Evening Journal Co.*, 63 Mich. 425, 6 Am. St. Rep. 74 320, 30 N. W. 376.

The truth of the accusations made will, of course, be a defense: *Leghorn v. Review Publishing Co.*, 31 Wash. 627, 72 Pac. 485; *McClure v. Review Publishing Co.*, 38 Wash. 160, 80 Pac. 303.

Appellant insists that the evidence shows that the articles were true, or substantially so, and that, therefore, it was the duty of the court to direct a verdict in favor of the appellant. This seems to have been the principal issue of fact, if not the only issue in the case, and we think it was fairly shown that in many instances sidewalks were poorly constructed, and that they were possibly not as thick as the contract called for, and also that the concrete mixture in some cases was not in the proportion of one of cement to three of sand

and five of gravel or crushed rock, as provided for in the contracts, and also that the respondent was discharged for incompetency as city inspector. But these facts, being true, did not necessarily show graft and jobbery as charged in the published articles. Graft, as defined by the Century Dictionary and Encyclopedia, volume 3, page 2591, means: "Dishonest gain acquired by private or secret practice or corrupt agreement or connivance, especially in a position of trust, as by offering or accepting bribes."

The trial court correctly instructed the jury that graft "is a dishonest transaction in relation to public or official acts, and a further definition of the word 'graft' is as commonly used to designate an advantage which one person by reason of his peculiar position or superior influence or trust acquires from another": *Craig v. Warren*, 99 Minn. 246, 109 N. W. 231; *State v. Sheridan*, 14 Idaho, 222, 93 Pac. 656, 15 L. R. A., N. S., 497.

While the facts shown in this case, as stated above, were all circumstances proper to be shown as tending to prove dishonesty or corruption, they do not necessarily prove that the respondent was dishonest or profited by reason thereof, or that he was himself guilty of graft or jobbery, or that he intentionally permitted contractors to job or graft the city. These facts may show that respondent was incompetent, but they are not conclusive of dishonesty. The most that may be said of such facts is that they are circumstances from which the jury might have found dishonesty or graft and jobbery. They were, therefore, for the jury, and the jury having found that they do not constitute graft and jobbery, that finding is conclusive here.

It is also claimed that the court erred in excluding a certain article which was published in the same issue of the paper as the one where the libel complained of was published. This article did not in any way mitigate or attempt to cure the libel published, and was therefore properly excluded. If it had attempted to do so, it would not have been admissible.

Exhibit No. 27 appears to be a report by respondent of certain defective work done. It tends to show that respondent was attempting, at least, to do his duty. No good reason is offered for its introduction. We have already referred to the question of privileged publications and need not discuss this assignment further. The charge of graft and jobbery having been found false by the jury, it follows that the articles were without the rule of privileged publication, and that such charges were unfair comments. If the court erred in permitting respondent to prove his reputation for honesty, that error was cured, because the court expressly withdrew such evidence and instructed the jury not to consider it.

We find no error in the record, and the judgment must therefore be affirmed.

Rudkin, C. J., Parker, Dunbar and Crow, JJ., concur.

A Charge Against a Public Officer imputing want of integrity or corruption of his official duties is actionable of itself: *Dauphiny v. Buhne*, 153 Cal. 757, 126 Am. St. Rep. 136; *Wofford v. Meeks*, 129 Ala. 349, 87 Am. St. Rep. 66; *Cotulla v. Kerr*, 74 Tex. 89, 15 Am. St. Rep. 819. To publish that the commissioners of a graveling district have charged their neighbors and fellow property owners a sum greatly in excess of the cost of the material is libel per se, and the charge is not privileged: *Murray v. Galbraith*, 86 Ark. 50, 126 Am. St. Rep. 1078.

As to What Words are Libelous Per Se, see the note to *Nichols v. Daily Reporter Co.*, 116 Am. St. Rep. 802.

Justification in Libel and Slander is the subject of a note to *Rutherford v. Paddock*, 91 Am. St. Rep. 285.

TWITCHELL v. SPOKANE.

[55 Wash. 86, 104 Pac. 150.]

MUNICIPAL WATERWORKS—Transfer of Profits to General Fund.—A city will not be enjoined from transferring the profits of its water system to the general fund, when all obligations against the water fund are being met when due and there is no statutory or other rule against such transfer. (pp. 1022, 1023.)

MUNICIPAL WATERWORKS—Right to Operate at Profit.—A city operating its own water system may charge such rates to consumers as will yield a reasonable profit. (p. 1023.)

MUNICIPAL WATERWORKS—Water Rates as Taxes.—Water rates paid by consumers where the supply is furnished by the city are not taxes. (p. 1023.)

MUNICIPAL WATERWORKS—Free Service for Public Purposes.—A city operating its own water system may furnish water free for municipal and charitable purposes. (p. 1023.)

MUNICIPAL WATERWORKS—Reasonableness of Rates.—In **Fixing the Rate** to consumers, a city operating its own water system may consider the cost of extending mains and depreciation. The mere fact that a profit is made does not prove a rate excessive. (p. 1024.)

MUNICIPAL WATERWORKS—Discretion in Fixing Water Rates.—A reasonable discretion abides in the officers whose duty it is to fix water rates where the system is operated by the city, and courts will not disturb a rate which they establish if it is not excessive. (p. 1024.)

MUNICIPAL WATERWORKS—Reasonableness of Rates.—A **Water Rate** of eighty cents per month for a five-room house with bath, toilet and lavatory, and two dollars and eighty cents per year for a lawn sixty by one hundred and thirty-five feet, is reasonable. (pp. 1022, 1024.)

William S. Lewis and Delbert Twitchell, for the appellants.

L. R. Hamblen, F. D. Allen and Henry Rhodes, for the respondents.

⁸⁶ MOUNT, J. The appellants brought this action to obtain a reduction of water rates, and to restrain alleged wrongful use of water revenues by the city of Spokane. The cause was tried to the court without a jury, and the action was dismissed. The plaintiffs appeal.

⁸⁷ It appears that the city of Spokane owns and operates a water system for supplying the city and the inhabitants thereof with water for domestic purposes. The total cost and appraised value of the plant at about the time the action was begun was \$2,338,749.35. Of this sum \$827,154.38 has been paid from revenues derived from the water system. The balance, \$1,511,591.79, was outstanding bonds and city warrants bearing interest. The total revenue from the water system for the year 1907 was \$291,775.78. The expenditures amounted to \$232,248.42, leaving a net balance of about \$59,000. The expenditures included \$68,200 for interest on bonds and warrants, \$18,000 for redemption of warrants, and \$86,030.90 for extension of water mains. Water was furnished by the city to itself, and also to several charitable institutions, free of charge. The rate charged consumers was eighty cents per month for a five-room house with bath, toilet and lavatory, and for a lawn sixty by one hundred and thirty-five feet, \$2.80 per year.

It is contended by the appellant (1) that the transfer of certain moneys from the water fund to the general fund is illegal, and that such money should be applied to the payment of outstanding warrants against the water fund; (2) that the rates charged amount to an excessive tax on water consumers; (3) that the rates fixed are excessive; and (4) that the city has no right to sell water at a profit, or to furnish water free for municipal or charitable purposes.

The evidence shows that certain funds were transferred from the water account to the general fund. It is not clear that the funds so transferred were used for general purposes, but we assume that they were so used. We find nothing in the record to indicate that such money was required to be kept in a special fund, or that there were any outstanding overdue warrants to which it could have been applied. The matured obligations against the water fund all seem to have been met when due. When there is no requirement by statute or otherwise that money coming into the city treasury shall be kept in a special fund and applied to a particular purpose, it is proper, of course, to place it in the general fund, and to use it for general city purposes. If we understand counsel correctly, it is not claimed that any money

derived from the sale of water or from the water system, which was necessary for the maintenance and expenses of the system, was transferred to the general fund, but it is claimed that the profits of the system, after the expenses were paid, were placed in the general fund, and that this was illegal; in other words, that the city is not authorized to sell water at such a rate as to make a profit. This is the point upon which the case of the appellants depend. It is, no doubt, true that courts will prevent the illegal disposition of public moneys, and that cities furnishing water to its inhabitants may not charge more than a reasonable rate, as argued by appellants. But we think there can be no doubt that such city is authorized to make such a rate to yield a reasonable profit. By statute, Pierce's Code, section 3643 (Laws 1905, c. 59, sec. 1), it is provided that cities may own and operate waterworks and furnish to its citizens water, with full power to regulate and control the use, disposition, and price thereof. Section 57 of the city charter of Spokane confers the same authority. In volume 1, Farnham on Water and Water Rights, at page 855, section 162, it is said: "When a municipal corporation owns its own plant for the supply of water to its inhabitants, the property is held for the common benefit, and every inhabitant has a right to the benefit of it on reasonable terms. Therefore, although the municipality has a right to fix the terms by which the water will be supplied, and to establish the rates which shall be paid for it, the right must be exercised in a reasonable manner, so that the rates shall be reasonably proportionate to the service rendered. The municipality, however, is not required to limit the rate to the actual expenses of furnishing the water, but may fix a rate which will result in some profit to it, which it may use to meet its other public needs."

⁸⁹ It is claimed that the rate charged amounts to an excessive tax on the community. But water rates are not taxes. The consumer pays for a commodity which is furnished for his comfort and use. The rule is stated in 30 American and English Encyclopedia of Law, second edition, page 422, as follows: "Water rates paid by consumers are in no sense taxes, but are nothing more than the price paid for water as a commodity. The obligation to pay for the use of water rests either on express or implied contract on the part of the consumer to make compensation for water which he has applied for and received": See, also, *Wagner v. Rock Island*, 146 Ill. 139, 34 N. E. 545, 21 L. R. A. 519.

The right of the city to furnish water for municipal and charitable purposes free can hardly be doubted: 30 Am. & Eng. Ency. of Law, 2d ed., p. 435; *Sewickley Waterworks Commrs. v. Sewickley Borough*, 159 Pa. 194, 28 Atl. 169; *Detroit Board of Water Commrs. v. Detroit Citizens' Street*

R. Co., 131 Mich. 1, 90 N. W. 657, 91 N. W. 171. The city owns the water and controls it. If the supply is greater than the demand, there is no good reason why it should account for water used in that way. The mere fact that a profit is made from the other consumers does not necessarily show that the rate is excessive.

Appellants argue that the cost of extending water mains and depreciation should not be considered in fixing the rate to consumers. No absolute rule for fixing a rate at which water must be sold by municipalities to its citizens is cited. We think, however, that the items stated are proper to be considered; but, assuming that they are not, this would be only a circumstance tending to show that the rate was excessive. It would not necessarily be conclusive. Some reasonable discretion must abide in the officers whose duty it is to fix such rates, and unless the courts can say from all the circumstances that the rate fixed is an excessive one, and disproportionate to the service rendered, the judgment of the ⁹⁰ officers fixing the rate must stand. The rate charged by the city seems reasonable for the service rendered.

We find no error in the record, and the judgment must therefore be affirmed.

Rudkin, C. J., Parker, Dunbar and Crow, JJ., concur.

Property of a Municipal Corporation in Waterworks is held by the city in trust for the use and benefit of the citizens of the municipality: *Huron Waterworks Co. v. Huron*, 7 S. D. 9, 58 Am. St. Rep. 817. As to the elements to be considered in fixing water rates, see *San Diego Water Co. v. City of San Diego*, 118 Cal. 556, 62 Am. St. Rep. 261. As to the reasonableness of rates charged by a public service corporation, see *Brooklyn Union Gas Co. v. City of New York*, 188 N. Y. 334, 117 Am. St. Rep. 868; *Poole v. Paris Mt. Water Co.*, 81 S. C. 438, 128 Am. St. Rep. 923. Whether existing or prescribed rates and charges for service by a public service corporation afford a reasonable compensation is a judicial question: *City of Madison v. Madison Gas etc. Co.*, 129 Wis. 249, 116 Am. St. Rep. 944.

STATE v. SWAN.

[55 Wash. 97, 104 Pac. 145.]

FALSE PRETENSES—Obtaining Money as a Charity.—The crime of obtaining money by false pretenses is committed by one who obtains funds as a charity under false representations that he has suffered a loss of property. (pp. 1025, 1027.)

CRIMINAL LAW—Act Constitutes Two Different Offenses.—It is no defense to a prosecution for obtaining a gift of money by false pretenses that the same act is also punishable as vagrancy. (p. 1027.)

C. R. Hovey and H. W. Hale, for the appellant.

⁹⁸ CROW, J. Defendant was charged, under Ballinger's Code, section 7165 (Pierce's Code, section 1662), with the crime of obtaining money under false pretenses. The charging part of the information is as follows: "He, the said M. J. Swan, did in the county of Kittitas and state of Washington, on or about the fifteenth day of January one thousand nine hundred and eight, unlawfully, feloniously, falsely, fraudulently, and designedly and with intent to defraud R. L. McDonald, obtain from said R. L. McDonald a sum of money, to wit, fifty cents, lawful money of the United States of America, the property of the said R. L. McDonald, by then and there unlawfully, willfully, feloniously, fraudulently and designedly pretending to said R. L. McDonald that he, the said M. J. Swan and his wife and children were on their way to Iowa and had lost a horse needed by him to convey them thither and that he was without means to obtain another horse; he, the said defendant, making said statements and representations as an appeal for aid; whereas in truth and in fact the said defendant had not suffered the loss of any horse, as he the said M. J. Swan well knew; that by means of said false pretense and representations the said R. L. McDonald delivered to the said M. J. Swan the sum of money aforesaid."

To this information a demurrer was sustained by the trial court, and the state has appealed.

No brief has been filed by respondent, but from appellant's brief it is made to appear that it was the theory of the trial court that if one obtained money from another as a charity, although the inducement was a false representation, he could not be charged with the crime of obtaining money by false ⁹⁹ pretenses. Reference to the section of the code under which the charge against respondent is made will disclose the fact that there is no limitation or exception made in favor of the one who by any false pretense obtains a thing of value from another. The only question in the case—if, indeed, it may be called a question—is whether the act charged is a false pretense within the meaning of the law. There is nothing in the act before us to indicate that it was not within the intent of the law to punish a false pretense of poverty and want, nor is it made to appear that the act charged is not within the spirit of the law. It is only when the act is clearly at variance with the legislative intent, or when, although within the letter, it would do violence to the spirit of the law, or violate some constitutional right, that courts are warranted in writing exceptions to a general statute, for it must be admitted that it is within the power of the legislature to define as a crime any actionable wrong.

Upon principle, also, it would seem that the act charged is a false pretense within the meaning of the law. By it

respondent obtained that which was the property of another. Had he appealed to the cupidity, avarice, or business judgment of the complaining witness he would have been guilty of the crime charged. Then, why is he not likewise guilty if he has appealed to the charitable impulses of his victim? The same object has been obtained. He has obtained the property of another. Mr. Bishop has defined a false pretense as "such a fraudulent representation of an existing fact or a past fact by one who knows it not to be true as is adapted to induce the person to whom it is made to part with something of value": Bishop on New Criminal Law, sec. 415. In 12 American and English Encyclopedia of Law, second edition, page 845, the following definition will be found: "A false representation made by a person as to his own or another's necessitous condition, by means of which gifts of money or property are obtained in charity, is a false pretense."

¹⁰⁰ This court, in the case of *State v. Phelps*, 41 Wash. 470, 84 Pac. 24, has said that any pretense which deceives the person defrauded is sufficient to sustain an indictment or information.

The exact question now before us, as well as the case (*People v. Clough*, 17 Wend. 351, 31 Am. Dec. 303) upon which the trial judge seems to have rested his opinion, was considered by the supreme court of Wisconsin in the case of *Baker v. State*, 120 Wis. 135, 97 N. W. 566. Answering the contention that the statute had no application to the act of inducing, by fraudulent representation of a fact, a donation of money as a charity, the court said: "This contention has support from *People v. Clough*, 17 Wend. 351, 31 Am. Dec. 303, which seems not to have been questioned or expressly reaffirmed on this point in New York. The conclusion was reached in that case on the strength of the recitation which preceded the English statute (30 George II, c. 24) which was the prototype of most of the statutes in this country, the latter, however, not retaining the preamble. That preamble recited as the wrong to be reached by the statute the obtaining by evil-disposed persons of divers sums of money or merchandise, 'to the great injury of industrious families and to the manifest prejudice of trade and credit.' From this the New York court argued that such trifling sums as people were ever induced to give to mendicants or for charity were not likely to cause great injury to industrious families, or to prejudice trade and credit. The English courts, in construing their own statute, have never so limited it: *Regina v. Hensler*, 11 Cox C. C. 570; *Regina v. Jones*, Temp. & M. 270. Nor has any other court, so far as we, or apparently the counsel, have ascertained, adopted the view of the New York court, which has been repudiated by many of them: Com-

monwealth v. Whitcomb, 107 Mass. 486; State v. Matthews, 91 N. C. 635; Strong v. State, 86 Ind. 208, 44 Am. Rep. 292; State v. Styner, 154 Ind. 131, 56 N. E. 98; 2 Wharton's Criminal Law, sec. 1153; Bishop's Criminal Law, sec. 467."

The doctrine in *People v. Clough*, 17 Wend. 351, 31 Am. Dec. 303, was never reaffirmed in the state of New York, and its rule was distinctly repudiated by the statute of 1851. In a dissenting opinion rendered in ¹⁰¹ the case of *McCord v. People*, 46 N. Y. 470, Justice Peckham says of the *Clough* case: "The supreme court of this state, I say it with great respect, once put an exception in our statute not placed there by the legislature; that a false pretense, whereby charity was obtained, was not within the meaning of the statute, though plainly within its language. It seems to be settled the other way in England: *Regina v. Jones*, Temp. & M. 270. . . . The recital preceding the English statute that evil disposed persons had obtained goods by false pretenses, 'to the great injury of industrious families, and to the manifest prejudice of trade and credit,' was referred to as showing that only trade and commerce were sought to be protected, and their invasion only were within the denunciation or penalty of the act, though this recital was never adopted here. . . . This made it necessary for the legislature to strike this exception out again, and they did so by an act passed in 1851: Laws 1851, p. 268. Now, the act in terms applied to all, the virtuous and the vicious, to 'industrious,' and to idle families alike."

The common law covered only those frauds which were perpetrated by the use of a false token or writing, or effectuated through the instrumentality of a conspiracy to cheat or defraud. It was the intent and object of the statute, therefore, to embrace all false pretenses, whether of act, word or deed, and this comprehends any verbal pretense or representation, fraudulently uttered, sufficient to induce another to part with his property. It will thus be seen that the *Clough* case is not supported by either reason or authority.

It is said in appellant's brief that the trial judge was further induced to hold the information bad because the acts charged had been defined in the vagrancy statute: Ballinger's Code, sec. 6724; Pierce's Code, sec. 1889. With this conclusion we are unable to agree; but if it were so, it would not follow that respondent could not be charged as he is. A person might be answerable under one of two statutes. The only consequence would be that conviction under the one would be a bar to prosecution under the other.

¹⁰² "It is no defense to an indictment under one statute that a defendant might also be punished under another": *In re Converse*, 137 U. S. 624, 11 Sup. Ct. Rep. 191, 34 L. ed. 796.

For the reasons herein assigned, the judgment of the lower court is reversed, and this cause remanded with instructions to overrule the demurrer and to hear and determine the facts charged in the information.

Rudkin, C. J., Parker, Dunbar and Mount, JJ., concur.

Obtaining Money by False Pretenses is the subject of a note to Barton v. People, 25 Am. St. Rep. 378. An indictment charging that the defendant, with intent to defraud, by falsely and fraudulently pretending to be a member of a Masonic lodge in Ohio, that he was on his way to a funeral, and was out of money, and by exhibiting a forged receipt from the Ohio lodge for dues, obtained money from a lodge of Masons in Indiana, upon a promise to repay the same, is good on motion to quash: Strong v. State, 86 Ind. 208, 44 Am. Rep. 292.

HOLLY v. MUNRO.

[55 Wash. 311, 104 Pac. 508.]

TAX JUDGMENT—Vacation on Tender of Taxes.—The rule that one asking a court of equity to vacate a judgment must show that he has a meritorious defense is satisfied, in case of a tax judgment, by a tender of all taxes due and a deposit of the amount in court on refusal to accept them. (p. 1029.)

JUDGMENT—Presumption of Jurisdiction from Recitals.—The rule that recitals in a judgment of facts sufficient to confer jurisdiction raise a presumption of jurisdiction should not be extended to cases where the recitals are not in the judgment but in the findings of fact. (pp. 1029, 1030.)

JUDGMENT—Presumption of Jurisdiction from Recitals.—The presumption of jurisdiction arising from the recital in a judgment of due service of process is *prima facie* only, and may be overthrown by evidence that no summons, other than a void one, was issued. (pp. 1028, 1030.)

Post, Avery & Higgins, for the appellants.

Osee W. Noble and S. Douglas, for the respondent.

312 DUNBAR, J. This is an action styled by the appellant, "an action to set aside a judgment obtained in tax foreclosure proceedings"; by the respondent, "an action to quiet title." Whatever name may be applied to it, the complaint asked for relief upon the ground that the sale of the property, which was made for the collection of taxes, was made under a void judgment by reason of an insufficient summons, which it is alleged was void and of no force or effect; and that no other, further or different summons was ever issued, filed, served or published in said action. The defendants admit that the summons set forth in the complaint was

published, but deny the other allegations just mentioned. A demurrer to the complaint was overruled by the lower court, and on a trial on the merits the court denied defendants' motion to dismiss the action, on a challenge to the sufficiency of the evidence and the allegations of the complaint at the close of plaintiff's case, and at the close of defendants' case rendered a decree for the plaintiff. From this decree the defendants appeal.

The assignments are that the court erred in overruling the demurrer to the complaint, and in denying defendants' motion to dismiss at the close of plaintiff's case. The first assignment is based upon the contention that this action is, in effect, an action to vacate a judgment, although in form ³¹³ an action to quiet title or remove a cloud; that the result from the one form of action is identical with the result from the other; that the name by which the action is christened is quite immaterial, and that, being in fact an action to vacate a judgment, there should have been an allegation of merits.

It is undoubtedly the general rule, which has been uniformly sustained by the decisions of this court, that one seeking the assistance of a court of equity for the purpose of vacating a judgment must show that the former judgment was inequitable, and that he had a good and sufficient defense in whole or in part to the action; for a court of equity will not do an idle thing and open a judgment simply because the proceedings have failed to comply with the forms of law, at the instance of a petitioner who would not be benefited by such action of the court. But this court, in *Gould v. White*, 54 Wash. 394, 103 Pac. 460, held that the rule did not apply to an action to set aside a tax judgment, that a tender of all the taxes paid seemed to be the sole requirement of the statute, and that the defendant could not insist upon more; citing *Hauswirth v. Sullivan*, 6 Mont. 203, 9 Pac. 798, where the reason for the distinction is forcibly announced. Under the authority of this case the complaint was sufficient, there being an allegation of tender of all the taxes due, and of the deposit of the amount tendered in court upon the refusal of the defendants to accept the same. But, in reality, this is not an exception to the general rule, for the complaint approaches the demands of the rule as nearly as the nature of the action will permit. For if an allegation of ownership, of sale for taxes without notice and under a void judgment, and a tender of the taxes to the purchaser under such judgment, is not sufficient, then one must stand without remedy against the loss of his property, which is effected without due process of law.

On the other proposition involved, it is undoubtedly true that it is the rule of this court that the recitation in a judgment of jurisdictional facts sufficient to give the court jurisdiction ³¹⁴ to pronounce a judgment establishes the presump-

tion of jurisdiction. But in all the cases decided by us to that effect, the jurisdictional fact was recited in the judgment, while the record in this case shows that such statement is only made in the findings of fact, while the judgment itself is silent on that subject. And while the judgment is based upon the findings, we do not think it wise to extend the rule beyond the solemn declarations of the judgment itself, especially in view of the fact that in this state findings are not required in equity cases, and are therefore not a part of the judgment-roll. But, in any event, the recital of jurisdiction is only *prima facie* evidence, and while the testimony in this case is not absolutely convincing that no other summons was issued in the case, we think it is reasonably so, and are therefore not inclined to disturb the judgment of the trial court on that question.

The summons involved having been held to be void by this court, in *Young v. Droz*, 38 Wash. 648, 80 Pac. 810, the judgment will be affirmed.

All concur.

The Vacation of Judgments by independent suit in equity is the subject of a note to *Little Rock etc. Ry. Co. v. Wells*, 54 Am. St. Rep. 218. And the vacation of judgments on motion, when not specially authorized by statute, is the subject of a note to *Furman v. Furman*, 60 Am. St. Rep. 633.

The Rule That a Recital in a Judgment of Jurisdiction is only *prima facie* evidence is recognized in *Hembree v. McFarland*, 55 Wash. 605, 104 Pac. 837, which was an action to recover possession of land, set aside a judgment, and remove the cloud thereof from the plaintiff's title. It was held that proof that the defendants made no appearance and were not personally served, and a record showing nothing but the publication of summons void on its face, were sufficient to overcome the presumption of recitals of due service and shifted the burden of proof in a direct attack on the judgment. See in this connection, *Forrest v. Fey*, 218 Ill. 165, 109 Am. St. Rep. 249; *Manternach v. Studt*, 230 Ill. 356, 120 Am. St. Rep. 310; *Town of Point Pleasant v. Greenlee & Harden*, 63 W. Va. 207, 129 Am. St. Rep. 971; *Stubbs v. McGillis*, 44 Colo. 138, 130 Am. St. Rep. 116.

STATE v. SUPERIOR COURT.

[55 Wash. 328, 104 Pac. 607.]

MANDAMUS.—Whether Lies to Prevent Change of Venue.—Mandamus lies to compel a court, after it has erroneously granted a change of venue, to proceed with the trial of the case. The remedy by appeal, in such event, is inadequate. (p. 1031.)

VENUE.—An Action to Establish and Enforce a Trust in real and personal property is transitory, since the decree acts in personam, and the venue is properly changed to the county of the defendant's residence. (pp. 1031, 1032.)

Fogg & Fogg and Jesse Thomas, for the relators.

Coleman & Fogarty, for the respondent.

329 GOSE, J. The relators brought an action in the superior court of Pierce county, against Dominic Calavero and wife and Norval McGhie and wife, as defendants. The complaint, in substance, states that, in the fall of 1906, the relator Frank J. Scougale held options for the purchase of the standing timber on certain tracts of land in Pierce county; that he induced the defendants to take a one-third interest each therein; that the relator thereupon, at the instance of the defendants, closed the options, purchased other adjoining timber land in fee, paying therefor with money furnished by the defendants; that the title was taken in the name of the Gig Harbor Timber Company; that each of the parties owned a one-third interest in the joint adventure, the defendants to be paid for the relator's interest by a sale of the logs; that the defendants, in violation of their agreement with the relator to cut and remove the timber from the land upon which the options were obtained, permitted the options to expire without doing so, to the damage of the relators in the sum of forty-two thousand dollars; that the defendants now deny that the relators have any interest in either the land or the timber, and have procured contracts extending the time for removing the timber in the name of defendant Cavaleiro or his son.

The relators prayed (1) that their title be established to an undivided one-third interest in the land and timber; (2) that the land and timber be sold and the proceeds divided between the parties according to their several interests; and (3) for a judgment for damages. Thereupon the defendants in due form applied to the court for a change of venue to Snohomish county, the place of their residence. The relators resisted the application, on the ground that the title to real and personal property was involved, and the action was local, under the provisions of our code: Ballinger's Code, sec. 4852; Pierce's Code, sec. 308. This objection was overruled, and the application allowed. The relators thereupon applied to this court for a writ of mandate, directing the court below to proceed with the trial of the cause, basing their right to the writ **330** upon the same grounds urged in the court below against granting the application.

The respondent demurred to the application, and first urges that the relators have an adequate remedy by appeal, and that mandamus does not lie. This view is not sustainable. If the change of venue was erroneously made, we cannot presume that the superior court of Snohomish county will assume to exercise jurisdiction; nor could we, upon an appeal from that court, direct the superior court of Pierce county to proceed with the trial. The remedy by appeal is there-

fore inadequate: *State v. Superior Court*, 40 Wash. 443, 111 Am. St. Rep. 915, 82 Pac. 875, 2 L. R. A., N. S., 568, 5 Ann. Cas. 775; *State v. Superior Court*, 40 Wash. 555, 111 Am. St. Rep. 925, 82 Pac. 877, 2 L. R. A., N. S., 395.

The respondent next urges that the action is transitory. In its final analysis the purpose of the action, aside from the question of damages, is to establish and enforce a trust in real and personal property. In such cases the decree acts in personam, and the action is a transitory one: *State v. Superior Court*, 7 Wash. 306, 34 Pac. 1103; *Massie v. Watts*, 6 Cranch, 148, 3 L. ed. 181; *Le Breton v. Superior Court*, 66 Cal. 27, 4 Pac. 777.

The writ will be denied.

Rudkin, C. J., Fullerton, Chadwick and Morris, JJ., concur.

Mandamus as a Remedy to Compel a Court to Order a Change of Venue, or to vacate an order changing the place of trial, or to proceed after having made such an order, is discussed in the note to *State v. Gardner*, 98 Am. St. Rep. 897. If a court having no jurisdiction to do so directs a change of venue to another county, the fact that any judgment which might be rendered in the court to which the transfer is made could be revised on appeal does not constitute an adequate remedy, and mandamus may issue to compel the court making the order of transfer to try the action: *State v. Superior Court*, 40 Wash. 443, 111 Am. St. Rep. 915. As to whether prohibition lies to enforce a change of venue, see *State v. Superior Court*, 40 Wash. 555, 111 Am. St. Rep. 925.

GABRIELSON v. HAGUE BOX AND LUMBER COMPANY.

[55 Wash. 342, 104 Pac. 635.]

TRIAL—Submission of Unwarranted Issue.—It is the duty of a court to exercise its judgment and see to it, although the pleadings have tendered an unwarranted issue, that an issue unsustained is not left to the jury for their consideration. (p. 1034.)

TIMBER—Contract to Remove—Cost of Logging Road.—In the absence of positive testimony of a custom, it must be presumed that one who contracts to remove timber and deliver it in the stream will supply all means and appliances necessary to prosecute the work, and hence he cannot recover on a quantum meruit for building a logging road in aid of the enterprise. (p. 1034.)

PLEADING—Stating One Cause of Action in Several Forms.—It is contrary to the spirit of the reformed procedure to set forth a single cause of action in separate counts, one upon contract and one upon the quantum meruit; and while such a defect may be subject to motion, and in a proper case be deemed waived by the opposite party, it requires reversal on appeal if the trial court submitted both issues.

to the jury, when there was no evidence to support the latter, and it is impossible to say that the jury rejected the false and rendered its verdict on the true issue. (p. 1035.)

CONTRACT—Remedies for Breach—Election.—Where a person for whom work is to be done breaches the contract, the other party may either sue upon his contract and recover so far as he has performed as well as for loss of profits, or he may waive the contract, sue upon a quantum meruit and recover the value of his labor. But he cannot pursue both remedies, for they bear a different measure of damage. (p. 1035.)

Frank D. Nash, for the appellant.

Loveday, Kelley & McMillan, for the respondent.

343 CHADWICK, J. This action in its original form was an action upon a quantum meruit, to recover a balance of \$965.14 alleged to be due for work and labor performed at the special instance and request of defendant. The complaint was thereafter amended, setting up an express contract, its breach, and damages in the sum of \$3,942.85; and a second cause of action upon a quantum meruit, being the cause of action first assigned, except that a balance of \$1,385.14 was claimed to be due. This complaint was stricken by the court, and plaintiff thereupon filed a second amended complaint, alleging that plaintiff and defendant had entered into an oral contract for the removal of the timber on a certain forty-acre tract of land; that he was to receive the sum of \$6.25 per thousand for the logs delivered in the boom; that he was to be paid when each 50,000 feet was delivered; that he had performed his contract until compelled to abandon it because of the neglect and refusal of defendant to pay him in the manner stipulated; that he had delivered 351,428 feet, and that 80,000 feet of logs remained in the timber, upon which he would have made a profit of \$2 per thousand; that there remained uncut about 1,600,000 feet, upon which he would have made a profit of \$2.500. Against these amounts he admits a setoff for the use of a donkey-engine. **344** Under this cause of action, he claims damages aggregating \$3,942.85.

For a second cause of action he alleges that he performed services, work and labor for defendant at its special instance and request of the reasonable value of \$3,968.45; admits the payment of \$2,074.80, and claims a balance due of \$1,893.68. A bill of particulars in support of this cause of action shows that it covers practically the same subject matter as is alleged in the first cause of action.

The answer, after admitting that a contract was entered into for logs to be delivered at the rate of \$6.25 per thousand, and alleging that at least 15,000 feet was to be delivered each day until completion of the contract, and that payment was to be made once a month, is in effect a general denial.

It was, however, admitted that 259,118 feet of logs had been delivered, and counter-demands for goods and money advanced and the use of the donkey-engine were set up. It is claimed that plaintiff was entitled to a credit in the sum of \$1,621.46, from which should be deducted the sum of \$2,311.74 for money and goods, leaving a balance due defendant of \$690.28. In both causes of action the plaintiff undertakes to recover the sum of \$1,157, which amount he alleges to be the value of labor performed in constructing a logging road in aid of his enterprise. The second amended complaint was filed over the objection of defendant. The case went to trial upon these issues.

There is no preponderance of evidence to show that plaintiff was to be paid as each 50,000 feet of logs was delivered. Neither is there a preponderance of the testimony to sustain a recovery upon a quantum meruit, either for the logging operations or for building the logging road. The contract as testified to is silent on that subject, and, in the absence of positive testimony or proof of custom, a court must presume that one who contracts to remove timber and deliver it in the stream will supply all means and appliances necessary to prosecute the work, and that it is covered by the contract ³⁴⁵ price. These questions would more properly be for the jury, if submitted upon issues properly framed, and would not be considered by us but for the reasons to which we shall presently advert. It is the privilege of a party to have his cause submitted to a jury upon a distinct issue. It is the duty of the court to exercise its judgment, and see to it, although the pleadings had tendered an unwarranted issue, that an issue unsustained is not left to the jury for its consideration. To prevent situations such as we have here is one of the purposes underlying the reformed methods of pleading. A person can have but one cause of action arising out of the same subject matter, and this he must state in plain and concise language and without repetition.

"Since the reformed pleading requires the facts to be averred as they actually took place, it does not in general permit a single cause of action to be set forth in two or more different forms or counts, as was the familiar practice at the common law. The rule is undoubtedly settled, that, under all ordinary circumstances, the plaintiff who has but one cause of action will not be suffered to spread it upon the record in differing shapes and modes, as though he possessed two or more distinct demands; and when he does so without special and sufficient reason, he will be compelled, either by a motion before the trial or by an application and direction at the trial, to select one of these counts, and to abandon the others": Pomeroy's Code Remedies, 3d ed., sec. 576.

The method of pleading employed in this case, though favored under the old practice in order to avoid the conse-

quences of a variance between the pleadings and proof, finds no favor under our present statutes, and is inconsistent with their spirit: *Muzzy v. Ledlie*, 23 Wis. 445. While this defect made the pleading subject to motion, and in a proper case would be deemed to be waived by the opposite party, it cannot be so held here. The testimony shows that respondent's original cause of action, if any, was upon the contract. There was nothing, in our judgment, warranting the submission of the question of the reasonable value of plaintiff's³⁴⁶ labor and services to the jury, except possibly in the sum of \$115. When a contract, such as the one before us, is entered into and is breached by one of the parties, the other party may either sue upon his contract and recover on the contract in so far as it is performed, as well as the value of his bargain in so far as it is unperformed, provided he can show a loss of profits, or he may, because of such breach, waive the contract and sue as upon a quantum meruit, and recover the value of his labor or services: *Noyes v. Pugin*, 2 Wash. 653, 27 Pac. 548; *Chase v. Smith*, 35 Wash. 631, 77 Pac. 1069. He cannot pursue both remedies, for they bear a different measure of damage. The court, however, not only did not withdraw the second cause of action from the jury in so far as the logs and the logging road were concerned, but left it to the jury to determine whether one or both causes of action were before them, and upon this to fix the amount of recovery. It was left to the jury to determine the issue as well as the fact.

If it were possible to pass these things unnoticed we would do so, but the case as it comes to us makes it impossible to say that the jury rejected the false and rendered its verdict upon the true issue. It may have rejected the element of damages and based its verdict on the value of the logging road, or it may have allowed damages for a breach of the contract and lost profits and also a sum to cover the cost of the logging road on the quantum meruit, which would under the evidence have resulted in a double recovery: *Simons v. Cissna*, 52 Wash. 115, 100 Pac. 200.

Finding no way to sustain the judgment upon any assurance that a just verdict was rendered, this case will be reversed and remanded for a new trial, with directions to the lower court to compel an election of remedies on the part of plaintiff.

Rudkin, C. J., Fullerton, Morris and Gose, JJ., concur.

One Cause of Action Should not be Stated in Different Counts, under the code system of pleading, as might have been done at common law; and if so set forth, the court may, on motion, require the plaintiff to elect upon which ground he will proceed: *Sturges v. Burton*, 8 Ohio St. 215, 72 Am. Dec. 582, and note.

HUMPHRIES v. COOPER.

[55 Wash. 376, 104 Pac. 606.]

DIVORCE—Liability of Husband for Fees of Wife's Attorney.

A husband is not liable for counsel fees incurred by his wife in bringing a suit for divorce, which she dismisses without the consent of the attorney. (p. 1037.)

DIVORCE—Liability of Wife for Counsel Fees.—A woman is liable for the fees of attorneys employed by her to prosecute her action of divorce, which she dismisses without their consent. (p. 1038.)

John E. Humphries and George B. Cole, for the appellants.

William R. Bell, for the respondents.

376 DUNBAR, J. This is an action brought by appellants against respondents to recover attorneys' fees. The material averments of the complaint are, that the appellants are attorneys at law, in King county, Washington; that the respondents were husband and wife on the twenty-eighth day of October, **377** 1908, at which date the defendant Della Cooper employed the appellants to bring suit for divorce against the respondent W. H. H. Cooper, upon the grounds of cruel and inhuman treatment of the said Della Cooper by the said W. H. H. Cooper, setting forth in detail the cruel acts referred to; that on the said date, at the special instance and request of respondent Della Cooper, the appellants prepared a complaint, embodying the charges made by her against said W. H. H. Cooper, which complaint was duly verified by the said Della Cooper, and was regularly filed in the proper court, and that the same was served upon the defendant; that the plaintiff in said action asked for temporary alimony, attorney's fees, and suit money; that at the time of the commencement of said action, the said Della Cooper was without means to employ counsel or prosecute said action against the defendant, and was wholly without means for her support and maintenance or suit money, and that the defendant positively refused to furnish her money with which to support and maintain herself, avoided the service of process, and did everything in his power to prevent her from collecting of him, by order of court or otherwise, any money whatever; that at the time of the commencement of said action the defendant W. H. H. Cooper had property of the value of more than twenty thousand dollars, and was doing a lucrative business; that said cause was set for trial April 1, 1909; that immediately prior to said date the respondents, for the purpose of cheating and defrauding appellants out of their attorneys' fee, without any notice whatever to appellants, compromised, settled and condoned the offenses set out in plaintiff's complaint, and signed a stipulation of dismissal

of said cause, and went back to live together; that said cause was dismissed without consent of the appellants; alleging the value of their services. A demurrer was interposed to this complaint, to the effect that it did not state facts sufficient to constitute a cause of action against the defendants, or either of them. The demurrer was sustained, and the appellants standing upon their complaint, ³⁷⁸ judgment was entered in favor of respondents, and from such judgment this appeal was taken.

It is contended by the appellants that the statements made by this court, in its opinion in *Hillman v. Hillman*, 42 Wash. 595, 114 Am. St. Rep. 135, 85 Pac. 61, would logically lead to the conclusion that the complaint in this case was sufficient to sustain a judgment against the husband. In this construction of that case we think the appellants are mistaken. It is true the court said: "Claims for attorneys' fees, where adjusted by actions, must be in actions brought for their adjustment, as claims of all other kinds are adjusted."

But there was no intimation that the claim for attorneys' fees, if it had been brought in a separate action, would have been permitted. In fact, the logic of the opinion is to the contrary.

But this identical question was before this court, in the form of action now presented, in the case of *Zent v. Sullivan*, 47 Wash. 315, 91 Pac. 1088, 13 L. R. A., N. S., 244, 15 Ann. Cas. 19. There, as here, after the contract with the attorney on the part of the wife to commence the action for divorce, and after the filing of the complaint and the service of summons, the action was dismissed by consent of the parties before final judgment, and suit was brought for the attorney's fees stipulated. In that case the authorities were collected and discussed, and while it was admitted that there was a conflict of authority on the question of the husband's liability for counsel fees, incurred by the wife in connection with divorce proceedings, whether she be plaintiff or defendant, it was held that the great weight of authority and the better reason was to the effect that such liability did not exist, and especially in this jurisdiction where the statute made such liberal provisions for the wife in such cases, the court saying, after quoting *Ballinger's Code*, section 5722. (*Pierce's Code*, sec. 4636): "In view of the liberal provisions of this statute, we see no possible reason why the wife is under a necessity to pledge ³⁷⁹ her husband's credit for the expenses of prosecuting or defending an action for divorce in this state, or why she should have any implied power in that regard."

In view of the fact that the question involved here was discussed so pointedly in the case of *Zent v. Sullivan*, 47 Wash. 315, 91 Pac. 1088, 13 L. R. A., N. S., 244, 15 Ann. Cas.

19, from the standpoint of both reason and authority, it would be idle to again enter into a discussion of that question, as we are satisfied with what was said in that case; and no distinction can be made between that case and this on the question of the liability of the husband.

But while the briefs of both appellants and respondents present the case as involving only the responsibility of the husband for the contract of the wife, the record shows that the demurrer challenged the responsibility of both the husband and wife, jointly or severally. The demurrer was sustained as a whole, and judgment was rendered in favor of both defendants. So that, notwithstanding the seeming waiver of this point by the appellants, we do not feel justified in disregarding the record. And, as we know of no reason why the wife should not be held responsible for her individual contracts, the judgment will have to be reversed and the cause remanded, with instructions to sustain the demurrer as to the liability of the husband only. The appellants will recover the costs of their appeal against the wife.

All concur.

The Liability of a Husband for the Fees of an Attorney whom his wife employs to obtain a divorce is considered in the note to Wana-maker v. Weaver, 98 Am. St. Rep. 637. In a suit by a wife for divorce in which her husband files a counterclaim and obtains a divorce for some fault or defect on her part, he is liable for the costs and also for the compensation of her attorneys in prosecuting the suit, though not for alimony: Mutter v. Mutter, 123 Ky. 754, 124 Am. St. Rep. 381. The fact that a wife has property of her own does not prove that an allowance of attorney's fees to her in a decree divorcing her from her husband is improper or unreasonable: De Ruiter v. De Ruiter, 28 Ind. App. 9, 91 Am. St. Rep. 107.

That a Married Woman is Liable on Her Contract With an Attorney to procure a divorce, and is bound to comply with the terms thereof in regard to the payment of his fees, see Patrick v. Morrow, 33 Colo. 509, 108 Am. St. Rep. 107.

GORDON v. BRINTON.

[55 Wash. 568, 104 Pac. 832.]

PRINCIPAL AND AGENT—Agent's Liability on Contracts—Intention.—It is the developed intent of the parties to a contract that is alone material to its operation, and when that is ascertained, it is conclusive. When a principal is disclosed, and his agent is known to be acting for him, the agent, in the absence of any provision to that effect, is not personally liable, and conversely where no principal is disclosed either in the contract or its signature, and there is no evidence of the agency, the agent signing is personally liable. (p. 1010.)

AGENCY—Personal Liability of Agent on Contract.—Where a contract for the sale of machinery is signed by the sellers in their

own names merely, and there is nothing on the face of the contract to show that they are acting as agents, and the agreement is acted upon by the parties, the sellers are personally bound and cannot escape liability on the ground that they were acting as agents, although the buyer states that he supposed they were agents but did not deal with them in that capacity. (p. 1041.)

Vince H. Faben and S. H. Kelleran, for the appellants.

Byers & Byers, for the respondent.

569 CHADWICK, J. This action is brought to recover for the breach of a contract evidenced by the following memorandum:

"Mr. E. M. Gordon,

"Seattle, Wash.

"Dear Sir: We acknowledge herewith receipt of ninety-seven dollars and fifty cents (\$97.50) being 25 per cent. payment on two Roberts motors which we agree to deliver to you for the sum of three hundred and ninety dollars (\$390) f. o. b. Seattle. The complete outfit will consist of the following:

"One model P Roberts motor with two cylinders rated at 15-18 H. P. with 5-A equipment as described in catalogue and one ejector muffler.

"One model H 1½-2 H. P. with single cylinder 3-2½-inch with complete equipment 4-A as described in Roberts Motor Company catalogue.

"Terms of payment are to be 25 per cent with order and the balance payable by sight draft with the bill of lading.

"We agree to take the motors back and refund you the price in full if the engines do not prove to be all that the catalogue describes them to be, and if when they are properly installed to our approval they do not give complete satisfaction in regard to ease in starting, lack of vibration and reliability.

Yours very truly,

"LEE & BRINTON."

Plaintiff paid the sum of ninety-seven dollars and fifty cents and upon delivery of the model P motor, he paid the additional sum of two hundred and forty-five dollars. The model H motor was never received by him, nor has he paid 570 any part of the balance of forty-seven dollars and fifty cents due on the contract. The larger motor was installed in a launch belonging to plaintiff, by parties suggested by defendants. They also took considerable interest in the motor after it had been installed. After several trials, at which plaintiff was present, the motor did not work to his satisfaction. He notified defendants that he rejected the motor, and brought this action to recover the purchase price. After a trial before the court without a jury, judgment was rendered in favor of the plaintiff, and defendants have appealed.

The principal defense interposed, or rather argued, in appellants' brief is that respondent contracted with them as agents merely, well knowing that they had no interest in the contract; and that his cause of action, if any, is against the Roberts Motor Company, and not against them. In addition to this general defense, it is urged that the boat was too heavy for the engines, that the motor did, in fact, run so as to meet the terms of the contract, that it was not installed in a proper way, that its failure to run and give satisfaction was due to salt water in the cylinders resulting from improper installation, and that its installation was not in any event to be approved by them. They further set up the balance of the purchase price as an affirmative defense, and asked judgment therefor.

It is urged by appellants that one who deals with an agent, known and acting as such for a disclosed principal, must sue the principal, in the absence of an open pledge of the agent's credit. Without discussing the authorities cited, it may be admitted that this is a general rule of law, accepted and applied in all proper cases. The text controlling this case is well stated in *Whitney v. Wyman*, 101 U. S. 392, 25 L. ed. 1050: "As the meaning of the lawmaker is the law, so the meaning of the contracting parties is the agreement. . . . If the contract be unsealed and the meaning clear, it matters not how it is phrased nor how it is signed, whether by the agent for the principal or with the name of the principal by ⁵⁷¹ the agent or otherwise. The intent developed is alone material, and when that is ascertained it is conclusive. Where the principal is disclosed, and the agent is known to be acting as such, the latter cannot be made personally liable unless he agreed to be so."

The intent in such contracts is not a unilateral or reserved intent. It must be mutual, or there must be some fact or circumstance sufficient to create notice of the agency. We have read the testimony with strict purpose to find anything that would indicate an intent on the part of either of the parties to act other than as principals in this case. If, in fact, appellants have dealt with reference to a particular subject matter as principals, making a promise on their own account, and respondent relied upon their promise and not upon the alleged principal, they are bound in law. The contract is clearly an agreement to receive the motor back if it refuses to work in the particulars enumerated. There is nothing disclosed to indicate that appellants were not selling it on their own account. Certainly respondent is not put upon notice of an agency under a contract that breathes ownership in the parties who engage to deliver a motor and to guarantee it.

"At this day the law must be considered as settled that a vendor or purchaser dealing in his own name, without dis-

closing the name of his principal, is personally bound by his contract; and it makes no difference that he is known to the other party to be an auctioneer, or broker, who is usually employed in selling property as the agent for others. Even where he discloses the name of his principal, if he signs a written contract in his own name merely, which contract does not upon its face show that he was acting as the agent of another, or in an official capacity in behalf of the government, he will be personally bound thereby": *Mills v. Hunt*, 20 Wend. 431; see, also, *Simonds v. Heard*, 23 Pick. 120, 34 Am. Dec. 41; 1 Am. & Eng. Ency. of Law, p. 1121.

No testimony was offered to show that the motor company was a party to the contract, or had in any manner authorized ⁵⁷² the special warranty upon which respondent relied. In fact, we take it from their correspondence, introduced as an exhibit by appellants, that they were acting independently of any agreement respondent may have had with Lee & Brinton. The binding character of the contract seems conclusive upon its face, and especially so when the parties have acted on the contract as drawn. Appellants recommended proper persons to install the motor, and when it was done, undertook to successfully demonstrate its efficiency. They explain their conduct by saying that they were only interested in seeing the motor work, and felt under no duty as to its installation. But they are bound by their acts. It may be noted that appellants do not plead an agency, but set up an affirmative demand for the balance of the contract price. This alone is sufficient to bind them to the contract as it is written.

Appellants rely with much assurance upon the case of *Triple v. Littlefield*, 46 Wash. 156, 89 Pac. 493. In that case the rule we have here announced was recognized, but the court found from the facts that the agents had not openly pledged themselves, and that the plaintiff not only had notice of the agency, but dealt with defendants as agents and not as principals. In this case, while respondent says on cross-examination that he supposed appellants were agents, yet nevertheless he says he made his contract with them and not with the company, a conclusion which we find to be borne out by the evidence considered as a whole. The legal liability of appellants being established, the other propositions advanced depend on the weight of the evidence, which we find to be sufficient to warrant the findings and conclusions of the court. Judgment affirmed.

Rudkin, C. J., Fullerton, Morris and Gose, JJ., concur.

That an Agent Contracting in His Own Name cannot escape liability on the contract by pleading that he acted as the agent of another, see Stewart, Morehead & Co. v. Postal Tel. C. Co., 131 Ga. 31, 127 Am. St. Rep. 205; Amans v. Campbell, 70 Minn. 493, 68 Am. St. Rep. 547; Am. St. Rep., Vol. 133—66

Shuey v. Adair, 18 Wash. 188, 63 Am. St. Rep. 879. For limitations on this rule, see Anderson v. Timberlake, 114 Ala. 377, 62 Am. St. Rep. 105; Heffron v. Pollard, 73 Tex. 96, 15 Am. St. Rep. 764.

An Agent Who Contracts in His Own Name, and fails to disclose his principal's name at the time of making a contract for the sale or purchase of goods, is personally liable for whatever obligation may arise out of the contract. The purchaser may, in such case, rely upon the responsibility of the person with whom he deals for the performance of the contract, and is not required to look elsewhere to obtain it: Argersinger v. McNaughton, 114 N. Y. 535, 11 Am. St. Rep. 687. One who executes a written contract of sale, which upon its face binds him personally, cannot relieve himself of responsibility thereunder by showing that he was acting simply as agent or broker for a principal: Cream City Glass Co. v. Friedlander, 84 Wis. 53, 36 Am. St. Rep. 895.

Persons Executing a Contract of Sale as Apparent Principals will not be permitted to show by parol evidence that they were acting as agents of another, when sued on a warranty implied by such contract: Bulwinkle & Co. v. Cramer, 27 S. C. 376, 13 Am. St. Rep. 645.

GRAY v. BOYLE.

[55 Wash. 578, 104 Pac. 828.]

BILLS AND NOTES.—In Order to be a Bona Fide Holder one is not bound, in taking a note, to be on the alert for circumstances that might excite suspicion. If he acts in good faith he becomes a holder in due course, although he may omit precautions which a prudent man would take. (p. 1044.)

BILLS AND NOTES—Illegal Transaction—Bona Fide Holder. A note growing out of a transaction forbidden by statute is enforceable by a bona fide holder, unless the law expressly declares it void. (p. 1045.)

BILLS AND NOTES—Illegal Transaction—Bona Fide Holder. A premium note, invalid as between the original parties because given in violation of statute forbidding insurance rebates, is nevertheless enforceable by the holder in due course, the law not expressly declaring such obligations void. (pp. 1043, 1046.)

Dudley G. Wooten, for the appellant.

Henry S. Noon, for the respondent.

578 RUDKIN, C. J. This action was instituted on a promissory note, in the usual form, to recover the sum of two hundred and thirty-three dollars and thirty-six cents, with interest and stipulated attorney's fees. The note was made payable to the order of C. D. Behan, but was indorsed to the plaintiff for value before maturity. The principal defense interposed was that the note was given in part payment of the annual premium on a policy for two thousand

dollars in the New York Life Insurance Company, of which the payee, Behan, was agent, and that a rebate of sixteen dollars and sixty-four cents was allowed to the insured, in violation of the anti-rebate act of March 14, 1905, Laws of 1905, page 373, which provides as follows:

"Section 1. No life insurance company doing business in this state shall make or permit any distinction or discrimination ⁵⁷⁹ in favor of individuals between insurants of the same class and equal expectation of life in the amount or payment of premiums or rates charged for policies of life or endowment insurance, or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of the contracts it makes; nor shall any such company or any agent thereof make any contract of insurance, or agreement as to such contract, other than as plainly expressed in the policy issued thereon; nor shall any such company or agent pay or allow or offer to pay or allow as inducement to insurance, any rebate of premiums payable on the policy, or any special favor or advantage in the dividends or other benefits to accrue thereon; or any valuable consideration or inducement not specified in the policy contract of insurance.

"Sec. 2. Every corporation violating any of the provisions of this act shall be fined in any sum not exceeding five hundred dollars.

"Sec. 3. Every officer or agent of any such corporation who shall violate any of the provisions of this act shall be deemed guilty of a misdemeanor and shall be fined in any sum not exceeding five hundred dollars or imprisonment in the county jail not exceeding six months."

The court below found that the plaintiff was a holder of the note in due course, as that term is defined in the negotiable instruments act, and gave judgment according to the prayer of the complaint. From that judgment the defendant has appealed.

We will assume at the outstart that the note was invalid as between the original parties and subsequent holders with notice, by reason of the violation of the anti-rebate act. This leaves but two questions for consideration: 1. Was the respondent a holder in due course? And 2. If so, does the anti-rebate act invalidate the note in his hands?

1. As already stated, the court found that the respondent was a holder in due course, and this finding is amply sustained by the testimony. A holder in due course is defined by our statute as follows:

"Sec. 52. A holder in due course is a holder who has taken the instrument under the following conditions:

"(1) That it is complete and regular upon its face;

580 “(2) That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact;

“(3) That he took it in good faith and for value;

“(4) That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it”: Laws 1899, p. 350.

“Sec. 56. To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith”: Laws 1899, p. 350.

The respondent purchased the note for value before maturity, and at the time of his purchase had no notice of any defect or infirmity in the instrument. The chief circumstance upon which the appellant relies to establish *mala fides* is the fact that the respondent knew that Behan was an insurance agent, and that the note was given in whole or in part in payment for an insurance premium. The rule by which the good faith of a holder of negotiable paper is to be determined is thus stated in Crawford's Annotated Negotiable Instruments Law, third edition, page 68: “The holder is not bound at his peril to be on the alert for circumstances which might possibly excite the suspicion of wary vigilance; he does not owe to the party who puts the paper afloat the duty of active inquiry in order to avert the imputation of bad faith. The rights of the holder are to be determined by the simple test of honesty and good faith, and not by a speculative issue as to his diligence or negligence. The holder's right cannot be defeated without proof of actual notice of the defect in title or bad faith on his part evidenced by circumstances. Though he may have been negligent in taking the paper, and omitted precautions which a prudent man would have taken, nevertheless, unless he acted *mala fide*, his title, according to settled doctrines, will prevail.”

This rule is fully supported by the authorities, and, measured by it, the title and good faith of the respondent were not impeached.

581 2. Law-writers substantially agree upon the defects which will invalidate commercial paper in the hands of a *bona fide* holder.

“The same doctrine will generally apply to all cases of a *bona fide* holder for value without notice before it comes due, where the original note, or the indorsement thereof, is founded on an illegal consideration; and this, upon the same general ground of public policy, without any distinction between a case of illegality founded in moral crime or turpitude, which is *malum in se*, and a case founded in the posi-

tive prohibition of a statute, which is *malum prohibitum*; for, in each case, the innocent holder is, or may be, otherwise exposed to the most ruinous consequences, and the circulation of negotiable instruments would be materially obstructed, if not totally stopped. The only exception is, where the statute creating the prohibition has, at the same time, either expressly or by necessary implication, made the instrument absolutely void in the hands of every holder, whether he has such notice or not. There are but few cases in which any statute has created a positive nullity of such instruments, either in England or America. The most important seem to be the statutes against gaming and the statutes against usury. And the policy of these enactments has been brought into so much doubt in our day that in England the rule as to usury and gaming and some other cases has been changed by recent statutes; and a total repeal, or partial relaxation of it, has found its way into the legislation of America": Story on Promissory Notes, sec. 192. See, also, 3 Kent, p. 80; Daniel on Negotiable Instruments, sec. 197 (2) and sec. 198.

Frequent application of this rule may be found in the gaming and usury laws of England and the several states, many of which expressly declare that notes and contracts, the consideration for which is usurious loans or money lost at play, shall be null and void: *Irwin v. Marquett*, 26 Ind. App. 383, 84 Am. St. Rep. 297, 59 N. E. 38; *Swinney v. Edwards*, 8 Wyo. 54, 80 Am. St. Rep. 916, 55 Pac. 306, and cases there cited. In all such cases the note is void in the hands of every holder. From this view of the law there is little or no dissent. On the other hand, the courts agree with equal unanimity that commercial paper is valid in the hands of an innocent holder, ⁵⁸² even though the consideration for the note arises out of some contract or transaction prohibited by law, unless the law in express terms declares the instrument void. In *Vallett v. Parker*, 6 Wend. 615, Savage, C. J., said: "Wherever the statutes declare notes void, they are, and must be so, in the hands of every holder; but where they are adjudged by the court to be so, for failure or illegality of consideration, they are void only in the hands of the original parties, or those who are chargeable with, or have notice of, the consideration."

This distinction runs through all the authorities: *New v. Walker*, 108 Ind. 365, 58 Am. Rep. 40, 9 N. E. 386; *Sondheim v. Gilbert*, 117 Ind. 71, 10 Am. St. Rep. 23, 18 N. E. 687, 5 L. R. A. 432; *Union Trust Co. v. Preston Nat. Bank*, 136 Mich. 460, 112 Am. St. Rep. 370, 99 N. W. 399, 4 Ann. Cas. 347; *Arnd v. Sjoblom*, 131 Wis. 642, 111 N. W. 666, 10 L. R. A., N. S., 842, 11 Ann. Cas. 1179; *Sullivan v. German*

Nat. Bank, 18 Colo. App. 99, 70 Pac. 162; Crawford v. Spencer, 92 Mo. 498, 1 Am. St. Rep. 745, 4 S. W. 713.

The cases cited by the appellant are not in point, as they all arose between the original parties to the note or their assignees who stood in their shoes. True, the courts said the notes were void or null and void, but this language must be understood as applying to the case before the court: Union Trust Co. v. Preston Nat. Bank, 136 Mich. 460, 112 Am. St. Rep. 370, 99 S. W. 399, 4 Ann. Cas. 347. In State Life Ins. Co. v. Strong, 127 Mich. 346, 86 N. W. 825, and Heffron v. Daly, 133 Mich. 613, 95 N. W. 714, cited by the appellant, the court held similar notes invalid as between the original parties, and in Citizens' Life Ins. Co. v. Commissioner of Insurance, 128 Mich. 85, 87 N. W. 126, the court said such notes were void, but the same court afterward held in Union Trust Co. v. Preston Nat. Bank, 136 Mich. 460, 112 Am. St. Rep. 370, 99 N. W. 399, 4 Ann. Cas. 347, that a holder in due course might recover on a check certified in violation of law. Little can be added to the exhaustive discussion of the question under consideration to be found in the case last cited. Counsel argues that the act against rebating will be nullified in a large measure if this court upholds the validity of negotiable ⁵⁸³ instruments taken in violation of its provisions, but this question is for the legislature and not for the courts. For, as said in Vallett v. Parker, 6 Wend. 615, "It is all-important to the commercial world that courts do not go in advance of the legislature in rendering negotiable paper void in the hands of an innocent indorsee." Any attempt on the part of this court to advance the legislative policy evinced in the anti-rebate act, by declaring commercial paper given in violation of its provisions null and void in the hands of innocent holders, would conflict with the policy so clearly manifested in the negotiable instruments act.

We find no error in the record, and the judgment is affirmed.

Fullerton, Chadwick, Morris and Gose, JJ., concur.

A Negotiable Instrument is Valid in the Hands of a Bona Fide Holder, although the consideration is illegal or immoral, unless some statute expressly makes it void: Irwin v. Marquett, 26 Ind. App. 383, 84 Am. St. Rep. 297, and cases cited in the cross-reference note thereto; Higginbotham v. McGready, 183 Mo. 96, 105 Am. St. Rep. 461; Union Trust Co. v. Preston Nat. Bank, 136 Mich. 460, 112 Am. St. Rep. 370; note to Union Collection Co. v. Buckman, 119 Am. St. Rep. 176.

Notice Which Will Invalidate a Note in the Hands of an Indorsee is actual knowledge of its infirmity, or of such facts that his action in taking the paper amounts to bad faith, but if the facts shown have any fair tendency to show bad faith, the question remains one of fact, and not of law, especially if the evidence of fraud is sufficient to

put the burden of showing good faith on the holder: *McNight v. Parsons*, 136 Iowa, 390, 125 Am. St. Rep. 265. It is said that notice of facts which would be sufficient to arouse the suspicion of an ordinarily prudent man is not enough to preclude good faith in a purchase of commercial paper: *Detroit Nat. Bank v. Union Trust Co.*, 145 Mich. 656, 116 Am. St. Rep. 319. Suspicious circumstances attending the purchase of a negotiable instrument are admissible against the indorsee, but are not sufficient to overthrow his title unless he can be charged with bad faith: *Harrington v. Butte and Boston Min. Co.*, 33 Mont. 330, 114 Am. St. Rep. 821.

STATE v. CARROLL.

[55 Wash. 588, 104 Pac. 814.]

BURGLARY—Venue When Goods are Taken into Another County.—A statute providing that when goods obtained by burglary are taken into another county, the prosecution for burglary may be in the latter county, violates the constitutional provision that one accused of crime has the right to be tried in the county in which the offense is alleged to have been committed. (pp. 1048, 1049.)

McBurney & Cummings, for the appellant.

⁵⁸⁸ DUNBAR, J. This is an appeal from a judgment of the superior court for King county, upon a trial and conviction for the offense of burglary. The information was as follows: "They, said James Ryan, alias James Bain, and John Carroll, and each of them, in the county of San Juan, state of Washington, on the twentieth day of January, A. D. 1908, the dwelling house of one Hulen Adkinson and one H. Hori, the same being that certain stateroom numbered 20 on that certain ship or steamboat known as the steamship 'Ramona,' and being a place or building in which goods and valuable things were then and there kept for use and deposit, did then and there willfully, unlawfully, feloniously, and burglariously break and enter, with intent then and there to commit a felony or misdemeanor, and did then and there, and in the commission of said burglary, the sum of nine dollars in lawful money of the Dominion of Canada, of the value of nine dollars in lawful money of the United States, and the sum of one dollar lawful money of the United States, all of the total value of ten dollars in lawful money of the United States, the property of said Hulen Adkinson, take, steal and carry away, and said James Ryan ⁵⁸⁹ alias James Bain and John Carroll, and each of them did thereafter on said twentieth day of January, A. D. 1908, bring into the county of King, in said state of Washington, said property so taken in the commission of said burglary."

This information was demurred to, the demurrer was overruled, the case was tried by a jury, verdict of guilty was found, motion for new trial was overruled, judgment was entered, and sentence pronounced to a term in the penitentiary.

The demurrer to this information should have been sustained. The information charged specifically the crime of burglary. The jury found that the defendant was guilty of burglary, the judgment of the court was that the defendant was guilty of the crime of burglary, and he was sentenced for the crime of burglary. The statement in the information that the defendants thereafter brought into the county of King the property so taken in the commission of said burglary does not affect the character of the information or the crime charged, and was evidently added simply to bring the case within the jurisdiction of the county of King, under the statute, Ballinger's Code, section 6791 (Pierce's Code, section 2014), which is as follows: "When property taken in one county by burglary, robbery, larceny or embezzlement has been brought into another county, the jurisdiction is in either county."

It is the contention of the appellant that this statute is unconstitutional by reason of its being obnoxious to section 22, of article 1, of the constitution of the state of Washington, which is as follows: "In criminal prosecutions, the accused shall have the right to appear and defend in person, and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed."

⁵⁹⁰ In this case the offense was alleged to have been committed in San Juan county, and the appellant was deprived of the constitutional guaranty that he should have a trial by an impartial jury of the county in which the offense was alleged to have been committed. It is true that, in cases of larceny, courts have generally held that the defendant could be tried either in the county where the offense was committed or in the county to which the goods had been removed. But this is upon the theory that each asportation of the stolen property constitutes a new theft, thereby making the crime a continuing crime. The rule is thus announced in a note to 9 American and English Annotated Cases, page 615: "In the absence of any provision in the constitution of the state that an offender is entitled to be indicted and tried in the county in which the offense has been committed, it has been held, as in the reported case,

that it is competent for the legislature to enact a law providing that an offender may be prosecuted, in the first instance, in a county other than the one in which the offense has been committed. . . . But where the constitution of the state provides that the accused in a criminal case is entitled to a trial by an impartial jury of the county in which the offense has been committed, it has generally been held that a statute giving jurisdiction of a prosecution to the courts of a county other than that in which the offense has been committed is void as denying to the offender the constitutional right of a trial in his county or vicinage."

In 12 Cyc. 234, it is said: "The offense of burglary is committed in the county where the party breaks and enters, and, where the constitution guarantees to the accused a trial in the county where the offense was committed, the legislature cannot authorize prosecution for burglary in a county in which it was not committed, but into which the accused may have carried property stolen at the time of the burglary."

In *State v. McGraw*, 87 Mo. 161, under a constitutional provision similar to ours, it was held that the general assembly could not, under the constitution, authorize a prosecution ⁵⁹¹ for burglary in a county other than the one in which the crime was committed.

By reason of the conclusion we have reached on this assignment, it is not necessary to discuss the other assignments set forth in the brief. The judgment will be reversed, with instructions to sustain the demurrer to the information.

Rudkin, C. J., Parker, Mount and Crow, JJ., concur.

The Venue of a Crime, or the Place Where It is Committed, is the subject of a note to *Simpson v. State*, 44 Am. St. Rep. 79. As to the place of the commission of robbery, see *State v. McAllister*, 65 W. Va. 97, 131 Am. St. Rep. 955. It has been decided that if goods are stolen in one state or country, and taken by the thief into another, the courts of the latter have not jurisdiction to try him for his offense, unless such jurisdiction has been expressly conferred by statute: *Strouther v. Commonwealth*, 92 Va. 789, 53 Am. St. Rep. 852. But see *State v. Morrill*, 68 Vt. 60, 54 Am. St. Rep. 870.

As to the Constitutionality of a Statute Authorizing a Crime to be Prosecuted in a county other than the one in which it was committed, see *Mischer v. State*, 41 Tex. Cr. Rep. 212, 96 Am. St. Rep. 780. According to *People v. Brock*, 149 Mich. 464, 119 Am. St. Rep. 684, a statute providing that larceny in a railroad car en route through the state may be prosecuted in any county through which the car passes is void as being in violation of a constitutional guaranty of trial by jury in the county where the alleged crime was committed.

DUNLAP v. SUNDBERG.

[55 Wash. 609, 104 Pac. 830.]

LIBEL.—To Maintain an Action for Libel It must Appear not only that the publication was written of and concerning the plaintiff, but also that it was so understood by some third person who read or heard the words. (p. 1052.)

LIBEL — Publication Respecting Physicians. — A Complaint in libel which alleges that the defendants published a circular reciting that they, as reputable physicians in a certain office building, demand the removal therefrom of osteopaths, chiropractors, criminal practitioners, patent medicine fakers, quacks and other fraudulent concerns, and which further alleges that the plaintiff is a duly licensed and reputable physician in such building, is demurrable, for the latter allegation negatives the idea that the words were spoken of or concerning him, and expressly excludes him from the classes of alleged objectionable persons mentioned in the circular. (pp. 1050, 1053.)

Edgar S. Hadley, for the appellant.

McBurney & Cummings, for the respondents.

610 CROW, J. Action for libel, commenced by Dr. John Dunlap, plaintiff, against John C. Sundberg and twenty-four other defendants. General demurrers interposed by the defendants were sustained; whereupon the plaintiff elected to stand upon his complaint, and has appealed from an order of dismissal.

This action involves the same petition which was published and of which complaint was made in *Lathrop v. Sundberg*, 55 Wash. 144, 104 Pac. 176, reading as follows: "We, the following reputable physicians and dentists, occupying offices in the Eitel Building, endeavoring to uphold the honor and dignity of our professions and desiring to encourage only the best and most desirable tenants for our office building, and thereby conserve the best interests of the public at large, are most emphatically opposed to the indiscriminate rental of offices in this building to osteopaths, neuropaths, autopaths, chiropractors, uptomtereists, unprofessional masseurs, criminal practitioners, 'medical institutes,' advertising 'specialists,' patent medicine fakers, quacks, charlatans, and other fraudulent concerns. We therefore demand the removal of all such persons now holding offices in this building and the exclusion therefrom of all such undesirable tenants in the future."

The appellant alleged that, on March 16, 1908, the respondents, with intent to harass and humiliate him, caused to be published in the "Seattle Times," and circulated, the above-mentioned petition of and concerning him in his business and professional capacity; that at the time of its publication and circulation he was and now is a duly licensed

physician, an alumnus of Princeton, Yale, Baltimore and New York ⁶¹¹ universities; that he holds licenses to practice medicine from the states of Montana, Illinois and Washington; that he has been a practitioner in each of those states, and that as a further preparation for the practice of his profession, he has studied abroad in the hospitals of Europe. He further alleges: "That at the time of the circulation and publishing of said libel the plaintiff was, as aforesaid, practicing his profession as a physician and surgeon in the Eitel building, and the defendants and each of them, when publishing and circulating said petition, intended to and did charge the plaintiff with being a quack and a charlatan in his business and profession, and charged the plaintiff with being an illegitimate practitioner, and in his business and professional capacity violating the laws of the state of Washington, and perpetrating frauds upon the public; and they further designated this plaintiff as being an undesirable tenant for said building and that his business and his manner of carrying on the same reflected upon the reputation of the building in which the plaintiff and the defendants were situated, and brought disgrace and shame upon the defendants who deemed themselves as reputable physicians."

The appellant's name was not mentioned in the petition or publication. If the complaint is sufficient to show that the words were in fact written and published of and concerning him, the demurrer should have been overruled: *Lathrop v. Sundberg*, 55 Wash. 144, 104 Pac. 176. The respondents, however, contend that the complaint does not state a cause of action, for the reason that its allegations fail to show that the words were published of or concerning appellant in any capacity whatever, or that they were so understood by any third person. The article protested against the indiscriminate renting of offices in the Eitel building to persons therein designated and classified as "osteopaths, neuropaths, autopaths, chiropractors, uptontereists, unprofessional masseurs, criminal practitioners, 'medical institutes,' advertising 'specialists,' patent medicine fakers, quacks, charlatans, and other fraudulent concerns." But reputable physicians are not complained of or ⁶¹² mentioned. Giving the complaint a most liberal construction, we fail to find any allegation that includes the appellant in any one of the classes that are enumerated. On the contrary, the complaint alleges, and the demurrer admits, that he is an educated and licensed physician, practicing his profession in the Eitel building. The petitioners made no complaint of any such person. In the *Lathrop* case it was alleged that the plaintiff was an osteopath, practicing his profession in the building. Osteopaths were specifically

mentioned in the petition, and this court held that it classed the plaintiff with criminal practitioners, patent medicine fakers, quacks, charlatans, etc., that the words were actionable per se, and that the complaint stated a cause of action. The petition does not, by the most remote suggestion, so classify any reputable physician such as the appellant alleges himself to be, and we fail to see how he has been injured or can complain. He cannot expect this court to assume that he is one of the unnamed persons designated in the petition, and was, therefore, classified as a criminal practitioner, advertising specialist, patent medicine faker, quack, or charlatan, ignoring his positive allegation that he is an educated, reputable, and licensed physician, honorably practicing his profession in the Eitel building. On the contrary, it may be readily inferred from the complaint that he, as a tenant in the Eitel building, was unobjectionable to other reputable practitioners and tenants.

The appellant attempts to avoid the defects of his complaint by calling attention to his allegation that the words were published of and concerning him, citing Ballinger's Code, section 4938 (Pierce's Code, section 409), which reads as follows: "In an action for libel or slander, it shall not be necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause arose, but it shall be sufficient to state generally that the same was published or spoken concerning the plaintiff; and if such allegation be controverted, ⁶¹³ the plaintiff shall be bound to establish on trial that it was so published or spoken."

In order that the appellant may maintain an action on the alleged libelous publication, it must appear not only that it was written of and concerning him, but also that it was so understood by some third person who read or heard the words. The complaint contains no allegation that the article was understood by any third person to be libelous or defamatory of him.

In *De Witt v. Wright*, 57 Cal. 576, the court said: "By section 400 of the Code of Civil Procedure, it is rendered unnecessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter, but it is sufficient to state, generally, that the same was published or spoken concerning plaintiff; but this section, in our opinion, does not do away with the necessity of the averment that the person or persons who read the writing or heard the words knew the plaintiff was meant. Without such knowledge, as already observed, there could be no cause of action."

The affirmative allegations of the complaint, to the effect that the appellant is a reputable physician, negative the

general statutory allegation that the words were spoken of and concerning him. Section 535 of the New York code is, in substance, the same as section 4938, *supra*; but the court of appeals of New York, in *Fleischmann v. Bennett*, 87 N. Y. 231, held that merely alleging the application of the article to plaintiff, in the language of the statute, will not save the complaint from successful attack by demurrer, when such allegation is rendered nugatory by other affirmative allegations, showing that the article could not have possibly referred to him: *Corr v. Sun Printing & Publishing Assn.*, 177 N. Y. 131, 69 N. E. 288; *Fagan v. New York Evening Journal Pub. Co.*, 129 App. Div. 28, 113 N. Y. Supp. 62.

The petition here pleaded does not name the plaintiff as one of the persons of whom it complains, nor is it aimed at ⁶¹⁴ any tenant engaged in the practice of his profession as a reputable physician. The appellant does not aver that he was engaged in any one of the occupations designated as objectionable, as did the plaintiff in *Lathrop v. Sundberg*, 55 Wash. 144, 104 Pac. 176, when he alleged himself to be an osteopath. There must have been something in the petition itself which referred to the appellant individually, or included him as one of the particular group of individuals therein mentioned and libeled, or it must have contained descriptive statements with which he can identify himself by proof, to show that the words were written of and concerning him, or he must be so identified with the situation or subject matter mentioned in the petition that, upon showing his relation to them, it may be fairly inferred that the article was directed against him. Appellant's allegation that he is a reputable physician, which is admitted by the demurrer, expressly excludes him from any one of the classes of alleged objectionable persons mentioned. He has, therefore, pleaded himself out of court, as there is nothing in the complaint to show that the article could, by any intendment, be applied to him, conceding him to be a reputable physician engaged in the practice of his profession as a tenant in the Eitel building.

The complaint fails to state a cause of action. The demurrer was properly sustained, and the judgment is affirmed.

Rudkin, C. J., Dunbar, Mount and Parker, JJ., concur.

The Identical Publication Set Forth in the Above Case of *Dunlap v. Sundberg* was the subject of an action of libel brought by an osteopathic physician in *Lathrop v. Sundberg*, 55 Wash. 144, 104 Pac. 176. He was a regularly graduated osteopath holding a doctor's degree from a school of osteopathy. His office was in the Eitel building referred to in the libelous publication. Said the court, referring to the osteopath as the appellant: "That the writing is libelous per se it has seemed to us there can be but little question. In order to constitute

a civil libel per se, it is not necessary that the words published should involve an imputation of crime. It is enough that they be of such a nature that the court can presume, as a matter of law, that they will tend to disgrace the party of whom they are published, or hold him up to public ridicule, or contempt, or cause him to be shunned or avoided: 25 Cyc. 250 et seq. The published article in question here tends to do all this, if it does not tend to do more. It carries an insinuation that the appellant is not a reputable physician, or one endeavoring to uphold the honor and dignity of the profession; it classes him with criminal practitioners, patent medicine fakers, quacks, charlatans, and other fraudulent concerns; it demands his removal from the building in which he has his office, as an undesirable tenant, and demands that in the future he be excluded therefrom. Clearly this is libelous per se, if published of and concerning the appellant and he is engaged in a reputable practice, and that it was published of and concerning the appellant and that his practice is reputable, was distinctly alleged in the complaint": Citing *Elmergreen v. Horn*, 115 Wis. 385, 91 N. W. 973.

It was contended that the publication was privileged, in reply to which the court further said: "The claim that the publication is privileged is equally without foundation. It is thought to be privileged because it was a communication concerning a matter in which the communicants had an interest and was made to another having a corresponding interest. But if the facts justified this contention, we think that the allegations of the complaint show such an abuse of the privilege as to justify a recovery if proven. The publication was not confined to the parties in interest. It was given to the newspapers and published to the world at large. The interests of the respondents did not require publication in this manner, and to so publish it was an abuse of the privilege. But, more than this, the communication itself went far beyond the necessities of the case. If the appellant's methods of practice were reputable, although disagreeable to the respondents, they have no interest which authorizes them to class him with disreputable practitioners, even in a communication that was otherwise privileged."

As to What Words are Libelous Per Se, see the note to *Nichols v. Daily Reporter Co.*, 116 Am. St. Rep. 802.

As to What Libelous Statements are Privileged, see the note to *Holmes v. Clisby*, 104 Am. St. Rep. 110.

Justification in Slander and Libel is the subject of a note to *Rutherford v. Paddock*, 91 Am. St. Rep. 235.

CASES
IN THE
SUPREME COURT
OF
WISCONSIN.

**SCHWIND v. CHICAGO, MILWAUKEE AND ST. PAUL
RAILWAY COMPANY.**

[140 Wis. 1, 121 N. W. 639.]

RAILROADS — Fencing Right of Way — Depot Grounds.—The question whether or not a given place is depot grounds, within the meaning of the Wisconsin statute requiring railroad rights of way to be fenced, is ordinarily a question of fact. (p. 1057.)

RAILROAD—Neglect to Fence Right of Way.—Where a Statute Commands railroads to fence their rights of way, and further declares that they "shall be liable for all damages done to domestic animals or persons thereon, occasioned in any manner, in whole or in part, by want of such fences," proximate causal relation, including reasonable anticipation, is not necessary to create liability to a person who goes upon an unfenced track and is struck by an engine, nor is contributory negligence a defense. The purpose of the statute is to cast upon railroads absolute liability for injuries to persons and animals whose entry upon tracks is made possible by absence of the prescribed fence. (pp. 1057, 1058.)

RAILROAD—Injury to Boy on Track.—The Mere Absence of a Fence prescribed by statute along a railroad right of way will support an inference that its presence would have deterred a boy of ten years from deviating from the adjacent muddy street to walk along the track, where he was struck by an engine. (p. 1059.)

RAILROAD—Injury to Boy on Track—Absence of Fence.—It is not error, in an action for injuries to a boy struck by a train while walking on an unfenced track, to instruct the jury to consider whether a fence would have "prevented or tended to prevent" his entry on the right of way. (p. 1059.)

DAMAGES—Measure of Recovery for Injury to Boy.—A verdict of ten thousand dollars in favor of a boy ten years old, for the loss of his entire left arm and for cuts and bruises on his head and face, is not so excessive that it will be disturbed on appeal. (pp. 1059, 1060.)

C. H. Van Alstine and H. J. Killilea, for the appellant.

O'Connor, Schmitz & Wild, for the respondent.

² DODGE, J. Plaintiff was injured by being run down by defendant's engine at a point south of Reservoir avenue and near Humboldt avenue, in the city of Milwaukee. At that place the defendant maintained several substantially parallel tracks for various purposes. The railroad premises were bounded on the north by Reservoir avenue, a narrow unpaved street running east and west. Coming from the north, Bremen street terminated in Reservoir avenue, and some two blocks east Humboldt avenue, a main business thoroughfare, crossed the railroad tracks. Reservoir avenue connected Bremen street and Humboldt avenue, but on the day in question was very muddy and unpleasant for passage. The railroad grounds were in better condition, and there was a much used foot-path along one of the tracks, the third or fourth south of Reservoir avenue. Plaintiff, a boy about ten years old, of apparently average intelligence, was sent from his home on Bremen street near Reservoir avenue to a place on Humboldt avenue, also north of Reservoir avenue. He started southward on Bremen street, encumbered by a basket for groceries, and passed on to the railroad grounds and took the path ³ above mentioned along the so-called roundhouse track, where he was injured by an engine coming up behind him. The railroad grounds were not inclosed by any fence. The jury found by special verdict in the first answer that the place in question was not depot grounds, and, by answer to the sixth question, that plaintiff's injury was caused in whole or in part by the fact that the defendant company had not fenced its right of way at the point where the plaintiff entered upon it. Other negligence was also found as the proximate cause of plaintiff's injury, as also the absence of contributory negligence.

(Plaintiff was drawn under the wheels of the engine or tender, which cut off his left arm close to the shoulder. Plaintiff also received a cut on the head, and his face was bruised and scratched, but he otherwise received no injury. The verdict was for ten thousand dollars.)

After a motion for a new trial, and also a motion to reverse the answer to the sixth question, among others, had been overruled, judgment was entered for the plaintiff, from which the defendant appeals.

Appellant's first contention is that the locus in quo was in fact depot grounds, although he assigns no error either upon the answer to the first question in the special verdict or to the refusal of the court to set it aside. Disregarding such omission, however, there was much evidence introduced with reference to the use which was made of the various tracks as well as of the location of the place of injury with reference to any station, and the jury were aided by a view in passing on accessibility to the public for loading freight. The question whether a given place is or is not depot ⁴ grounds,

within the meaning of section 1810, Statutes of 1898, is ordinarily a question of fact: *Grosse v. Chicago etc. R. Co.*, 91 Wis. 482, 65 N. W. 185; *Cole v. Duluth etc. R. Co.*, 104 Wis. 460, 80 N. W. 736; *Habenicht v. Chicago etc. R. Co.*, 126 Wis. 521, 105 N. W. 910. In the present case the evidence quite clearly was such that the jury within their province might well have found in the negative as they did.

The next material contention of the appellant is advanced under the form of an attack upon the sixth finding that the plaintiff's injury was caused in whole or in part by the absence of a fence. Counsel supports his contention mainly by cases decided under very different statutes and involving radically different principles and reasons from those applicable to our statutes; statutes which merely command railroad companies to fence their rights of way, and under which it is held that failure to do so, being a breach of the law, is an act of negligence. Such cases are entirely analogous to the decisions of this court under statutes prohibiting excessive rates of speed and requiring ringing of bell: *Stats.* 1898, sec. 1809; *Ransom v. Chicago etc. R. Co.*, 62 Wis. 178, 51 Am. Rep. 718, 22 N. W. 147; *Piper v. Chicago etc. R. Co.*, 77 Wis. 247, 46 N. W. 165. The principle there involved is merely that the failure of the statutory duty constitutes negligence from which the courts start with the logical deduction that for injuries proximately caused thereby, and not contributed to by the negligence of the person injured, the company should be liable. In the application of that rule there has been much discussion whether proximate causal relation can exist between the absence of a fence and the intentional entry upon railroad grounds by one in the full exercise of his faculties and competent to use judgment, choice, and volition, as in the two cases cited by appellant from Minnesota: *Fezler v. Willmar etc. R. Co.*, 85 Minn. 252, 88 N. W. 746; *Schreiner v. Great Northern R. Co.*, 86 Minn. 245, 90 N. W. 400, 58 L. R. A. 75. It was in the ⁵ application of these same principles that *Schmidt v. Milwaukee & St. P. R. Co.*, 23 Wis. 186, 99 Am. Dec. 158, was decided, where it was held, under a statute not expressly imposing liability for injury to persons, that the absence of fence might be proximately causal of an injury to an infant too young to exercise judgment or volition. All such cases are, however, beside the question presented by our present section 1810, Statutes of 1898, for that, in addition to commanding the railroads to build a fence, expressly provides that in its absence "such road shall be liable for all damages done to cattle, horses or other domestic animals, or persons thereon, occasioned in any manner, in whole or in part, by want of such fences or cattle-guards." An injury may well be occasioned in whole or in part by the absence of a fence,

although it may not be proximately caused thereby. It is enough if such omission gives occasion for entry on the place of injury: *Curry v. Chicago etc. R. Co.*, 43 Wis. 665.

It has already been decided that proximate causal relation, including the element of reasonable anticipation, is not necessary, but merely that the railroad's omission shall be *causa sine qua non*: *Atkinson v. Chicago etc. R. Co.*, 119 Wis. 176, 96 N. W. 529; *Hayes v. Michigan Cent. R. Co.*, 111 U. S. 228, 4 Sup. Ct. Rep. 369, 28 L. ed. 410. Also, that contributory negligence of the respondent is no defense: *Quackenbush v. Wisconsin etc. R. Co.*, 62 Wis. 411, 22 N. W. 519, 71 Wis. 472, 37 N. W. 834. The purpose of this statute was to cast upon the railroads absolute liability for injuries to cattle whose entry upon the tracks was made possible by absence of the prescribed fences, and when it was amended in the revision of 1878 by the addition of "persons," the extension of the same purpose to human beings was obvious.

The question to be decided in this case, therefore, is not whether the injury to this plaintiff was proximately caused by the absence of a fence, but whether, in the exact language of the statute, it was "occasioned in any manner, in whole or ⁶ in part," by such absence. We need not decide whether the deliberate and intentional entry upon a railroad right of way and tracks by an adult fully cognizant of all the conditions, and with no circumstances of confusion or inadvertence, might be held, as matter of law, not occasioned by the absence of a fence, for that case is not presented, and we need not theorize as to whether presence of a fence would have availed to counteract such deliberate purpose. On the other hand, if, by reason of storm, inability to observe, or lack of knowledge of the exact location, even an adult of full intelligence should wander from a highway onto an adjoining railroad right of way, it would be difficult to discover any reason why he might not come within the intent and purpose of the act as clearly expressed by its unambiguous words. In the case of children other elements, however, are presumptively present. They lack in greater or less degree, according to age, development and intelligence, the pertinacity of purpose and the soundness of judgment of the adult. Their conduct is often controlled by propensities, temptations, curiosities and obstacles which would not materially affect that of the adult. This consideration has been recognized by this court in many cases: *Meibus v. Dodge*, 38 Wis. 300, 20 Am. Rep. 6; *Busse v. Rogers*, 120 Wis. 443, 98 N. W. 219, 64 L. R. A. 183; *Comptv v. C. H. Starke D. & D. Co.*, 129 Wis. 622, 109 N. W. 650, 9 L. R. A., N. S., 652. All these childish tendencies must be taken into account in weighing probability of childish action. In the light of them, and of the fact that this boy was on his

way from Bremen street eastward to Humboldt avenue, a distance of four hundred or five hundred feet, and was confronted by the muddy road and tempted by the better pathway near the railroad tracks, although he in a measure appreciated and understood the danger of the latter course, and was able to exercise some measure of intelligent judgment, is it certain that, if his entry upon the latter course had been obstructed by a substantial fence such as the law requires, he would have persisted in overcoming that obstacle, ⁷ instead of pursuing the safer pathway along Reservoir avenue, or even conceived the plan? We think not. The situation presented an opportunity for inference by reasonable men familiar with human and boyish tendencies and with complete knowledge of plaintiff's intelligence and maturity, such as the jury were qualified to draw, and we cannot say as a matter of law that his deviation onto the railroad grounds would so certainly have occurred even had such fence been interposed that the court should have answered the sixth question in the negative. The mere absence of a required obstacle or warning has often been held to support an inference that its presence would have affected conduct even of mature persons; much more justifiable is such inference in case of children or animals: *Schmidt v. Milwaukee etc. R. Co.*, 23 Wis. 186, 99 Am. Dec. 158; *Schrier v. Milwaukee etc. R. Co.*, 65 Wis. 457, 27 N. W. 167; *Blomberg v. Stewart*, 67 Wis. 455, 30 N. W. 617; *Palmer v. New York etc. R. R. Co.*, 112 N. Y. 234, 19 N. E. 678.

Error is assigned upon the charge under the sixth question because the court told the jury to consider whether a fence would have "prevented or tended to prevent" plaintiff's entry on right of way. In this we discover no error. The tendency of a fence to prevent the entry was proper to be considered in answering the question whether plaintiff's injury was caused by absence of such fence as the law requires. Of course defendant would not be liable merely because of such tendency alone, but no charge to that effect was given.

The findings that the locus was not depot grounds, and that absence of fence caused the plaintiff's injury, are sufficient to support judgment for plaintiff, and we need not discuss any errors assigned or committed in connection with other forms of negligence alleged and found against defendant, or with the question of plaintiff's contributory negligence.

Contention is made that the verdict—ten thousand dollars—is excessive. ⁸ While it is larger than we might approve as an original proposition, yet it is not substantially larger than courts have often sustained for similar or equivalent injuries: *Schmidt v. Milwaukee etc. R. Co.*, 23 Wis. 186, 99 Am. Dec. 158; *Berg v. Chicago etc. R. Co.*, 50 Wis. 419, 7 N. W. 347;

Nadau v. White River L. Co., 76 Wis. 120, 20 Am. St. Rep. 29, 43 N. W. 1135; Baltzer v. Chicago etc. R. Co., 89 Wis. 257, 60 N. W. 716; Yerkes v. Northern Pac. R. Co., 112 Wis. 184, 88 Am. St. Rep. 961, 88 N. W. 33; Chicago Anderson P. B. Co. v. Rembarz, 51 Ill. App. 543. It has been held not excessive by the trial court, whose opportunity for knowledge is better than ours. We cannot feel justified to disturb it.

By the COURT. Judgment affirmed.

The Obligation of a Railroad Company to Fence Its Tracks as required by statute is absolute, save where there is some exception by implication based upon public policy, necessity, or convenience: Marengo v. Great Northern Ry. Co., 84 Minn. 397, 87 Am. St. Rep. 369. A statute requiring a railway company to fence its road and to maintain such fence, and providing that "it shall hereafter be liable for all damages sustained by any person in consequence of its failure or neglect to fence," imposes an absolute duty on the company to fence, and is not a mere fence law for animals, but is also a police regulation designed for the benefit of the public; and under it the company is liable for injury inflicted by its train upon a young child, who, being non sui juris, strays upon the track, and is injured in consequence of the failure of the company to fence its road: Rosse v. St. Paul etc. Ry. Co., 68 Minn. 216, 64 Am. St. Rep. 472.

STATE v. MILWAUKEE.

[140 Wis. 38, 121 N. W. 658.]

HEALTH OFFICER—Scope and Nature of Powers.—A health officer must necessarily possess large powers and be endowed with the right to take summary action which at times may trench upon despotic rule. (p. 1061.)

HEALTH OFFICER—Power to Revoke License of Milk Vender.—A city with authority to license, restrain, and regulate the sale of milk has power to revoke licenses of milk venders, and may vest this power in the health commissioner with right to exercise the same summarily and even without notice. (p. 1062.)

LICENSE—Revocation for Misconduct of Holder.—The power to license, regulate, and restrain a business includes the power to revoke an individual license for misconduct of the holder. (p. 1063.)

John T. Kelly, city attorney, and Clinton G. Price, assistant city attorney, for the appellants.

Carl Runge, for the respondent.

39 WINSLOW, C. J. The health commissioner of Milwaukee granted the relator a license to peddle milk in said city for one year, the license being by its terms "subject to revocation" according to the provisions of the city ordinances. The license having been in form revoked by the health commissioner because relator had been convicted of selling impure

milk, the relator brought an action of certiorari in the circuit court and the action of the commissioner was reversed, whereupon the city and the health commissioner appealed to this court.

The question is whether the revocation was lawful. In addition to broad general police powers, the common council of the city of Milwaukee had power under the city charter "to regulate and restrain the sale of . . . milk," also to "tax, license, regulate, and restrain . . . venders of milk; to fix and regulate the amount of license under this subdivision," etc.: Subds. 9 and 40, sec. 3, c. 4, Charter of Milwaukee, being c. 184, Laws of 1874, as amended. By chapter 13 of the charter the duties of the commissioner of health are defined and made very broad and sweeping. He is given power to ⁴⁰ summarily abate nuisances of all kinds, destroy diseased or infected food, clothing and other like articles, establish temporary hospitals in case of epidemics, and, in fine, to exercise very broad and autocratic powers in all matters relating to the conservation of the public health, and section 16 of the chapter further provides that the council may "further define" his duties and pass such ordinances in aid of his duties as may tend to promote and secure the general health of the inhabitants of the city.

A health officer who is expected to accomplish any results must necessarily possess large powers and be endowed with the right to take summary action, which at times must trench closely upon despotic rule. The public health cannot wait upon the slow processes of a legislative body or the leisurely deliberation of a court. Executive boards or officers who can deal at once with the emergency under general principles laid down by the law-making body must exist if the public health is to be preserved in great cities: *Lowe v. Conroy*, 120 Wis. 151, 102 Am. St. Rep. 983, 97 N. W. 942, 66 L. R. A. 907, 1 Ann. Cas. 341. It is well said in *People v. Vandecarr*, 175 N. Y. 440, 108 Am. St. Rep. 781, 67 N. E. 913: "The vesting of powers more or less arbitrary in various officials and boards is necessary if the work of prevention and regulation is to ward off fevers, pestilence, and the many other ills that constantly menace great centers of population."

There is nothing of greater importance relating to the food supply of a great city than that the milk sold should be pure and wholesome, and the common council of Milwaukee, realizing this fact, and realizing also that it was imperative that action should be quick and decisive if it is to be efficient, passed ordinances requiring under penalties that all milk sold must be unadulterated, must meet certain standards, and be obtained from healthy cows fed upon wholesome feed, and further requiring that every milk vender must obtain a license from the health commissioner, "which license may at

any time be revoked by the commissioner of health for violation ⁴¹ of the provisions hereof, or for any good or sufficient cause." We are convinced that the council had power to pass the ordinance and vest the power of issuing and revoking licenses in the health commissioner by virtue of the power to "tax, regulate and restrain" the "venders of milk," and to "regulate and restrain the sale of milk," given to it by the city charter.

The requiring of licenses and the reserving of the power to revoke such licenses, in case of misconduct or violation of law, is well recognized as one of the most effective means of regulating and restraining a business that has yet been discovered, but the power of revocation would amount to little if it could not be vested in an executive officer or board with power to act quickly. The sale of infected milk for a single hour might produce an epidemic of typhoid fever which would sweep hundreds to the grave. The importance of reserving in some executive official the power to revoke can hardly be overestimated. Prosecutions to recover fines and penalties may drag their weary lengths along for weeks and months and even then prove ineffective; but the revocation of the license remedies the evil and avoids the danger of the spreading of disease at once. It is regulation in the most effective sense. We have no hesitation in holding that when the city was given the power to license, restrain and regulate the sale of milk it also took power to revoke licenses, and that it might vest such power in the health commissioner with the right to exercise the same summarily and even without notice: *McQuillan on Municipal Ordinances*, sec. 420, and cases cited; *Child v. Bemus*, 17 R. I. 230, 21 Atl. 539, 12 L. R. A. 57.

It is only fair to say that this court seems in a measure to blame for the erroneous ruling made by the trial court. In the case of *State v. Milwaukee*, 129 Wis. 562, 109 N. W. 421, it was said that the words "'regulate' and 'restrain' do not in any sense mean revoke." That case involved the power of the council to delegate to a court the ⁴² power to revoke a liquor license. The general statutes of the state having provided for the revocation of all liquor licenses in any city by the council alone, it was necessarily held that an ordinance which attempted to vest the power in a court was void because contrary to the general state law. It was entirely unnecessary to support the decision in that case by holding that the power to regulate and restrain does not include the power to revoke a license. We now deem the remark to have been ill-advised and distinctly erroneous, and overrule it. The case of *Mernaugh v. Orlando*, 41 Fla. 433, 27 South. 34, which was cited in the *Sepic* case (129 Wis. 562, 109 N. W. 421), as authority for the proposition, simply holds that the power to "regulate and restrain" saloons and beer-halls does

not include the power to prohibit the sale of liquors entirely in the municipality. This may be at once admitted without at all militating against the proposition that the power to "license, regulate and restrain" does include the power to revoke an individual license for misconduct of the holder. Such an act does not prohibit the business, but regulates it in the truest sense by keeping it in the hands of law-abiding licensees.

By the COURT. Judgment reversed, and action remanded with directions to quash the writ of certiorari.

As to the Constitutionality of an Ordinance Requiring Milk Venders to take out a license and providing for the inspection of milk, see *City of Norfolk v. Flynn*, 101 Va. 473, 99 Am. St. Rep. 918; *People v. Vandecarr*, 175 N. Y. 440, 108 Am. St. Rep. 781. As to the constitutionality of other milk and dairy regulations, see *In re Hoffman*, 155 Cal. 114, 132 Am. St. Rep. 75, and cases cited in the cross-reference note thereto.

As to the Powers Which may be Delegated to Health Officers, see the note to *Blue v. Beach*, 80 Am. St. Rep. 212. Subsequent decisions on this subject are *State v. Zimmerman*, 86 Minn. 353, 91 Am. St. Rep. 351; *Lowe v. Conroy*, 120 Wis. 151, 102 Am. St. Rep. 983; *Anable v. Board of Commissioners*, 34 Ind. App. 72, 107 Am. St. Rep. 173.

A Licensee Takes His Business License Subject to Such Conditions as the legislature sees fit to impose, and if one of such conditions is that it may be revoked at pleasure, this may be done without notice to the licensee, as such license is not a contract nor property, and the revocation of it does not deprive the licensee of any property, immunity, or privilege, within the meaning of constitutional provisions: *Wallace v. Mayor etc. of Reno*, 27 Nev. 71, 103 Am. St. Rep. 747.

RICHARDS v. MANITOWOC AND NORTHERN TRACTION COMPANY.

[140 Wis. 85, 121 N. W. 937.]

CONTRACT.—The Refusal of One Party to Perform an Executory contract unless the other party consents to a modification amounts to a total breach of the agreement. (p. 1065.)

CONTRACT—Performance by One Party After Breach by the Other.—Where the party for whom work is to be done, while the contract is still executory, orders the other party to go no further, the latter has no right to proceed to perform the agreement and recover the value of the completed job; his remedy is to recover damages for the breach. (p. 1065.)

A. L. Hougen and C. H. Sedgwick, for the appellant.

Nash & Nash, for the respondent.

⁸⁶ KERWIN, J. This action was brought to recover the sum of \$606.12 for labor performed and materials furnished in August and September, 1902, at the special instance and

request of defendant. The complaint alleges, in effect, that the plaintiff was doing business under the name of Richards Iron Works, and that the defendant was a corporation operating a street interurban railway in the city of Manitowoc; that during August and September, 1902, plaintiff performed the labor and furnished the materials above referred to, and that a statement of the account was furnished on September 11, 1902, and no payment has been made thereon. The defendant admits its corporate existence and business, and denies generally the other allegations of the complaint. The case was referred, and the referee made and filed his report, in which he found that plaintiff was entitled to recover \$75 and costs. Plaintiff filed exceptions to the report and findings of the referee, and moved the circuit court to modify the report and for judgment as modified in the sum demanded in the complaint. The circuit court denied the motion to modify, confirmed the report of the referee, and ordered judgment for the plaintiff in the sum of \$75 and interest at six per cent from November 9, 1907, to date of its order, together with costs and disbursements. Judgment was entered accordingly, from which this appeal was taken.

87 The referee found, among other things, that the defendant was operating a street railway line along the highways of the city of Manitowoc and across the Manitowoc river upon a bridge; that in July, 1902, the superintendent of defendant, duly authorized, ordered of plaintiff certain appliances for use on the bridge; that the plaintiff accepted the order and immediately began work under the contract; that about the second day after the appliances had been ordered the general superintendent and superior officer of defendant, with authority so to do, peremptorily ordered the work stopped if the job was to cost more than \$75, but, notwithstanding, the plaintiff proceeded with the work and finished the job at a cost of \$606.12; that defendant refused to pay any amount in excess of \$75; that plaintiff applied to the common council of the city of Manitowoc and received permission to remove the appliances from the bridge, but never did remove them; that the appliances furnished were worth \$606.12. And as conclusions thereon that the appliances were ordered by authority of defendant; that when ordered it was believed by the superintendent of defendant that they would cost not to exceed \$75; that within two days after the order was given the order was canceled and the work ordered stopped unless the cost of the job was limited to \$75; that the plaintiff elected to proceed with the job and elected and submitted to the condition and consented to do the job for \$75; that the first contract was superseded by the second implied agreement; that by electing to proceed with the construction the plaintiff became bound by the limitation and

cannot recover in excess of \$75; and that plaintiff is entitled to recover the sum of \$75.

The main contention of appellant is that, because a valid contract was made and no price fixed, he was entitled to complete ⁸⁸ the job and recover what it was reasonably worth. It does not appear definitely how much had been done under the contract when the work was ordered stopped and the contract canceled. Only two days had elapsed from the time of the giving and acceptance of the order, and a large and substantial part, perhaps the principal part, of the contract was then unperformed and the contract executory. There is no doubt that the refusal of the defendant to perform on its part unless plaintiff would consent to a modification was a total breach of the contract. But notwithstanding the breach, the plaintiff had no right to proceed and perform the contract, which was executory at the time of breach, and recover the value of the completed job. His remedy was to recover damages for the breach and proceed no further with performance of the contract on his part: *Ward v. American H. F. Co.*, 119 Wis. 12, 96 N. W. 388; *Fountain City D. Co. v. Peterson*, 126 Wis. 512, 106 N. W. 17; *Engeldinger v. Stevens*, 132 Wis. 423, 112 N. W. 507.

The theory obviously of the appellant is that the plaintiff, after the contract was made, had a right to proceed and complete it, notwithstanding the order of defendant to proceed no further. This is not the law. While the contract remained executory the defendant had a right to stop the performance on the part of plaintiff by subjecting itself to such damages as would compensate plaintiff for being stopped in the performance of the contract: *Ward v. American H. F. Co.*, 119 Wis. 12, 96 N. W. 388; *Hamilton v. McPherson*, 28 N. Y. 72, 84 Am. Dec. 330; *Johnson v. Meeker*, 96 N. Y. 93, 48 Am. Rep. 609; *Hinckley v. Pittsburgh B. S. Co.*, 121 U. S. 264, 7 Sup. Ct. Rep. 875, 30 L. ed. 967; *Badger State L. Co. v. G. W. Jones L. Co.*, 140 Wis. 73, 121 N. W. 933.

The plaintiff on the trial, however, did not claim damages on account of breach, but maintained his right to recover on the original contract for the value of the job completed, and the main question litigated appears to have been whether the original contract was modified so as to limit the cost of the ⁸⁹ job to \$75. The plaintiff offered no evidence of the damages occasioned by the breach. The court below as well as the referee seems to have awarded judgment for \$75 on the theory that, when the defendant ordered the work stopped unless it could be done for \$75, and plaintiff proceeded with and completed the job, plaintiff impliedly agreed to the modification. We need not decide this proposition. The plaintiff not having proved the amount of his damages occasioned by the breach, and it not appearing that he was entitled to

recover more than \$75, the amount which defendant concedes, we think the judgment was right and must be affirmed.

By the COURT. The judgment is affirmed.

A Contracting Party Who has Certain Things to Do under his contract has no right to proceed to execute it after he has been notified that the other party to the agreement will not stand by his compact: *Davis v. Bronson*, 2 N. D. 300, 33 Am. St. Rep. 783, and see the note thereto on the right of a party to a contract to proceed with its execution after his adversary declines to do so.

BARDON v. O'BRIEN.

[140 Wis. 191, 120 N. W. 827.]

DEEDS — Reservation or Exception of Growing Timber.—A clause in a deed to land “reserving the pine and cedar timber now growing or being thereon and the right to cut and remove the same” creates an exception, not a reservation. The timber remains the property of the grantor, and he is not required to remove it within a reasonable time after the conveyance. (p. 1068.)

Action to recover the value of pine and cedar timber that has been cut by the defendant from land which the plaintiff claimed he owned under a clause in a deed made by him which reads: “Reserving the pine and cedar timber now growing or being thereon and the right to cut and remove the same.” The trial court held that the plaintiff reserved all the pine and cedar timber upon the land conveyed which he should cut and remove within a reasonable time after the conveyance, and that a reasonable time having expired prior to the cutting of any of the timber by the defendant, the plaintiff had no title thereto or interest therein. From a judgment in favor of the defendant, dismissing the action upon the merits, this appeal is taken.

W. E. Pickering and W. B. Kellogg, for the appellant.

Luse, Powell & Luse, for the respondent.

194 KERWIN, J. The vital question in this case is whether, under the clause in the deed reserving the pine and cedar timber, the grantor was bound to remove it within a reasonable time. There is considerable conflict of authority on the question, many cases holding that such a clause amounts to a reservation and not an exception, and that the timber reserved is only such as shall be removed within a reasonable time, while others hold that such a clause amounts to an exception of the timber from the grant. The phrase

"excepting and reserving" is commonly used in deeds, and is sometimes held to amount to an exception of part of the property which is the subject of conveyance, and sometimes to a reservation out of the estate conveyed, depending largely ¹⁹⁵ upon the intention of the parties, the subject matter of the grant, whether the thing excepted or reserved is a thing newly created out of the lands and tenements granted, or part of the property in existence and excepted therefrom: *Pritchard v. Lewis*, 125 Wis. 604, 110 Am. St. Rep. 873, 104 N. W. 989, 1 L. R. A., N. S., 565. Many cases are cited by respondent from other states holding that, under reservations similar to the one here, the timber was not excepted, but only the right to enter and cut it, and that when no time limit is specified for the entry and cutting, the law implies that a reasonable time was intended. But the doctrine of this court in *Rich v. Zeilsdorff*, 22 Wis. 544, 99 Am. Dec. 81, is not without support in other jurisdictions: *Knotts v. Hydrick*, 12 Rich. 314; *Sears v. Ackerman*, 138 Cal. 583, 72 Pac. 171; *Whitaker v. Brown*, 64 Pa. 197; *Winthrop v. Fairbanks*, 41 Me. 307; *Clap v. Draper*, 4 Mass. 266, 3 Am. Dec. 215; *North Georgia Co. v. Bebee*, 128 Ga. 563, 57 S. E. 873; *Starr v. Child*, 5 Denio, 599; *State v. Wilson*, 42 Me. 9; *Craig v. Wells*, 11 N. Y. 315.

At an early day this court, in *Rich v. Zeilsdorff*, 22 Wis. 544, 99 Am. Dec. 81, held that a clause in a deed reserving to the grantor the timber with the right to enter and cut it is an exception of the timber with sufficient interest in the soil to sustain it. In that case the reservation was, "reserving the right to cut and remove all the pine timber or trees upon said premises and half of all cedar trees upon said premises, and the right is hereby reserved by the party of the first part to enter upon said lands at any time within two years next succeeding the date of this instrument for the purpose of cutting and removing the trees or timber so reserved." The opinion is rested upon the fact that the right to cut and remove only is reserved and not the timber. The distinction between an exception and a reservation is discussed, and the court said: "A reservation is always of something taken back out of that which is clearly granted, while an exception is some part of the estate not granted at all."

¹⁹⁶ And it is held that where the timber is reserved it is an exception, since the timber is part of the realty and would have passed to the grantee but for the exception, and that the property in the timber continues in the grantor, with the right in so much of the soil as is necessary to sustain it. In the *Rich* case (22 Wis. 544, 99 Am. Dec. 81), this court draws the distinction between a case where the timber is reserved and the right to cut and remove it, and holds that where the timber is reserved the reservation is an exception, since the

thing reserved is a part of the realty. This doctrine was again stated and approved in *Williams v. Jones*, 131 Wis. 361, 111 N. W. 505, which case was approved in the late case of *Western L. & C. Co. v. Copper River L. Co.*, 138 Wis. 404, 120 N. W. 277.

It seems clear, therefore, that a reservation of timber in a deed similar to the one before us, under the decisions of this court, amounts to an exception of the timber from the grant. Many of the authorities cited by counsel for respondent support his contention, namely, that reservations similar to the one in the instant case have been held to reserve only such timber as should be cut within a reasonable time. But we think this court is committed to the doctrine that such a reservation of timber amounts to an exception from the grant of the timber thus reserved, and that the rule should not now be departed from. We must therefore hold that the pine and cedar timber was excepted from the grant and remained the property of the plaintiff, and therefore he was entitled to judgment.

By the COURT. The judgment of the court below is reversed, and the cause remanded with instructions to render judgment for the plaintiff for \$375 and costs.

Dodge, Siebecker and Timlin, JJ., dissent.

A motion for a rehearing was denied October 5, 1909.

Reservations and Exceptions in Deeds are defined and distinguished in the recent cases of *Ammons v. Toothman*, 59 W. Va. 165, 115 Am. St. Rep. 908; *Pritchard v. Lewis*, 125 Wis. 604, 110 Am. St. Rep. 873; *Elsea v. Adkins*, 164 Ind. 580, 108 Am. St. Rep. 320.

Deeds to Timber and Their Effect are considered in the note to *Wilson etc. Co. v. Alderman & Sons Co.*, 128 Am. St. Rep. 868. A conveyance of a tract of land in fee simple, to wit, all of the timber thereon, is a conveyance of the timber with an interest in the land, with the right to cut it any time without importing into such grant that it must be cut within a reasonable time: *Lodwick Lumber Co. v. Taylor*, 100 Tex. 270, 123 Am. St. Rep. 803. And where the owner of land conveys by warranty deed the timber standing thereon, he is not entitled to have the deed canceled because improvidently made, in that it does not limit the time for removing the timber, the land being useless so long as the timber remains thereon and the purchaser having failed to remove it within a reasonable time: *Butterfield Lumber Co. v. Guy*, 92 Miss. 361, 131 Am. St. Rep. 540.

BATES v. CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY.

[140 Wis. 235, 122 N. W. 745.]

CARRIER—Unsafe Baggage-room—Liability to Passenger.—

The general rule that an employer has the right to construct and maintain his property and appliances in his own way, and so long as there is no latent danger therein his employes assume the risk, has no application between carrier and passenger in respect to a baggage-room. A carrier must keep such room reasonably safe for passengers invited to identify and claim their baggage, and cannot rely on the theory that defects therein involve "a question of engineering," meaning a question of judgment in the construction. (p. 1071.)

CARRIER—Baggage-room With Pit or Depression in Floor.—

Whether a baggage-room constructed with a pit or depression in the floor to facilitate the handling of baggage is reasonably safe for the use of passengers claiming or identifying baggage therein is a question for the jury, notwithstanding this plan of construction has been deliberately adopted by the carrier at this and other stations. (p. 1072.)

CARRIER—Injury to Passenger in Baggage-room.—In an Action by a passenger against a carrier for injuries sustained by stepping into a pit or depression in the floor of a baggage-room, the inquiry is whether the carrier could have reasonably anticipated that an injury might probably result by reason of the construction and maintenance of the room used as it was; and the court properly refuses to submit the question for special verdict, "Could it have been reasonably anticipated that the accident in question would have occurred at the time and place in question?" (p. 1073.)

EVIDENCE—Right of Court to Disregard as Impossible.—It requires an extraordinary case to authorize the court to regard sworn testimony as manifestly impossible and untrue. (p. 1073.)

CARRIER—Injury to Passenger in Baggage-room.—In an Action by a woman for injuries received from stepping into a pit or depression in the floor of a baggage-room in which she had been invited to identify and claim her baggage, the weight and credibility of her testimony that she did not see the pit is for the jury, and the court will not say that it is impossible or untrue. (p. 1073.)

TRIAL—Special Verdict—Failure to Request.—Under the Wisconsin statute it is incumbent upon attorneys to present to the trial court, fairly and openly, their request for the submission of questions of fact in a special verdict; if by inadvertence or finesse they fail to do so, being present and having opportunity, they waive the right to have the jury pass upon that particular item of fact, and the court, rendering its judgment adversely to them, necessarily resolves that fact against them. (p. 1074.)

C. W. Graves and Charles E. Vroman, for the appellant.

D. O. Mahoney and J. Henry Bennett, for the respondent.

237 TIMLIN, J. Upon a special verdict finding that the plaintiff when injured was in the baggage-room of the defendant **238** at the invitation of the baggage-master, and that this baggage-room was not then reasonably safe for the use of passengers invited thereto to identify their baggage, and that

this condition of the baggage-room was the proximate cause of plaintiff's injury, and that there was no want of ordinary care on plaintiff's part which contributed to such injury, the plaintiff had judgment for the amount of damages found by the jury.

The appellant assigns several errors which fairly raise the question of the sufficiency of the evidence to support the verdict; of the sufficiency of the verdict to support the judgment; and complains of failure to submit to the jury a question proposed by defendant, also of error in instructions to the jury. The facts in evidence show that the baggage-room of the respondent at La Crosse is so constructed that a depression or pit extends from the double doors at the west side of the room eastward into the room about twenty-four feet and nearly across the room. This is about two feet nine inches in depth and slightly wider than the baggage truck, and it is used for running the baggage truck into the room so that the platform of the truck will be practically on a level with the floor of the room. This is an obvious convenience in loading baggage on the truck and transferring the loaded truck from the baggage-room to the platform which is on the lower level. At both sides and at the end of this pit or depression the floor of the baggage-room is available for and used for the deposit of baggage.

The plaintiff was a passenger on defendant's road, and went into the baggage-room at the suggestion of the defendant's employés to identify her baggage and have the same checked. She then had some conversation with the baggage-man, and left for the purpose of purchasing a rope to tie up one item of her baggage which was defectively fastened. She then returned and engaged in conversation with the baggage-master while one of the assistants of the latter was ²³⁹ tying up the baggage with this rope which she brought with her. She went with the baggage-master across the baggage-room to identify her luggage. Near where she stood there was a truck in the pit or depression, and she accidentally stepped between the edge of the truck and the edge of the pit or depression, breaking her leg and sustaining injuries. She had not noticed nor had her attention been called to the pit, depression, or truck up to this time. The testimony on the part of the defendant differed materially from this, but the foregoing is the version of the occurrence established by the verdict.

Upon this state of facts the defendant denies the right of the plaintiff to recover damages because the construction of the baggage-room was "an engineering problem," and contends that its construction and maintenance was no breach of duty to anyone; that it was a customary and usual mode of constructing baggage-rooms and handling baggage, and

necessary to the easy and convenient operation of that branch of the carrying business; and that therefore the jury was not warranted in finding that the baggage-room was not reasonably safe. To maintain this contention the appellant cites *Boyd v. Harris*, 176 Pa. 484, 35 Atl. 222; *Tuttle v. Detroit etc. R. Co.*, 122 U. S. 189, 7 Sup. Ct. Rep. 1166, 30 L. ed 1114; *Chicago & G. W. R. Co. v. Armstrong*, 62 Ill. App. 228; *St. Louis Nat. S. Co. v. Burns*, 97 Ill. App. 175; *Chicago & E. I. R. Co. v. Driscoll*, 176 Ill. 330, 52 N. E. 921; *Titus v. Bradford etc. R. Co.*, 136 Pa. 618, 20 Am. St. Rep. 944, 20 Atl. 517; *Bethlehem I. Co. v. Weiss*, 100 Fed. 45, 40 C. C. A. 270, and other cases of that class. These cases all involved questions arising between master and servant.

Generally speaking, and without reference to special statutes or exceptional rules, the law confers upon the master the right to construct and maintain his own property and appliances in his own way and according to his own judgment, and so long as there is no latent or hidden danger in ²⁴⁰ such construction or maintenance, the servant accepting employment from the master does so subject to this right of the master, and assumes the risk of injury from the open and obvious character of such appliances. Consequently in such cases, where the defect causing the injury presents a mere question of this kind, courts have sometimes designated it as a mere "question of engineering," meaning a question of judgment in the construction of the appliance. There is no legal rule or doctrine by force of which a court or jury is disabled from deciding a cause merely because in such decision there may be involved "a question of engineering." The expression relates to a condition of fact pertinent in cases between master and servant and not to a rule of law. The rule above stated obtaining between master and servant and relied upon by appellant has no application between carrier and passenger, which was the relation of the parties in the instant case. As to the respondent it was the duty of appellant to have its baggage-room reasonably safe: *Indermaur v. Dames*, 19 Eng. Rul. Cas. 64; *Illinois Cent. R. Co. v. Griffin*, 80 Fed. 278, 25 C. C. A. 413; *Banderob v. Wisconsin Cent. R. Co.*, 133 Wis. 249, 113 N. W. 738. Whether or not the appellant performed this duty may be a question of law or a question of fact, and the inquiry in the instant case is whether there was sufficient evidence to go to the jury on this point. It is the duty of a carrier to provide reasonably safe depot buildings in which freight and property transported over its road might be securely stored: and facts showing the character and location of the depot building, the materials out of which it was built, and its liability to take fire are proper to be laid before the jury for the purpose of showing that the building was not reasonably safe: *Whitney v.*

Chicago etc. R. Co., 27 Wis. 327. See, also, *Conroy v. Chicago etc. R. Co.*, 96 Wis. 243, 250, 70 N. W. 486, 38 L. R. A. 419. While it is the duty of the railroad company to have its depot open and lighted for the convenience of passengers (*Dowd v. Chicago etc. R. Co.*, 84 Wis. 105, 36 Am. St. Rep. 917, 54 ²⁴¹ N. W. 24, 20 L. R. A. 527), it is a question for the jury whether under the circumstances of the particular case the railroad company was negligent in failing to have such lights: *Patten v. Chicago etc. R. Co.*, 32 Wis. 524. Whether a railroad company provided a sufficient platform to enable passengers to descend from the cars without danger was said to be a question for the jury in *Delamatyr v. Milwaukee etc. R. Co.*, 24 Wis. 578; and a like ruling was made in *McDermott v. Chicago etc. R. Co.*, 82 Wis. 246, 52 N. W. 85, where several cases are cited; and see *Banderob v. Wisconsin Cent. R. Co.*, 133 Wis. 249, 113 N. W. 738. Whether the baggage-room constructed as described was reasonably safe for the use of passengers claiming or identifying baggage therein was in the case at bar, we think, a question for the jury, notwithstanding the particular defect which rendered it unsafe inhered in a plan of the room deliberately adopted and used at La Crosse and elsewhere by the appellant. Not that the jury may at its will condemn any plan or building as not reasonably safe, but facts and circumstances may be laid before them tending to show that the building is dangerous for the use to which it is put by the carrier, and it is for the court to say whether the evidence has any such tendency, and for the jury to pass upon its weight and sufficiency. No doubt, if the baggage-room so constructed was only for the purpose of transferring baggage to and from outgoing and incoming trains with the truck described, there would be no evidence of its insufficiency for that purpose, but when it is also used as a place for passengers to enter and walk about in for the purpose of identifying baggage at all hours and under all conceivable conditions of congestion of baggage, it may well be found to have been so constructed as to be dangerous to those passengers so using it. The finding of the jury covers both construction and maintenance, and the maintenance of this unguarded opening in a baggage-room used for such purposes might well, upon the evidence before the jury, be found to constitute a ²⁴² failure to maintain the baggage-room in a reasonably safe condition. It is not necessary to this to say that a barrier or railing around the pit or opening would destroy or impair its efficiency for the purpose of loading or unloading and removing baggage. For such purposes the baggage-room was reasonably safe. It is only when the additional use by passengers for the purpose of identification is added that the room can be said not to have been reasonably safe for such additional use. Criticisms upon the

instructions to the jury because such instructions permit the jury to consider whether or not the appellant was negligent in constructing and maintaining the pit in question are disposed of by these considerations.

The appellant requested the court to submit to the jury the following question as part of the special verdict: "Could it have been reasonably anticipated that the accident in question would have occurred at the time and place in question?" The court properly refused to submit this question. Its negation would have determined nothing. The mere fact that the appellant could not have reasonably anticipated the specific accident at the particular time and place is not significant. The inquiry should have been whether the appellant could have reasonably anticipated that an injury might probably result to a passenger by reason of the construction and maintenance of this baggage-room used as it was: *Coolidge v. Hallauer*, 126 Wis. 244, 105 N. W. 568. It is not necessary to decide whether this refusal would have been error if the question was properly drawn.

On the question of contributory negligence it is contended that the respondent must have seen, and ought therefore to have avoided, this pit or depression, and that her testimony to the effect that she did not see it is manifestly impossible and untrue. It requires an extraordinary case to authorize the court to so dispose of sworn testimony. Whether the respondent saw the pit or not would depend on the amount and location of the baggage in the room, whether there was or was not a truck in the pit, how she reached her ²⁴³ baggage, what were her habits and opportunities of observation in many particulars, and we cannot say that her testimony on this point is impossible. Its weight and credibility were for the jury. The burden of proof upon this point was upon the appellant.

The jury found by special verdict that the baggage-room was not reasonably safe for the use of passengers who were invited therein for the purpose of identifying and having baggage checked, and that this was the proximate cause of respondent's injury, and that there was no contributory negligence on the part of the respondent, but did not expressly find defendant negligent or find defendant negligent further than may be implied from the above findings. The appellant did not request that this question of defendant's negligence be submitted to the jury. It is not necessary in this case for the court to determine whether or not an express finding of negligence was necessary in addition to the facts above found in order to fix the liability of the appellant, because, if such finding was necessary to uphold a recovery, it must be presumed that the appellant, by its failure to request its submission to the jury, waived appellant's right

to the determination of that question by the jury, and also that that question was determined adversely to the appellant by the judgment appealed from, because, as we have seen, there is evidence to support such a finding. Chapter 346, Laws of 1907, being section 2858m, Statutes, changes the rule which formerly prevailed, and it is now incumbent upon attorneys to present to the trial court fairly and openly requests for the submission of questions of fact in a special verdict. If by inadvertence or finesse they fail to do so, being present and having opportunity, they thereby waive the right to have the jury pass upon that particular item of fact, and the court rendering its judgment adversely to them (if the court does so render judgment) necessarily resolves that fact against them.

Respondent's counsel cites chapter 192, Laws of 1909 (section 3072m, Statutes), to us for the purpose of showing that the ²⁴⁴ judgment in his favor should not be reversed or set aside except as therein provided. The statute is as follows: "No judgment shall be reversed or set aside or new trial granted in any action or proceeding, civil or criminal, on the ground of misdirection of the jury, or the improper admission of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court to which the application is made, after an examination of the entire action or proceeding, it shall appear that the error complained of has affected the substantial rights of the party seeking to reverse or set aside the judgment, or to secure the new trial."

It is not quite clear what change this act makes in the rules adopted and acted upon by this court long prior to the passage of the act: See *Franke v. Mann*, 106 Wis. 118, 81 N. W. 1014, 48 L. R. A. 856; *Mauch v. Hartford*, 112 Wis. 40, 87 N. W. 816.

The cases applying and announcing those rules are too numerous to be cited. Eighty instances of this kind will be found cited and referred to under the title "Appeals and Errors," subtitle 11, "Harmless and Immaterial Error," Cumulative Index Digest for September, 1908, which merely covers the work of this court from 122 Wis. to 133 Wis. and 115 N. W. inclusive. Whether this act of 1909 changes the rule stated in *Dresser v. Lemma*, 122 Wis. 387, 100 N. W. 844, to the effect that, if error is committed, prejudice is presumed to flow therefrom, and whether that rule so stated is consistent with *Franke v. Mann*, 106 Wis. 118, 81 N. W. 1014, 48 L. R. A. 856, which declares that not only error, but prejudicial error, must be made to appear affirmatively, or consistent with other decisions of this court, and how far, if at all, the act of 1909 extends the existing provisions of section 2829, Statutes of 1898, has not been discussed by counsel, and we reserve the decision of these questions for

some case in which they are necessarily involved and thoroughly presented.

By the COURT. The judgment of the circuit court is affirmed.

Railroads must Keep Their Depots, Stations and Approaches thereto in a reasonably safe condition for passengers, otherwise they are negligent: *Mangum v. North Carolina R. R. Co.*, 145 N. C. 152, 122 Am. St. Rep. 437; *Abbot v. Oregon R. R. Co.*, 46 Or. 549, 114 Am. St. Rep. 885; *Pineus v. Atlantic etc. R. R. Co.*, 140 N. C. 450, 111 Am. St. Rep. 856; *Jackson v. Natchez etc. Ry. Co.*, 114 La. 981, 108 Am. St. Rep. 366; *Barker v. Ohio River R. R. Co.*, 51 W. Va. 423, 90 Am. St. Rep. 808. A railway company is answerable for injuries received by a person then at a passenger depot for the purpose of taking a train, through its negligence in leaving an unguarded hole in the floor of a toilet-room into which, the room being without light, the person fell, while in the exercise of due care: *Jordan v. New York etc. R. R. Co.*, 165 Mass. 346, 52 Am. St. Rep. 522.

STATE v. WAGGENSON.

[140 Wis. 265, 122 N. W. 726.]

MANDAMUS—Conditions Precedent to Issuance.—To entitle one to mandamus, he must not only have a clear legal right which can become effective only by the act of another, but it must be the clear duty of the latter to perform such act. (p. 1076.)

MANDAMUS—Conditions Which Petition must Show.—Where the right to have an act done at the time and in the manner demanded is dependent upon some other act having been done or some condition existing, facts must be stated in the petition showing that such preliminary act has been done or condition created. (pp. 1076, 1077.)

MANDAMUS—Act Requiring Expenditure of Money.—Where the doing of an official act requires the expenditure of money, performance will not be coerced by mandamus in the absence of a showing that the money therefor is presently available. (p. 1077.)

MANDAMUS to Compel Drainage Commissioners to Repair a Ditch will not issue at the suit of a proprietor suffering damage from the ditch clogging up, in the absence of a showing that there is money available therefor, or that the conditions precedent to making the repairs have been complied with, the only default on the part of the commissioners, shown by the petition, being a failure to file the statutory report necessary to obtain funds. (pp. 1077, 1078.)

Graham & Graham, for the appellant.

Naylor & McCaul, for the respondents.

266 MARSIIALL, J. An alternative writ of mandamus was issued in due form which, on motion duly made, was quashed because (1) the facts stated as a basis for the proceedings were insufficient; (2) such facts were insufficient to show relator to be entitled to prosecute the proceedings.

The facts relied upon are, in brief, as follows: Relator is the owner of certain lands through which a portion of a drainage system has been constructed and put in operation under the laws of the state of Wisconsin. It has been the duty of the drainage commissioners since the installation of the drainage system to keep such system in repair, and, since the passage of chapter 419, Laws of 1905, on or about the first Tuesday of June each year to file with the clerk of the circuit court having jurisdiction of the matter a report specifying in detail the repairs necessary and the sum to be assessed to make the same against each tract, lot, easement or corporation. About a year after the completion of the drainage ditch through relator's land it commenced to fill up with sand. The deposit therein has increased till it nearly fills the ditch, causing large quantities of water which would otherwise be carried down the same to be deposited on relator's land, rendering it valueless for farming purposes, to his great damage. The commissioners have often been requested to put the ditch in a proper state of repair but have wholly refused ²⁶⁷ to do so. They have not filed any report as required by the law aforesaid or raised any money to make necessary repairs upon the ditch.

An alternative writ was issued as requested requiring the commissioners to repair the drainage ditch where it passes through relator's land, or show cause to the contrary before the circuit court for Monroe county.

Appellant's counsel present this appeal as if, since appellant has a clear legal right to have the drainage ditch repaired, the alternative writ, by which it was sought to enforce such right, should not have been quashed. It does not necessarily follow, because a person has a clear legal right which can only be effective by the act of another, that it is the clear duty of the latter to perform such act at the particular time and in the particular manner such person may demand it. It is fundamental that both conditions must exist; the right and the duty to act, before the extraordinary remedy can be successfully invoked: *State v. Manitowoc*, 52 Wis. 423, 9 N. W. 607; *State v. Hunter*, 111 Wis. 582, 87 N. W. 485; *State v. Milwaukee*, 132 Wis. 615, 113 N. W. 40; *State v. Krumenauer*, 135 Wis. 185, 115 N. W. 798; *State v. Icke*, 136 Wis. 583, 118 N. W. 196, 20 L. R. A., N. S., 800.

When the duty sought to be enforced is of a private nature, a demand must be made for substantially that particular thing, of the particular person upon whom the duty of performance rests; and his refusal thereof must precede application for a writ to coerce such person to act; and the facts in that regard must be made to appear in the petition for the ²⁶⁸ writ, to warrant its issuance: *Merrill on Mandamus*, secs. 222, 223. Where the right to have the par-

ticular act done at the time and in the manner demanded is dependent upon some other act having been done or some condition existing, in order to show affirmatively by the petition for the writ that the relator is entitled, as claimed, facts must be stated therein showing that such preliminary act has been done or condition created: *State v. Elwood*, 11 Wis. 17; *State v. Warner*, 55 Wis. 271, 9 N. W. 795, 13 N. W. 255; *State v. Wood Co.*, 72 Wis. 629, 40 N. W. 381; *State v. Mayor etc.*, 99 Wis. 322, 74 N. W. 783.

The quoted authorities are particularly applicable to this case, in that they are to the effect that where the doing of the official act in question requires the expenditure of money, performance cannot be coerced by mandamus, in absence of a showing that money is presently available, applicable to do the particular matter.

Now, in this case there is no showing in the petition that respondents had money which could properly be applied to repair of the ditch. If they had no such money under their control, it was plainly shown by the relator, as the fact is, that it was only obtainable by their filing a report, as the drainage law (chapter 419, Laws of 1905) provides, specifying, among other things, in detail, the labor necessary to the preservation and protection of the improvement, the places needing repairs, and securing, on due notice and hearing, judicial approval of the proposed work and expenditure, and determination of the amount of the assessment upon each particular parcel of land benefited, and collection of such assessments in due course; and it was further alleged that no such report had been made, though the law requires one to be made in the circumstances of respondents, annually, to the court having jurisdiction of the matter. Thus by the statute it is left to the judgment of the commissioners, preliminarily, ²⁶⁹ and to the court finally, what repairs to a drainage ditch are needed, and the method is provided for obtaining the necessary funds, which is necessarily exclusive.

The most the petition shows as to default on the part of the commissioners is failure to make the required report. No action in that respect was demanded before commencement of these proceedings, nor do such proceedings contemplate coercion of respondents in such respect. So far as is disclosed, it is proposed to cause respondents to repair the ditch, regardless of whether there is money applicable therefor, or whether the conditions precedent to the making of repairs have been complied with, merely because there is need for the repairs and respondents have failed to present the matter to the court for consideration and direction, and in due course to accumulate the necessary money to meet the expense. In other words, it is proposed to compel respondents to make the repairs at their own expense, as a

sort of penalty for the default aforesaid, and take their chances of later recouping the same by collection of approved assessments upon the property benefited. Sufficient has been said to show, clearly, that the facts stated in the petition for the writ of mandamus do not constitute any basis for the relief sought, and, therefore, that the writ was properly quashed.

By the COURT. Order affirmed.

Duties, the Performance of Which may be Compelled by Mandamus, are discussed in the note to *Ward v. Commissioners of Beaufort Co.*, 125 Am. St. Rep. 492. When mandamus is the proper remedy against public officers is the subject of a note to *State v. Gardner*, 98 Am. St. Rep. 863.

PIPER v. CITY OF MADISON.

[140 Wis. 311, 122 N. W. 730.]

MUNICIPAL WATERWORKS—Negligence in Operation.—In maintaining a system of waterworks and selling water to its inhabitants a city acts in its proprietary capacity, and is liable for the negligence of its agents and employes in conducting the business. (p. 1080.)

MUNICIPAL WATERWORKS—Negligence in Operation.—The fact that a city, in addition to selling and distributing water to its inhabitants, also uses its waterworks system for protection against fire, does not relieve it from liability for negligent acts of its agents and employes in conducting the business, unless performed in the actual work incident to extinguishing fires. (p. 1081.)

Gilbert, Jackson & Ela, for the appellants.

John A. Aylward, city attorney, and Aylward, Davies & Olbrich, for the respondent.

312 SUEBECKER, J. The city of Madison, being authorized to maintain and operate a system of waterworks, built its system in 1885. About 1890 a water-tower was constructed on Washington avenue. It is claimed that this tower was chiefly constructed to equalize the pressure. As originally planned, the connection between the pipes of the waterworks system and the tank in the water-tower was controlled by a valve located inside the base of the tower. In time the dampness and the dripping water rusted the bearings and it became impossible to operate the valve. Attempts to remedy the matter were unsuccessful, and in 1891, upon the advice of an expert hydraulic engineer, the valve at the base of the tower was discontinued and a new valve to control the water supply to the tank in the tower

was placed at the junction of the supply pipe for the tank and the main pipe-line at the junction of Pinckney street and Washington avenue, about a block from the tower. Plaintiffs conducted a grocery on Washington avenue in a building located between the valve at the junction of Washington avenue and Pinckney street and the water-tower, and stored part of their stock of groceries in the basement of this building. About 7:30 in the morning of January 17, 1907, plaintiffs observed that water was flowing into the basement, presumably from a broken water-pipe. The officials of the waterworks department were notified, and as rapidly as possible employes cut off the supply of water from the pipes in that section of the city. The valve at the junction of Pinckney street and Washington avenue, controlling the supply of water to the tank in the water-tower, was also closed. This work took more than two hours, and did not stop the flow of water into plaintiffs' basement. A small drain-pipe from the tower-tank was then opened and with the disappearance of the water from the tank the flow of water into plaintiffs' basement ceased. Considerable damage was done ³¹³ to plaintiffs' stock of groceries by the water, and they bring this action to recover for the damage suffered. Subsequent investigation showed that the ten-inch pipe supplying the tank in the water-tower had broken. On the trial in the circuit court of the action for the recovery of the damages suffered, the jury were instructed as to the law of negligence, and were informed that if city authorities in charge of the water department acted upon the advice of men skilled in the work in question, and if the city officials, in good faith and in reliance upon the advice of such experts in waterworks construction, had constructed a waterworks system according to their best judgment, then defects in the construction became mere errors in judgment, and the city would be relieved from liability for any damages resulting therefrom. Under the instructions of the court the jury found that the defendant was not guilty of any want of ordinary care in failing to keep the valve in the base of the water-tower in such condition that it could be used to shut off the water from the tower. The jury also found the amount of the damages sustained by the plaintiffs. The court awarded judgment in favor of the defendant for its costs. This is an appeal from such judgment.

Under legislative authority the city has voluntarily constructed a system of waterworks for public and private use. The revenue derived from sales of water for private use is applied to the cost of construction, operation and maintenance of the waterworks. The business is in charge of a board of commissioners, who employ a superintendent and such other agents and servants as are required for the

conduct of this part of the municipal business. The plaintiffs ³¹⁴ bring this action to recover damages to their property which they allege were caused by the negligence of the city through its agents and servants employed by the city in conducting the business of the waterworks department. Under the alleged facts the employés in charge of this municipal department represent the city and act for it. The errors assigned involve an inquiry as to the extent to which the city is responsible for the acts of its agents and servants in the conduct of this municipal enterprise.

In his treatise on the Law of Municipal Corporations, Mr. Dillon states: "Municipal corporations . . . possess a double character: the one governmental, legislative, or public; the other, in a sense, proprietary or private. . . . In its governmental or public character the corporation is made, by the state, one of its instruments, or the local depository of certain limited and prescribed political powers, to be exercised for the public good on behalf of the state rather than for itself. . . . But in its proprietary or private character the theory is that the powers are supposed not to be conferred, primarily or chiefly, from considerations connected with the government of the state at large, but for the private advantage of the compact community which is incorporated as a distinct legal personality or corporate individual; and as to such powers, and to property acquired thereunder, and contracts made with reference thereto, the corporation is to be regarded quoad hoc as a private corporation, or at least not public in the sense that the power of the legislature over it or the rights represented by it is omnipotent": 1 Dillon on Municipal Corporations, sec. 66 (39); *Hays v. Oshkosh*, 33 Wis. 314, 14 Am. Rep. 760; *Mulcairns v. Janesville*, 67 Wis. 24, 29 N. W. 565; *Folk v. Milwaukee*, 108 Wis. 359, 84 N. W. 420.

The function of a city in selling and distributing water to its citizens is of a private nature, voluntarily assumed by it for the advantage of the people of the city. Responsibility for the acts of persons representing it in such a business falls upon the city through the relation of master and servant, and ³¹⁵ the maxim of *respondeat superior* applies. Whenever this relation is established the city is liable in damages for the negligence of its agents and servants in the conduct of such business. The following adjudications uphold this liability upon the ground that the city in conducting such a business is acting in its proprietary capacity: *Lynch v. Springfield*, 174 Mass. 430, 54 N. E. 871; *Hourigan v. Norwich*, 77 Conn. 358, 59 Atl. 487; *Chicago v. Selz, Schwab & Co.*, 202 Ill. 545, 67 N. E. 386; *Bullmaster v. St. Joseph*, 70 Mo. App. 60; *Philadelphia v. Gilmartin*, 71 Pa. 140.

The fact that the city may also use the waterworks for protection against fire does not relieve it from liability for negligent acts of its servants or agents in the conduct of this business, except for such acts as are performed by them in the actual work incident to extinguishing fires: *Chicago v. Selz, Schwab & Co.*, 202 Ill. 545, 67 N. E. 386.

In submitting this case to the jury the court held that in conducting the business of distributing and selling water the city is exercising a public function, and its officers and agents in conducting the business are in the exercise of quasi-judicial authority, and if they exercise their judgment and discretion in good faith, the city is not liable for damages resulting from their negligent acts. This was error, because the city in this case was acting in its private or proprietary capacity, and it is therefore liable for the negligent acts of its servants or agents. A new trial must be awarded.

By the COURT. Judgment reversed, and the cause remanded to the trial court for a new trial.

A City Engaged in an Enterprise of a Private Nature, such as the furnishing of light to its inhabitants, appears to be held to the same responsibility for injuries received on account of the negligence of its officers or agents as would an individual operating an electric light plant: *Eaton v. City of Weiser*, 12 Idaho, 544, 118 Am. St. Rep. 225; *Pineus v. Atlantic etc. R. R. Co.*, 140 N. C. 450, 111 Am. St. Rep. 857; *Hodgins v. Bay City*, 156 Mich. 687, 132 Am. St. Rep. 546. And it would seem that the same rule of liability applies to a city furnishing water to its inhabitants: *Brown v. Salt Lake City*, 33 Utah, 222, 126 Am. St. Rep. 828.

O'CONNOR v. QUEEN INSURANCE COMPANY.

[140 Wis. 388, 122 N. W. 1038, 1122.]

INSURANCE — Fire Confined Within Furnace — Damage from Radiated Heat and Smoke.—Where a fire is started in a furnace with highly inflammable materials not intended for such purpose, and the fire, although confined within the furnace, soon becomes so intense that the heat and smoke char and discolor the furniture, woodwork and finish of the house, without actual ignition thereof, the fire is "hostile" and the injury a "direct loss or damage by fire" within the meaning of the Wisconsin standard policy. (pp. 1082, 1086.)

D. G. Classon and Bates, Harding, Edgerton & Bates, for the appellant.

Francis S. Bradford, for the respondent.

388 KERWIN, J. Action upon a fire insurance policy. The servant of plaintiff built a fire in the furnace with

paper and cannel coal, not used or intended to be used for such purpose, which fire developed within a few moments to such a degree of fury as to fill the house with great volumes of smoke, soot and excessive and intense heat, and damage the personal property ³⁸⁹ therein to the amount, as found by the jury, of five hundred and sixty-two dollars. The only question submitted to the jury was the amount of damages, and the court directed a verdict for the plaintiff for the amount of damages found by the jury. Judgment was entered for plaintiff accordingly, from which this appeal was taken.

The policy in this case, being the Wisconsin standard form, insured the plaintiff "against all direct loss and damage by fire"; and the controversy is as to whether the loss and damage were caused by anything insured against by the defendant company. The question arises whether the fire which caused the damage was a fire within the meaning of the policy. The plaintiff lived in a rented house heated by a furnace. His servant built a fire in the furnace of material not for use therein or intended so to be used, and of such a highly inflammable character as to cause intense heat and great volumes of smoke to escape through the registers leading into the rooms and greatly damage plaintiff's property. The heat was so intense as to char and injure furniture, and the great volumes of smoke and soot greatly injured the furnishings and personal property of the plaintiff. It does not appear from the evidence that there was any ignition outside of the furnace, although the fire was so intense as to overheat the chimney and flues and char furniture in the rooms. The evidence shows that the chimney was so hot it seemed as though it was on fire; that the fire was burning fiercely in the furnace; around the mopboards was burned and the mopboards blistered; the wall-paper charred and burned and the chimney cracked from the excessive heat. ³⁹⁰ It is the contention of appellant that the damage occasioned by heat, smoke and soot is not covered by the policy where the fire is confined within the furnace. This position involves the construction of the words of the policy, "direct loss or damage by fire," and leads to a consideration of what fires are within the contemplation of the policy.

No limitation is placed upon the word "fire" by the language of the policy itself, but it is said that "contracts of insurance are to be construed according to the sense and meaning of the terms which the parties have used, and, if they are clear and unambiguous, the terms are to be taken and understood in their plain, ordinary and proper sense." No doubt this is the general rule, but it must also be remembered in applying the rule that this and other courts have construed contracts of insurance favorably to the in-

sured: *Karow v. New York Continental Ins. Co.*, 57 Wis. 56, 46 Am. Rep. 17, 15 N. W. 27; *Brady v. Northwestern Ins. Co.*, 11 Mich. 425; *May on Insurance*, 3d ed., sec. 402; *Peters v. Warren Ins. Co.*, 14 Pet. 99, 10 L. ed. 371.

Appellant insists that a fire confined within the limits of a furnace, although producing damage by smoke and heat, is not a fire within the meaning of the policy in question, and relies mainly upon the case of *Austin v. Drew*, 4 Camp. 360. In that case the plaintiff was the owner of a sugar factory several stories high, with pans on the ground floor for boiling sugar and stove for heating. A flue extended to the top of the building with registers on each floor connecting with the flue to introduce heat. Because of the negligence of a servant in not opening a register at the top of the flue, or chimney, used to shut in the heat during the night, the smoke, sparks and heat from the stove were intercepted, and, instead of escaping through the top of the flue, were forced into the rooms, in consequence of which the sugar was damaged. The flames were confined within the stove and flue and no actual ignition took place outside thereof, and it was held that the loss was not covered by the policy. The lord chief justice ³⁹¹ said that there was no more fire than always existed when the manufacture was going on, and which continued to burn without any excess. The case seems to turn upon the point that the fire was the usual and ordinary fire, never excessive, and always confined within its proper limits. We shall briefly refer to other cases cited by appellant on this point.

In *German Am. Ins. Co. v. Hyman*, 42 Colo. 156, 94 Pac. 27, 16 L. R. A., N. S., 77, the loss was caused by an explosion produced by lighting a match, where the policy contained a provision that the insurers should not be liable for loss by explosion unless fire ensues, and in that event for the damage by fire only. *Samuels v. Continental Ins. Co.*, 2 Pa. Dist. Rep. 397, was a claim for damages caused by smoke and soot from a lamp whose flame flared up above the lamp. *United L., F. & M. Ins. Co. v. Foote*, 22 Ohio St. 340, 10 Am. Rep. 735, was a case of explosion excepted from the policy, and it was held that the fire was caused by the explosion; therefore the loss was occasioned by explosion. *Renshaw v. Fireman's Ins. Co.*, 33 Mo. App. 394, is also an explosion case caused by ignition from a burning gas jet, and it was held that where the explosion is the direct result of the antecedent fire, the policy covers it, but where the explosion is not occasioned by the fire, there is no liability for the result of the explosion. In the one case the fire causes the explosion, and in the other the explosion causes the fire. *Briggs v. North A. & M. Ins. Co.*, 53 N. Y. 446, is a case where the explosion was before the fire and not caused by the fire. *Transatlantic F. Ins. Co. v. Dorsey*, 56

Md. 70. 40 Am. Rep. 403, was a case of explosion, and the main question was whether the fire was the direct cause of the explosion. 1 Wood on Fire Insurance, second edition, section 103, it is true, lays down the general rule that no liability arises where the fire is confined within the limits of the agencies employed, referring to the case of *Austin v. Drew*, 4 Camp. 360, with the observation that the doctrine of that case had been considerably misconceived by courts and text-writers. *Gibbons v. German Ins. & Sav. Inst.*, ³⁹² 30 Ill. App. 263, was a case of damage caused by the escape of steam. *Case v. Hartford F. Ins. Co.*, 13 Ill. 676, discusses *Austin v. Drew*, 4 Camp. 360, and discards the idea that there can be no loss by fire without actual ignition. *Millaudon v. New Orleans Ins. Co.*, 4 La. Ann. 15, 50 Am. Dec. 550, is a case where the damage was caused by the explosion of a steam boiler; while in *Waters v. Merchants' L. Ins. Co.*, 11 Pet. 213, 9 L. ed. 69, an explosion of gunpowder is held to be a loss by fire where the thing exploded was on fire. *American T. Co. v. German F. Ins. Co.*, 74 Md. 25, 21 Atl. 553, was a case of overheated boiler owing to the absence of water. *Austin v. Drew*, 4 Camp. 360, is referred to, and it was held damage not covered by the policy. *Cannon v. Phoenix Ins. Co.*, 110 Ga. 563, 78 Am. St. Rep. 124, 35 S. E. 775, is a case where the fire was an ordinary fire in a stove. The fire was what is termed in law books a "friendly" and not a "hostile" fire. In this case the stovepipe became disarranged and smoke and soot escaped, together with the water used in cooling the ceiling causing the damage. *Austin v. Drew*, 4 Camp. 360, is cited in support of the opinion.

It will be seen from the foregoing cases relied upon by appellant that the cases in this country in any way tending to support appellant's contention rest upon the doctrine of *Austin v. Drew*, which has not been extended, but limited to the particular facts of the case, and the doctrine enunciated therein criticised in some well-considered cases. We shall briefly refer to some of the authorities. At page 929, section 402, Mr. May, in his work on Insurance, discusses the doctrine laid down in *Austin v. Drew*, and concludes that if the doctrine in that case is intended to go further than the facts of the case, it has been deemed not to be good law by every high authority. In *Scripture v. Lowell M. F. Ins. Co.*, 10 Cush. 356, 57 Am. Dec. 111, the doctrine of *Austin v. Drew* is explained, and the court says that lack of study of the case by courts and text-writers has caused it to be misapplied, and refers to the language of the lord chief justice in *Austin v. Drew* to the effect that ³⁹³ the fire was an ordinary one, and no more than always existed when the manufacturing was going on. *Singleton v. Phenix Ins. Co.*, 132 N. Y. 298, 30 N. E. 839, is a case

where a boat was loaded with quicklime in barrels. The boat was found to be on fire through the slacking of the lime. It was towed into the river and sunk to prevent total destruction. It was claimed that some water in the boat must have caused the slacking of the lime. Held, that the loss was by fire within the meaning of the policy. Further intimated that it may not be necessary to show actual ignition or combustion to establish a loss by fire. In *Way v. Abington Mut. F. Ins. Co.*, 166 Mass. 67, 55 Am. St. Rep. 379, 42 N. E. 1032, 32 L. R. A. 608, fire in the stove ignited the soot in the chimney, and the smoke and soot from the burning chimney escaped into the room and damaged property. Held, that such damage was covered by the policy insuring against all loss or damage by fire. The case seems to have turned upon the fact that the fire in the chimney was a "hostile" fire; therefore the damage caused by such was covered by the policy. In *Lynn G. & E. Co. v. Meriden F. Ins. Co.*, 158 Mass. 570, 35 Am. St. Rep. 540, 35 N. E. 690, 20 L. R. A. 297, it was held under an insurance policy against loss or damage by fire that damage to machinery in a part of the building not reached by the fire, caused by short circuiting of electric current, was covered by the policy. It was further held that the fire was the direct and proximate cause of the damage under the words of the policy, "direct and proximate cause." In *California Ins. Co. v. Union C. Co.*, 133 U. S. 387, 10 Sup. Ct. Rep. 365, 33 L. ed. 730, the words of a policy, "direct loss or damage by fire," are defined to mean loss or damage occurring directly from fire as the destroying agency in contradistinction to the remoteness of fire as such agency. In *German Am. Ins. Co. v. Hyman*, 42 Colo. 156, 94 Pac. 27, 16 L. R. A., N. S., 77, under an insurance policy providing that the insurer would not be liable for loss by explosion, it was held that if the fire precedes the explosion, and the latter is an incident of the former and ³⁹⁴ caused by it, the insured may recover for his entire loss, but if the explosion precedes the fire and is not caused by it, the insured can only recover for the loss by fire. In *Russell v. German F. Ins. Co.*, 100 Minn. 528, 111 N. W. 400, 10 L. R. A., N. S., 326, it is held that to render a fire the immediate or proximate cause of the loss or damage, it is not necessary that any part of the insured property actually ignited or was consumed by fire. In *Ermentrout v. Girard F. & M. Ins. Co.*, 63 Minn. 305, 56 Am. St. Rep. 481, 65 N. W. 635, 30 L. R. A. 346, the action was on a policy insuring plaintiff "against all direct loss or damage by fire," and the policy further provides that if the building fell, "except as result of fire," the insurance on the building should immediately cease. There was evidence tending to prove that a building adjacent to the one

insured caught fire and was partially consumed, and as a result of such fire fell, carrying down with it a partition wall and a part of the insured building. Held, that the fall of the insured building was "the result of fire" and "a direct loss or damage by fire," although no part of it ignited or was consumed by fire. Cameron, in his work on the Law of Fire Insurance in Canada, page 51, discusses the effect of the word "direct" in policies providing against "direct loss or damage by fire," and says that the word has no significance or value, and whether used or not the fire must be the proximate cause of the loss or damage. See, also, Richards on Insurance Law, third edition, section 231, where it is said that the word "direct" in a policy means immediate or proximate as distinguished from remote, but that the proximate results of fire may include other things than combustion, as, for example, the resulting fall of a building, injuries to insured property by water, loss of goods by theft, exposure of goods during fire: See, also, Elliott on Insurance, section 221, and Clement on Fire Insurance as a Valid Contract, 84-87.

The foregoing cases, we think, fully show that *Austin v. Drew*, 4 Camp. 360, is not authority against plaintiff here. There the fire was under control, not excessive, and suitable³⁹⁵ and proper for the purpose intended. It was, in the language of the books, a "friendly" and not a "hostile" fire. In the case before us the fire was extraordinary and unusual, unsuitable for the purpose intended, and in a measure uncontrollable, besides being inherently dangerous because of the unsuitable material used. Such a fire was, we think, a "hostile" fire, and within the contemplation of the policy. Ordinarily the question in such cases is for the jury: *New York & B. D. E. Co. v. Traders' & M. Ins. Co.*, 132 Mass. 377, 42 Am. Rep. 440; *New York & B. D. E. Co. v. Traders' & M. Ins. Co.*, 135 Mass. 221; Richards on Insurance Law, 3d ed., sec. 231. But in this case the evidence being practically undisputed, we think no error was committed in directing a verdict for the plaintiff.

By the COURT. The judgment of the court below is affirmed.

Mr. Justice Marshall Dissented, expressing his views in an opinion of twelve pages, closing as follows: "I will notice that the fire in question is referred to as 'unusual,' as if that took the case out of *Austin v. Drew*, 4 Camp. 360. That theory was repudiated in *Scripture v. Lowell Mut. F. Ins. Co.*, 10 Cush. 356, 57 Am. Dec. 111, recognized here and by most text-writers and courts as having stated clearly the gist of *Austin v. Drew*, and fenced out the numerous erroneous theories indulged in by some, as a basis for criticism or decisions one way or the other, according to circumstances. The fire is also referred to as a 'hostile fire,' adopting language coined by the Massachusetts court in *Way v. Abington Mut. F. Ins. Co.*, 166 Mass. 67, 55

Am. St. Rep. 379, 43 N. E. 1032, 32 L. R. A. 608, as if, within the doctrine of that case, a fire built in a furnace and confined thereto may become a 'hostile fire' merely by becoming uselessly and negligently too large. The term 'hostile fire' is misapplied, it seems, here. It was used by the Massachusetts court as an appropriate characterization of a fire started accidentally in a place not designed for that purpose. Obviously, if in that case the fire had been started by the assured in the chimney, it would not have been called a 'hostile fire,' and within the calls of the policy, merely because it became unexpectedly large and destructive. It was suggested in the opinion that had the fire been set in the chimney it would not have been what was denominated a 'hostile fire.'

"The importance of the subject treated justifies, it is thought, the length of this opinion. If I am right in the idea that the court has gone beyond any substantial support in the books, especially in allowing the recovery for damages wholly caused by radiated heat, without even charring, and by smoke, what I have written may be helpful when the question shall again be presented.

"The opinion written for the court doubtless supports the decision rendered as fully as it can well be done. It states clearly the court's position that radiated heat and smoke from a fire, wholly confined to a furnace in which the fire is made for an ordinary purpose, causing charring of house finish and discoloration of woodwork and furniture, is within the calls of the standard policy of this state for a remediable loss directly caused 'by fire.'

"In my opinion, the judgment should be reversed, and the cause remanded for a new trial, or for judgment for the defendant. It has not been necessary to study the case carefully to discover which of the alternatives is the right one."

WHAT ARE LOSSES OR DAMAGES BY FIRE WITHIN THE MEANING OF INSURANCE.*

I. What is Meant by Term "Fire" in Insurance.

- a. General Definition of Fire, 1087.
- b. Distinction Between "Friendly" and "Hostile" Fire, 1089.

II. Loss or Damages as Dependent upon Origin of the Fire.

- a. Necessity for Loss to be Proximate Result of a Fire, 1091.
- b. Explosions, 1091.
- c. Lightning, 1093.
- d. Falling Walls, 1094.
- e. Riots, Mobs and Other Lawless Organizations, 1094.

I. What is Meant by Term "Fire" in Insurance.

a. General Definition of Fire.—The term "fire" as used in a fire insurance policy in connection with clauses excepting the insurance company from losses by explosions and the like means an actual fire according to the ordinary and common use of the term: German-

*REFERENCES TO MONOGRAPHIC NOTES.

What is included in loss by fire: 45 Am. Dec. 657; 23 Am. St. Rep. 915.
The earthquake clause in policies of fire insurance: 132 Am. St. Rep. 437.
Proximate and remote causes in insurance cases: 36 Am. St. Rep. 852.
When property is deemed "wholly destroyed" or a "total loss" within the meaning of contracts of insurance other than marine: 59 Am. St. Rep. 810.

Am. Ins. Co. v. Hyman, 42 Colo. 156, 94 Pac. 27, 16 L. R. A., N. S., 77. A fire may be both a burning by slow and a burning by rapid combustion, and if the insurance policy makes no distinction between them, a loss by either is covered by its general terms: Furbush v. Consolidated Patron's etc. Ins. Co., 140 Iowa, 240, 118 N. W. 371.

The case of Western Woolen Mill Co. v. Northern Assur. Co., 72 C. C. A. 1, 139 Fed. 637, is a well-considered case on the meaning of the term "fire" in an insurance policy. In that case the property insured was wool, and it was insured against all direct loss or damage by fire. The wool was in the same condition as when taken from the sheep, and contained about five per cent of foreign matter. It became submerged while stored by an unusual flood. After the subsidence of the water the wool was spread upon the floor for the purpose of drying. In handling it for that purpose it was necessary to use pitchforks because of it being too hot for the hands. There was no flame nor visible fire to be seen. The fleeces came apart as if the fiber had been destroyed by the action of the heat and water. Steam, smoke and some ashes were apparent. Judge Carland, in holding that the damage was not caused by a fire within the meaning of the insurance policy, said: "The policies of insurance were contracts between the parties to this litigation, and must be construed as such. In their interpretation we must give to the words employed therein their ordinary popular signification, unless it appears the parties intended to use them in a different sense. No such intention appears in this case as to the use of the word 'fire.' That the wool, submerged for the time mentioned, became smoking hot, may be conceded; that spontaneous combustion, caused by the wool being submerged in water, existed may also be conceded; and still the plaintiff has not shown any direct loss by fire as that word is used and known to the public generally. Fire is always caused by combustion, but combustion does not always cause fire. The word 'spontaneous' refers to the origin of the combustion. It means the internal development of heat without the action of an external agent. Combustion, or spontaneous combustion, may become so rapid as to produce fire; but, until it does so, combustion cannot be said to be fire. 'Fire' is defined in the Century Dictionary as 'the visible heat or light evolved by the action of a high temperature on certain bodies, which are in consequence styled 'inflammable or combustible.' In Webster's Dictionary 'fire' is defined as 'the evolution of light and heat in the combustion of bodies.' No definition of fire can be found that does not include the idea of visible heat or light, and this is also the popular meaning given to the word. The slow decomposition of animal and vegetable matter in the air is caused by combustion. Combustion keeps up the animal heat of the body. It causes the wheat to heat in the bin and in the stack. It causes hay in the stack and in the mow of the barn to heat and decompose. It causes the sound tree of the forest, when thrown to the ground, in the course of years to decay and molder away, until it becomes again a part of mother earth. Still we never speak of these processes as 'fire.' And why? Because the process of oxidation is so slow that it does not, in the language of the witness at the trial, produce a 'flame or glow.'"

The term "fire" used in a marine insurance policy against fire has been construed to include fire from an accident brought about by the

perils of the sea, but not from spontaneous combustion: *Providence etc. Ins. Co. v. Adler*, 65 Md. 162, 57 Am. Rep. 314, 4 Atl. 121. The common understanding of the word "fire" does not include heat, short of the degree of ignition, however produced. Thus damage to furniture and a library by the escape of steam from the pipes of the apparatus by which the room is heated, thereby producing such a degree of heat as to char the furniture and books in the room is not a loss by fire under an ordinary fire insurance policy: *Gibbons v. German Ins. etc. Inst.*, 30 Ill. App. 263.

The fact that the property insured is charred by the action of heat is generally sufficient evidence to justify its submission to a jury to determine whether the damage was caused by a fire within the meaning of an insurance policy: *Singleton v. Phenix Ins. Co.*, 132 N. Y. 298, 30 N. E. 839.

A burning lamp is not regarded as a fire within the terms of an insurance policy: *Briggs v. North Am. etc. Ins. Co.*, 53 N. Y. 446; *Fitzgerald v. German-American Ins. Co.*, 30 Misc. Rep. 72, 62 N. Y. Supp. 824.

Under the standard fire policy fixed by statute an exception covering a fire loss caused by an electric current cannot be added to the policy because the policy specifically contains its own exceptions and forbids any additional conditions inconsistent therewith: *Wausau Tel. Co. v. United etc. Ins. Co.*, 123 Wis. 535, 101 N. W. 1101.

b. Distinction Between a "Friendly" and "Hostile" Fire.—In the principal case it was declared that where a fire is started in a furnace with highly inflammable materials not intended for such purpose, and the fire, although confined within the furnace, soon becomes so intense that the heat and smoke char and discolor the furniture, woodwork and finish of the house, without actual ignition thereof, the fire is a "hostile" one and the injury is a "direct loss or damage by fire" within the meaning of the Wisconsin standard fire insurance policy. The dissenting opinion of Mr. Justice Marshall shows a strong presentation of the arguments urged against the doctrine of the majority of the court: *O'Connor v. Queen Ins. Co.*, 140 Wis. 388, ante, p. 1081, 122 N. W. 1038, 1122.

But a fire in a chimney caused by the accidental ignition of soot is regarded as a "hostile" and not a "friendly" fire, and hence the damage caused by the smoke therefrom is a loss by fire. The reason for this is that a chimney is not intended to be used as a place in which to kindle fires, or have fires for use and enjoyment in connection with the occupation of a building. Occasional fires in a chimney from the ignition of soot are to be expected. In a sense such fires are accidental, since they are not lighted intentionally, and only start from time to time without human agency when a considerable quantity of soot has accumulated: *Way v. Abington Mut. Fire Ins. Co.*, 166 Mass. 67, 55 Am. St. Rep. 379, 43 N. E. 1032, 32 L. R. A. 608. It has, however, been held in Georgia that an insurer is not liable under a policy of insurance against all direct loss or damage by fire, for damage arising from the escape of smoke and soot from a disengaged stovepipe and of water used in cooling the ceiling. The court said: "It does not appear from the proofs of loss that there was any fire in or about the building, except in the stove where it was intended to be built. This fire did not spread from where it was built and intended to remain. It was, therefore,

all the time during the alleged injury and damage to the goods what is termed in the books a 'friendly,' and not a 'hostile,' fire. It is true there is sound authority for the proposition that an insured can recover loss occasioned by smoke, soot, etc., thrown out by a fire, but we think in these cases it will be found that such matter causing injury was the product of a hostile fire. If a fire should break out from where it was intended to be, and become a hostile element by igniting property, although it might not actually burn the property insured, yet if it caused injury thereto by smoke or heat, or other direct means, damages would be recoverable": *Cannon v. Phoenix Ins. Co.*, 110 Ga. 563, 78 Am. St. Rep. 124, 35 S. E. 775.

An instructive case on the question of loss from a fire which was confined to the place intended for it is that of *American Towing Co. v. German F. Ins. Co.*, 74 Md. 25, 21 Atl. 553. In that case it was held that a policy of fire insurance of a steam tug, her boiler and machinery, did not cover damage to the interior of the boiler of the tug caused by an overheating from the furnace due to the absence of water in the boiler, and not as a result of any fire outside of the furnace itself. The observations of the court in this connection are worth considering in connection with those made in the principal case. The court, speaking through Mr. Chief Justice Alvey, said: "If a person has his house insured against all loss or damage by fire, and he should make a fire in his grate or fireplace of such intense heat as to crack his chimney, or to warp or crack his mantelpieces, it could hardly be contended that he could hold the insurance company liable for such damage, though the damage was unintentionally allowed to be produced by the action of fire. In such case the fire would not have extended beyond the proper limits within which it was intended to burn; but the heat emitted therefrom would have produced effects not intended by the insured. No doubt there are many instances where the insurer has been held liable for injury done to buildings and furniture by heat or smoke, without actual ignition, where the heat or smoke has proceeded from fire outside of and beyond the limits of the place where it was intended, by the contract of insurance, to burn." The court also discussed the case of *Austin v. Drew*, 4 Camp. 361, cited in the principal case, and approved the theory held by Mr. May to the effect "that the true ground of that decision was that insurers do not undertake to be responsible for the excessive use of fire purposely used, whereby the article to which the fire is purposely applied is damaged, whether by heat or ignition, and that they would be no more liable in this case than they would be where the bread is overbaked or coffee is overroasted."

Since a lighted lamp is not regarded as a fire within the meaning of insurance, no recovery can be had for a loss caused by smoke therefrom where there was no ignition outside of the lamp itself: *Fitzgerald v. German-American Ins. Co.*, 30 Misc. Rep. 72, 62 N. Y. Supp. 824.

Where the burning of an automobile was caused by its having run off the road into a ditch filled with water and thereby bringing its kerosene lamps in contact with gasoline vapor arising from the gasoline floating in the ditch, which had leaked from the gasoline tank as a result of its being in a slanting position, the fire is one which is within a clause excepting the insurer from liability for a

fire "originating within the vehicle," the court saying: "What the policy intended to except was fire developed by or originating in the use of the automobile as distinguished from fire occasioned by external causes. In other words, 'within' in this policy is used as the antithesis of 'extrinsic' or 'without,' not as the synonym of 'interior'": *Preston v. Aetna Ins. Co.*, 193 N. Y. 142, 85 N. E. 1006, 19 L. R. A., N. S., 133.

II. Loss or Damages as Dependent upon Origin of the Fire.

a. **Necessity for Loss to be Proximate Result of a Fire.**—To render a fire the immediate or proximate cause of the loss or damage, it is not necessary that any part of the insured property should have been actually ignited or consumed by the fire: *Russell v. German F. Ins. Co.*, 100 Minn. 528, 111 N. W. 400, 10 L. R. A., N. S., 326. Thus where damage to machinery of an electric company, situated in a part of the building remote from the actual fire, was caused by the short circuiting of an electric current which was a result of the fire, it is a loss by fire: *Lynn Gas & Electric Co. v. Meriden F. Ins. Co.*, 158 Mass. 570, 35 Am. St. Rep. 540, 35 N. E. 690, 20 L. R. A. 297. And a loss by fire includes a loss by water or chemicals being thrown upon the insured property to prevent its destruction by fire: *Davis v. Insurance Co. of North America*, 115 Mich. 382, 73 N. W. 393; *Cohn v. National F. Ins. Co.*, 96 Mo. App. 315, 70 S. W. 259. And a fire insurance policy covers a loss of goods by reason of the building in which they are situated being blown up to prevent the spread of a fire: *City F. Ins. Co. v. Corlies*, 21 Wend. 367, 34 Am. Dec. 258. But where the burning of a field of grain was the result of a fire started by order of the board of supervisors of a county on certain pasture lands for the purpose of destroying certain insects which were injurious to fruit trees, but which got beyond control, the loss is one within an exception in the policy covering a loss occasioned by order of any civil authority, even though the fire was started on other property and the authority of the supervisors to start such a fire was merely *de facto*: *Conner v. Manchester Assur. Co.*, 65 C. C. A. 127, 130 Fed. 743, 70 L. R. A. 106.

b. **Explosions.**—If a fire precedes an explosion, and the latter is merely an incident of the former or caused by it, the loss or damage is regarded as caused by fire, but if the explosion precedes the fire and is not caused by it, the insured cannot recover for the loss caused by the explosion under a policy covering a loss by fire: *German-American Ins. Co. v. Hyman*, 42 Colo. 156, 94 Pac. 27, 16 L. R. A., N. S., 77; *Transatlantic F. Ins. Co. v. Dorsey*, 56 Md. 70, 40 Am. Rep. 403; *Renshaw v. Fireman's Ins. Co.*, 33 Mo. App. 394; *United etc. Ins. Co. v. Foote*, 22 Ohio St. 340, 10 Am. Rep. 735; *Hall v. National F. Ins. Co.*, 115 Tenn. 513, 112 Am. St. Rep. 870, 92 S. W. 402, 5 Ann. Cas. 777. But where a fire in another building causes an explosion which shatters the insured building, which subsequently burns, the insurer is not liable under a standard form policy which merely insures "against all direct loss or damage by fire": *Hustace v. Phenix Ins. Co.*, 175 N. Y. 292, 67 N. E. 592, 62 L. R. A. 651. And where a fire insurance policy excepts "any loss by explosion, unless fire ensues, and then the loss or damage by fire

only," but provides for the insurance of losses or damages caused by lightning, a loss caused by an explosion of a powder-house near to the insured building is not covered, even though the explosion was caused by lightning: *German Ins. Co. v. Roost*, 55 Ohio St. 581, 60 Am. St. Rep. 711, 45 N. E. 1097, 36 L. R. A. 236. And where the insurance policy excepted any loss or damage "by explosion from any cause, unless fire ensues, and then only for the loss of damage by fire," a loss from the explosion of dynamite or some other similar explosive by some person at the door of the insured building is not covered by the policy, even though ignited by fire, where no fire ensued: *Phoenix Ins. Co. v. Greer*, 61 Ark. 509, 33 S. W. 840. And it has been held that an exception in a fire insurance policy for losses occasioned by "explosions of any kind whatever" did not exempt the insurer from liability for a loss by a fire caused by the explosion of a lamp: *Heffron v. Kittanning Ins. Co.*, 132 Pa. 580, 20 Atl. 698. So, also, where a fire was caused by an explosion of soot in a flue, the insurer under a policy of insurance, which makes it not liable for damages caused by an explosion unless fire ensues, and then only for the damage caused by fire, is not liable for damage to goods by reason of falling to the floor, but is liable for the actual damage caused by the fire: *Cohn v. National Fire Ins. Co.*, 96 Mo. App. 315, 70 S. W. 259. And under a policy containing a similar clause relative to explosion, it has been held that the insurer is not liable for a loss caused by an explosion in an adjoining building which was caused by a fire, where the loss in the insured property was not a result of fire: *Miller v. London etc. Ins. Co.*, 41 Ill. App. 395; *Hall v. National Fire Ins. Co.*, 115 Tenn. 513, 112 Am. St. Rep. 870, 92 S. W. 402, 5 Ann. Cas. 777.

A court will take notice of the universally accepted scientific fact that an explosion of gaseous substances is preceded by ignition and accompanied by intense heat: *Renshaw v. Fireman's Ins. Co.*, 33 Mo. App. 394. The mere fact that an explosion of gaseous substances is caused by the contact of a lighted match therewith does not constitute the loss by the explosion a loss by fire under the terms of an insurance policy: *German-American Ins. Co. v. Hyman*, 42 Colo. 156, 94 Pac. 27, 16 L. R. A., N. S., 77; *Heuer v. Northwestern Nat. Ins. Co.*, 144 Ill. 393, 33 N. E. 411, 19 L. R. A. 594; *Heuer v. Westchester Fire Ins. Co.*, 151 Ill. 331, 37 N. E. 873; *Vorse v. Jersey Plate Glass Ins. Co.*, 119 Iowa, 555, 97 Am. St. Rep. 330, 60 L. R. A. 838, 93 N. W. 569; *Home Lodge Assn. v. Queen Ins. Co.*, 21 S. D. 165, 110 N. W. 778; *Mitchell v. Potomac Ins. Co.*, 183 U. S. 42, 22 Sup. Ct. Rep. 22, 46 L. ed. 74.

The court, in *German-American Ins. Co. v. Hyman*, 42 Colo. 156, 94 Pac. 27, 16 L. R. A., N. S., 77, in discussing the effect of clauses exempting the insurer from loss caused by explosions, said: "The 'fire' referred to in the provision of the policies under consideration is an actual fire according to the ordinary and common use of the term. The blaze produced by lighting a match, gas jet, or lamp is not alone such a fire as is contemplated; and the accidental igniting of gas by such means, resulting in an explosion, does not, within the language of the contract, render the explosion an incident to a fire. . . . Further, sustaining the construction that, in order to be within the meaning of the contract, the ignition of the explosive substance must be caused by an actual combustion involuntarily or

illegally started, termed by some of the authorities a 'negligent or unlawful' fire, and not by a harmless combustion, such as a lighted cigar, the burning of gas jets, the lighting of matches, reasonable fire in a stove for heating purposes, and other 'innocent' fires, see the following additional authorities: Ostrander on Fire Insurance, 2d ed., sec. 325; May on Insurance, 4th ed., 416a; United Fire Ins. Co. v. Foote, 22 Ohio St. 340, 10 Am. Rep. 735; Renshaw v. Fireman's Ins. Co., 33 Mo. App. 401; Briggs v. North American M. Ins. Co., 53 N. Y. 449; Transatlantic Fire Ins. Co. v. Dorsey, 56 Md. 70, 40 Am. Rep. 403."

But if the fire insurance policy insures against loss or damage by fire without making any exception, a loss by explosion will be covered notwithstanding that the explosion is caused by an innocent fire, such as a gas jet, purposely left burning, igniting escaping gas: Renshaw v. Missouri State etc. Ins. Co., 103 Mo. 595, 23 Am. St. Rep. 904, 15 S. W. 945. Thus in Furbush v. Consolidated Patron's etc. Ins. Co., 140 Iowa, 340, 118 N. W. 371, the court, in referring to this distinction, observed: "The policy contains no exceptions whatever, as did the one in Vorse v. Jersey P. Glass Ins. Co., 119 Iowa, 555, 97 Am. St. Rep. 330, 93 N. W. 569, 60 L. R. A. 838, and other like cases relied upon by appellant. A fire may be both a burning by slow, and a burning by rapid, combustion, and if the insurance company makes no distinction between them in its policy, either is covered by a stipulation for indemnity for loss by fire. This is the distinguishing feature between this and the Vorse case, and is the one generally recognized by the authorities: Briggs v. North American M. Ins. Co., 53 N. Y. 446; Renshaw v. Missouri etc. Ins. Co., 103 Mo. 595, 23 Am. St. Rep. 904, 15 S. W. 645; Wausau Tel. Co. v. United F. Ins. Co., 123 Wis. 535, 101 N. W. 1100. See, also, Heuer v. Northwestern Ins. Co., 144 Ill. 393, 33 N. E. 411, 19 L. R. A. 594; Mitchell v. Potomac Ins. Co., 183 U. S. 42, 22 Sup. Ct. Rep. 22, 46 L. ed. 74; Scripture v. Lowell Mut. Ins. Co., 10 Cush. 356, 57 Am. Dec. 111. That an explosion such as occurred in this case [explosion of acetylene gas by contact with match] is a fire within the meaning of the policy in suit is well sustained by the authorities already cited, and no case has been called to our attention holding otherwise, save where there is a clause in the policy absolving the company from liability for explosions. In such cases fire and explosion are differentiated, and in such instances it is manifest that an explosion and a fire cannot mean the same thing."

c. Lightning.—Lightning is defined by Webster as a sudden discharging of electricity from a cloud to the earth producing a vivid flash of light. A policy covering a loss by fire does not cover a loss by lightning which is not followed by a fire: Babcock v. Montgomery Co. Mut. Ins. Co., 4 N. Y. 326; Kenniston v. Merrimac Co. Mut. Ins. Co., 14 N. H. 341, 40 Am. Dec. 193. Where, however, the policy of insurance covers losses or damages by lightning, the insurer is liable whether fire ensues or not: Haws v. St. Paul F. etc. Ins. Co., 130 Pa. 113, 15 Atl. 915, 18 Atl. 621, 2 L. R. A. 52. The fact that an insurance company has followed a custom of paying losses incurred by lightning does not make it liable to pay such a loss under its policy insuring against fire, where the building insured

was knocked down by lightning but not burned: *Sleet v. Farmers' Mut. F. Ins. Co.* (Ky.), 113 S. W. 515.

d. **Falling Walls.**—Where the falling of the walls of a building some length of time after a fire is not the proximate result of the fire, the insurance company is not liable under a policy insuring against "all direct loss or damage by fire": *Cuesta v. Royal Ins. Co.*, 98 Ga. 720, 27 S. E. 172. But where the fall of a building is the result of a fire in an adjoining building, it is loss by fire, although no part of it was ignited or consumed by fire: *Ermentrout v. Girard etc. Ins. Co.*, 63 Minn. 305, 56 Am. St. Rep. 481, 65 N. W. 635, 30 L. R. A. 346. If, under all the circumstances, the parties to the contract of insurance could have reasonably foreseen that a fire might leave the wall of an adjacent building in such a condition that it would be likely to be blown down and fall over the insured building, such a contingency is an element of the risk: *Russell v. German F. Ins. Co.*, 100 Minn. 528, 111 N. W. 400, 10 L. R. A., N. S., 326. If the fall of a wall previously weakened by fire is caused through the owner's failure to keep it in a secure condition, the loss through its fall is not ordinarily covered by the policy of insurance: *Alter v. Home Ins. Co.*, 50 La. Ann. 1316, 24 South. 180. Where an insured building is so injured by its collapse that its identity is lost, the insurer is not liable under a policy of insurance against fire because of the fact that the debris was destroyed by fire: *Farrell v. Farmers' Mut. F. Ins. Co.*, 66 Mo. App. 153. So, also, where the policy provides that if the building falls, except as a result of fire, the insurance shall immediately cease, the insurer will not be liable where the fire is the result of the fall of the building: *Nicholls v. Sun Mut. Ins. Co.*, 71 Miss. 326, 42 Am. St. Rep. 465, 14 South. 263.

The court of appeals of New York, in construing a clause in a fire insurance policy similar to that in the last-cited case, said: "The intent of the policy was that insurance should continue only while the building remained standing substantially as a building. If it should fall from the occurrence of a fire, the insurance company would become liable under its contract; but if it, or any material part of it, should fall before any fire broke out, and cause damage to the property insured, the insurer would not be liable. The contract was one of indemnity against a loss caused by fire and not against a loss, the proximate cause of which was in the working of some other agency. The meaning of the clause in question, when reasonably interpreted, is that the insurer is excused from its obligation by either the fall of the building as a structure, or of such a substantial and important part thereof as impairs its usefulness as such and leaves the remaining part of the building subject to an increased risk of a fire": *Nelson v. Traders' Ins. Co.*, 181 N. Y. 472, 74 N. E. 421.

e. **Riots, Mobs and Other Lawless Organizations.**—Where a policy of insurance has an exception against liability for loss or damage by fire happening during the existence of an invasion or other military operations, unless proof be made that the loss was not occasioned by or connected with such invasion or military operations, the insured cannot recover without making such proof unless the same is waived: *Royal Ins. Co. v. Martin*, 192 U. S. 149, 24 Sup.

Ct. Rep. 247, 48 L. ed. 385. So, also, where the policy of insurance excepts the insurer for a "loss caused directly or indirectly by invasion, insurrection, riot," etc., the insurer is exempted from liability for loss by a fire caused by a riot: *Lockett-Wake Tobacco Co. v. Globe etc. Ins. Co.*, 171 Fed. 147. Under a similar exception, where property is burned by an armed and disguised mob of one hundred or more men, who overawe and terrorize the civil authorities and inhabitants of a town and then proceed to burn property, the direct cause of the fire being the riot, the insurance company is not liable for the loss: *Spring Garden Ins. Co. v. Imperial Tobacco Co. (Ky.)*, 116 S. W. 234, 20 L. R. A., N. S., 277. So, also, where five masked men break into and enter a building in the night-time and by threats of personal violence compel the occupants to vacate the property, after which they burn it, the loss is within an exception against a loss by riot: *Germania F. Ins. Co. v. Deckard*, 3 Ind. App. 361, 28 N. E. 868. A similar ruling was made in *Lycoming F. Ins. Co. v. Schwenk*, 95 Pa. 89, 40 Am. Rep. 629.

But under similar exceptions in an insurance policy, it was held that the insurer could not escape liability from loss by a fire brought about by the efforts of four or five convicts who had combined to escape from prison, where the prison power was adequate to overcome their resistance, and where as soon as the convicts came in contact with the officers authorized to capture them they immediately yielded, nor is the insurer aided by the fact that exaggerated reports were circulated outside the prison walls, where a large number of persons had lawfully assembled and armed themselves to render assistance: *Straus v. Imperial F. Ins. Co.*, 94 Mo. 182, 4 Am. St. Rep. 368, 6 S. W. 698.

MILLER v. SOVEREIGN CAMP WOODMEN OF THE WORLD.

[140 Wis. 505, 122 N. W. 1126.]

DEATH—Presumption from Absence.—Proof of Diligent Search and Inquiry is not necessary to establish the presumption of the death of a person who has been absent and unheard of from his home or place of residence for seven years. (p. 1097.)

RESIDENCE.—Intention is Almost Invariably a Controlling Element in determining residence. (p. 1097.)

RESIDENCE—How Lost or Changed.—Intention to Acquire a New residence without removal avails nothing, neither does removal without intention. (p. 1098.)

RESIDENCE.—A Temporary Absence from Home with the intention of returning does not deprive one of his residence. (p. 1098.)

RESIDENCE.—Where a Son Resided With His Widowed Mother until he reached his majority, and thereafter returned to her home frequently and made it his headquarters, this may be regarded as his residence in the absence of evidence that he acquired or attempted to acquire any new residence. (pp. 1098, 1099.)

LIFE INSURANCE—Absence of Insured for Seven Years.—Where the beneficiary in a benefit certificate shows that the insured

has been absent from his home unheard of for seven years, she is entitled to recover the insurance, if no evidence is offered to rebut the presumption of death from such absence. (p. 1099.)

LIFE INSURANCE—Waiver of Proof of Death.—The refusal of a benefit association to recognize any liability based on the presumption of death arising from seven years' absence of the insured is a waiver of its right to insist upon proofs of death as a condition precedent to suing on the benefit certificate. (pp. 1096, 1099.)

Jeffris, Mouat, Smith & Avery and Arthur H. Burnett, for the appellant.

J. M. Becker, for the respondent.

505 BARNES, J. The plaintiff, as the beneficiary in a benefit certificate issued to her son, Otto Miller, brings this action to recover one thousand dollars. To establish the death of the insured evidence was offered tending to show that at the time the action was begun he had been absent from his home and unheard of for seven years. No evidence was offered by the defendant. The court directed a verdict in favor of plaintiff, and such ruling is assigned as error.

Otto Miller was last heard from in 1899. He was then twenty-three years of age and unmarried. He was a musician and a barber and had pursued both callings for a livelihood, and had been away from home on and off for **506** several years prior to his disappearance. It appears that he was devoted to his mother, writing to her frequently when he was away, and returning to her home at irregular intervals. The testimony fairly shows that in so far as the alleged decedent had any home it was with his mother. In 1899 he was engaged to be married to a young lady at Monroe, where his mother resided. In July, 1899, the plaintiff and Otto went to Salina, Colorado, where Mrs. Miller visited some relatives until the following July. It is not entirely clear whether she went to Colorado with the purpose of making it her permanent home, but the inference from the testimony is strong that she did not. Otto did not remain at Salina long, but spent most of his time in Denver and Boulder until December, 1899, at which time he wrote his mother from Denver. Nothing further had been heard from him up to the time of the trial. Some rumors reached plaintiff as to his whereabouts, and numerous letters were written to parties who it was thought might be likely to know of him if he were alive. The plaintiff continued to make the required payments on the benefit certificate for the seven years after the disappearance of her son.

It is contended by the defendant that the evidence offered was insufficient to raise the presumption of death, and that a verdict should have been directed in its favor. If this contention be not well taken, then it is urged that the jury

should have been permitted to pass upon the principal issue in the case.

Some of the more modern cases hold that an interested party seeking to establish the death of another may not rely on the absence of such party from his home or place of ⁵⁰⁷ residence for seven years without being heard from as being sufficient to raise a presumption of death, but in addition thereto it must be shown that diligent search and inquiry have been made, and all available sources of information exhausted without result before a *prima facie* case of death is established: *Modern Woodmen of America v. Gerdom*, 72 Kan. 391, 82 Pac. 1100, 2 L. R. A., N. S., 809, 7 Ann. Cas. 570, and cases cited. If this rule is adopted by this court, the judgment could not be sustained. While a considerable amount of evidence of search and inquiry was offered by plaintiff and was not contradicted, still different minds might reasonably draw different conclusions as to whether the search was sufficiently diligent, thorough and exhaustive to meet the requirements of the rule. In such a case the jury rather than the court should draw the inference. The rule stated by Mr. Greenleaf is that: "After the lapse of seven years, without intelligence concerning the person, the presumption of life ceases, and the burden of proof is devolved upon the other party. . . . It is sufficient, if it appears that he has been absent for seven years from the particular state of his residence, without having been heard from": 1 Greenleaf on Evidence, sec. 41.

Other treatises on the law of evidence state the rule in substantially the same way: 4 Wigmore on Evidence, sec. 2531; Jones on Evidence, 2d ed., sec. 61 (57). Each of the authors named cites an abundance of cases in support of the rule announced. In *Cowan v. Lindsay*, 30 Wis. 586, this court adopted, without qualification, the rule as laid down in Greenleaf on Evidence, and has reiterated such rule in *Whiteley v. Equitable L. Assur. Soc.*, 72 Wis. 170, 39 N. W. 369, and in *Wisconsin T. Co. v. Wisconsin M. & F. Ins. Co. Bank*, 105 Wis. 464, 81 N. W. 642. although it was not necessary to the decision of either of the two cases last cited to do so. Thus it will be seen that the court is firmly committed to the general doctrine which does not require proof of diligent search and ⁵⁰⁸ inquiry in order to establish the presumption of death when a person has absented himself from his home or place of residence for seven years.

To hold in this case that the home of the plaintiff was not that of her son would be equivalent to holding that where a son has reached his majority, and has made it a practice to work away from home at times, he thereby loses his domicile with his parents, at least in the absence of direct evidence on his part of intention not to change his place of residence.

The plaintiff is a widow seventy-two years of age. She had six children. One died in 1898 and one in 1899, and three others died prior to 1898, so that Otto was the only living child and heir when his mother went to Colorado in July, 1899. Otto appears from the evidence to have been an affectionate son, returning often to the home of his mother, and writing her very frequently during his absence. The death of the plaintiff's daughter Emma in 1899 was the immediate cause of her going to Colorado. While there Otto made her numerous visits up to the time of his disappearance. There was nothing to suggest that he had acquired or intended to acquire a home or place of residence different from that of his mother. Intention is almost invariably a controlling element in determining residence. In Pennsylvania it is held that: "Residence is, indeed, made up of fact and intention; that is, of abode with intention of remaining. But it is not broken by going to seek another abode; but continues until the fact and intention unite in another abode elsewhere": *Pfoutz v. Comford*, 36 Pa. 420.

Other courts hold that a person leaving his place of residence with the present intention of abandoning it thereby ceases to be a resident of such place: *Swaney v. Hutchins*, 13 Neb. 266, 13 N. W. 282. But residence is not lost by leaving it for temporary purposes, where the intention remains to return when such purposes are accomplished: ⁵⁰⁹ *Daubmann v. City Council*, 39 N. J. L. 57; *Stratton v. Brigham*, 2 Sneed (34 Tenn.), 420; *Warren v. Thomaston*, 43 Me. 406, 69 Am. Dec. 69. The general rule is that a man must have a habitation somewhere and that he can have but one, and that in order to lose one he must acquire another: *Kellogg v. Winnebago Co.*, 42 Wis. 97; *Bulkley v. Williamstown*, 3 Gray, 493. Residence signifies a person's permanent home and principal establishment, to which whenever he is absent he has the intention of returning: *In re Clark's Estate*, 61 Hun, 619, 15 N. Y. Supp. 370. Section 69, Statutes of 1898, prescribes rules for determining the residence of electors. Subdivision 3 of this section provides that a temporary absence from home with the intention of returning shall not deprive a party of his residence; and subdivision 9 provides that intention to acquire a new residence without removal shall avail nothing, and that neither shall removal without intention. These statutory provisions would seem to be merely declaratory of the common law.

The residence of Otto Miller was with his mother, at least until he reached his majority, as he could form no valid intent to change it before. There is no proof that he acquired or attempted to acquire any new residence. There is abundant evidence that he did return to the home of his mother frequently, and at least made it his headquarters.

Under these circumstances we do not think the court erred in assuming that the residence of the plaintiff was the residence of her son.

The certificate upon which suit was brought provided that no legal proceeding should be instituted to recover thereunder until ninety days after proofs of death were furnished. The constitution of the defendant required the officers of the local camp to report the death of a member to the sovereign clerk of the order, and made it the duty of such clerk to forward to the clerk of the local camp such blanks as should be prescribed by the sovereign commander and finance committee, ⁵¹⁰ upon which to make proof satisfactory to them. A proper request for such blanks was made, and was refused on the ground that no notice of death had been received. In refusing to send the blanks an officer of the defendant, presumably duly authorized, stated that proof of absence could not be received as proof of death, and that the validity of the claim made could not be recognized unless actual death could be shown. The defendant, no doubt in conformity with the provisions of its constitution, had blanks upon which to make proofs of death that would be satisfactory to it. The plaintiff could hardly be expected to know what was required in this regard. There was a denial of liability if plaintiff proposed to rely on the presumption of death resulting from absence. Under these circumstances the defendant waived its right to insist on proofs of death as a condition precedent to the beginning of suit: *King v. Hekla F. Ins. Co.*, 58 Wis. 508, 17 N. W. 297; *Faust v. American F. Ins. Co.*, 91 Wis. 158, 51 Am. St. Rep. 876, 64 N. W. 883, 30 L. R. A. 783; *Matthews v. Capital F. Ins. Co.*, 115 Wis. 272, 91 N. W. 675.

By the COURT. Judgment affirmed.

The Presumption of Death Arising from Absence is the subject of a note to *Policemen's Ben. Assn. v. Ryce*, 104 Am. St. Rep. 209.

By Denying Its Liability on a Policy an Insurance Company may waive its right to insist on proofs of loss: *Ohio Farmers' Ins. Co. v. Vogel*, 166 Ind. 239, 117 Am. St. Rep. 382; *Security Mut. Ins. Co. v. Woodson*, 79 Ark. 266, 116 Am. St. Rep. 75; *Home Ins. Co. v. Koob*, 113 Ky. 360, 101 Am. St. Rep. 354; *Germania Ins. Co. v. Ashby*, 112 Ky. 303, 99 Am. St. Rep. 295.

WHITE v. WHITE.

[140 Wis. 538, 122 N. W. 1051.]

ALIENATION OF AFFECTIONS—Action by Wife—Parties.—

Where through conspiracy the parents of a man alienate and separate him from his wife, he is not a joint tort-feasor with them and hence is not a proper party defendant in her action for the wrong. (pp. 1103, 1104.)

ALIENATION OF AFFECTIONS—Action by Wife—Evidence.

In an action by a wife against her husband's parents for their alienation of his affections, she may testify to his declarations to her and others of inducements held out to him by his parents to abandon her. (p. 1104.)

EVIDENCE.—Erroneous Admission of Evidence is not Prejudicial to the opposing party if it supports his claim and impeaches the case of his adversary. (p. 1104.)

ALIENATION OF AFFECTIONS—Action Against Parents of Husband.—In determining whether parents maliciously conspired to accomplish the alienation of their son's affections from his wife, the evidence should be considered in view of the rights of the parents and their obligations respecting their son's welfare and happiness. (p. 1105.)

ALIENATION OF AFFECTIONS.—Exemplary Damages may be Awarded in an action by a wife against the parents of her husband for a malicious conspiracy to alienate his affections, although one of the defendants is without property while the other has considerable means. (p. 1106.)

ALIENATION OF AFFECTIONS—Measure of Damages.—An award of five thousand dollars compensatory damages and fifteen hundred dollars exemplary damages is not excessive in an action by a wife against her husband's parents for alienating his affections. (pp. 1103, 1106.)

Ryan, Morton & Newbury and M. A. Jacobson, for the appellants.

Clasen & Walsh and Tullor & Lockney, for the respondent.

539 **SIEBECKER, J.** This is an action by the plaintiff, who is the wife of Frederick H. White, Jr., for the alleged cause of action that the defendants maliciously, wrongfully and wickedly confederated, conspired and agreed to alienate and destroy the love and affection of Frederick H. White, Jr. for plaintiff as his wife, and to induce him to desert her, and to prevent him from providing her the necessities of life and discharging toward her the duties of a husband. It is alleged that the defendants, to accomplish the objects of the malicious, wrongful and wicked conspiracy and agreement, urged and persuaded Frederick H. White, Jr., to desert and leave the plaintiff and to go and remain beyond the borders of the state, wherein plaintiff and her husband had resided as husband and wife up to the time he deserted her in July, 1905, and for this wrongful

purpose the conspirators offered him sums of money and to pay him a fixed sum of money annually to so desert the plaintiff. It is also claimed that the defendants influenced him to wrongfully leave her by threatening that, if ⁵⁴⁰ he did not comply with such wrongful object, he would be disinherited and barred from securing any portion of his parents' estates. It is also alleged that Frederick H. White, Jr., was induced to act upon such wrongful importunities, and that he became imbued with hatred and ill-will toward plaintiff, which alienated and destroyed his affection for her, to her great injury and damage.

It appears that Frederick H. White, Jr., is the husband of the plaintiff and that they were married December 11, 1901. The defendants Frances L. and Frederick H. White, Sr., are his parents. At the time of the marriage the plaintiff was twenty years of age and her husband was twenty-one. He was then attending a medical school and she a business college in Milwaukee. They had become acquainted about a year before their marriage, and for the two months preceding their marriage they had met daily on their car trips to and from Milwaukee and Waukesha. They were married without their parents' knowledge. The parents were informed of the marriage by telegram from the husband, and they returned to Waukesha, but did not immediately live in his parents' home, for the alleged reason that the parents were cool and indifferent toward plaintiff and her husband. A week thereafter plaintiff and her husband made their residence with his parents at Waukesha. His parents soon thereafter gave a reception to present plaintiff and her husband to the friends of the family. Plaintiff and her husband continued to reside with his parents at Waukesha until the summer of 1903. At different times during this period, while so residing together at the White home in Waukesha, disagreements and quarrels arose between plaintiff and her mother in law, Frances L. White. Her mother in law spoke of the plaintiff in a derogatory way, deprecated her marriage to her son, and characterized her as unfit to be his wife. In the summer of 1903 plaintiff and her husband moved to Milwaukee, where his parents assisted them to secure and furnish a dwelling, ⁵⁴¹ which plaintiff and her husband occupied until the late autumn of 1904, when they broke up housekeeping and took up their residence with plaintiff's sister, Mrs. Barnum, at Waukesha, Wisconsin, where they continued to reside as husband and wife until July 10, 1905, when he left and refused longer to live with and provide for her, as he has ever since refused to do. The plaintiff avers that this desertion was the culmination of the malicious conspiracy of his parents and Mary A. Stewart, to which her husband finally became a party. The husband asserts that he left her and refused

further to live with and support her as his wife because of her ill-treatment of him, due to her ungovernable disposition, which resulted in personal violence to him and a failure to do her duty as his wife.

It appears that Mary A. Stewart had lived with Mr. and Mrs. White, Sr., for many years; that she was retained by them in their family; that she assisted in raising Frederick and the other children; that she was of aid and assistance in various ways to Mrs. White personally and also in the household affairs, and that she was actively interested in furthering Frances L. White's wishes and desires respecting plaintiff and her husband's marital relations and affairs. Frances L. White, her children, and Mary A. Stewart went to San Antonio, Texas, for the winter of 1904-05. They wrote letters from there to Frederick H. White, Jr., in November and December, referring to plaintiff in terms of reproach, reflecting on her as unworthy of his care, attention and society, and as unfit to be his wife, and suggesting pecuniary inducements if he should rid himself of her and seek release from his marriage obligations. After the receipt of these letters he visited the family in Texas. The evidence tends to show that his mother and Mary A. Stewart then tried to induce him to leave plaintiff, return to his medical studies at his mother's cost, and that upon his declination to comply with their solicitations he was informed by them that his parents refused to ⁵⁴² longer give him assistance and financial aid. In the following July he left the plaintiff and refused to reside with her as his wife or to maintain a home for her support. Since then he has resided with his parents and has attended medical college as his mother had proposed and urged him to do before he left the plaintiff.

Upon these facts and other evidential facts corroborative thereof the court found that no cause of action was shown against Frederick H. White, Sr., and Harry W. Wood, and dismissed the action as to them. The court also found that the defendants Frances L. White and Mary A. Stewart contrived, conspired and associated together for the purpose of preventing plaintiff from performing her marital duties toward her husband and from enjoying and receiving her husband's society and support; that they thus wrongfully and maliciously intermeddled in the marital relations of plaintiff and her husband, and maliciously urged, persuaded and induced him to desert and abandon her, that they might thereby accomplish their wrongful purpose of destroying his love and affection for her and of inducing him forever to desert her as his wife; and that they thereby had deprived her of his society and aid and comfort as a husband. The court awarded plaintiff five thousand dollars as compensation and fifteen hundred dollars as puni-

tory damages in the action, with costs. The court also found that the plaintiff's husband had joined his mother and Mary A. Stewart in the malicious and wrongful conspiracy and awarded judgment accordingly. This is an appeal from such judgment.

The defendants contend that the court erroneously held that plaintiff's husband was a proper party ⁵⁴³ defendant and a party to the conspiracy for the alienation and loss of his affection and society. Section 2345, Statutes of 1898, as amended by chapter 17, Laws of 1905, provides that: "She [a wife] may also bring and maintain an action in her own name, and for her own benefit, for the alienation and the loss of the affection and society of her husband." This statute, which confers rights on a married woman to maintain an action in her own name as to her separate property, business, personal earnings, or for any injury to her person or character as if she were sole, had been construed before the amendment to confer on her the right to maintain an action against her husband for violation of those rights, as she had a right against strangers: *Carney v. Gleissner*, 62 Wis. 493, 22 N. W. 735; *Brader v. Brader*, 110 Wis. 423, 426, 85 N. W. 681.

The question here is: Is the husband a joint tort-feasor in the commission of the wrong constituting the plaintiff's cause of action? True, he was guilty of the wrong of leaving the plaintiff in consequence of the wrongful conspiracy and of causing her the loss of his affection and society. This, however, is the result of the tort alleged to have been committed by the other defendants, namely, their malicious purpose of the willful and intentional alienation of him from her and the causing the loss of his affection and society. The gist of the action is the damage resulting to the plaintiff by the wrongful conduct of those who induced the alienation and the loss of her husband's affection and society. This is attributable to the acts and conduct of the persons who influenced the husband to yield to their wrongful purpose. Their acts in furtherance of this purpose constitute the tort for which the resultant damages are recoverable. It cannot be said that the husband was an active participant in carrying out the objects of the wrongful conspiracy to accomplish the alienation and the loss of the husband's affection for his wife and the consequent loss of his society by her. The wrongdoers acted upon and through him to accomplish their illegal purpose against the plaintiff, and the cause of action was complete when their ⁵⁴⁴ machinations had operated to cause plaintiff the alienation and the loss of affection and society of her husband. He is not, therefore, a joint tort-feasor with those who wrongfully brought about this state of mind, and hence he cannot be held to have joined or confederated with the

other active parties in the wrong constituting the wife's cause of action. In so far as his conduct may be violative of any marital rights of the wife, he is personally responsible to her independently of the defendants' wrong through which he was led to breach his legal obligations, and the wife may seek her redress in an appropriate action against him. From these considerations it follows that he was not a party to the tort, and hence not a proper party defendant.

It is suggested that this court passed on this question on the former appeal of the case (132 Wis. 121, 111 N. W. 116), and held that the husband was a proper party defendant. This question was not presented on that appeal and is not embraced in the decision. The complaint, considered on that appeal upon general demurrer, also contains allegations to the effect that Frederick H. White, Jr., and the other defendants, after his separation from the plaintiff, had maliciously conspired to entice and induce her into unchaste and criminal acts to degrade and injure her for the purpose of enabling her husband to legally separate from her. No proof was offered to sustain this allegation, and it is therefore dropped from the consideration of the case on this appeal.

The court permitted plaintiff to testify to declarations made by her husband to her and others, which purport to give the offers and inducements held out to him by his parents to induce him to separate from and abandon the plaintiff. It is claimed that this was prejudicial error. This class of evidence has been held proper and competent as showing the influences producing the alienation and the loss of affection complained of, and the cause of separation and the destruction of the marital relation: *Hardwick v. Hardwick*, 130 Iowa, 230, 106 N. W. 639; *Williams v. Williams*, 20 Colo. 51, 37 ⁵⁴⁵ Pac. 614; *Nevins v. Nevins*, 68 Kan. 410, 75 Pac. 492. To the same effect is the case of *Horner v. Yancey*, 93 Wis. 352, 67 N. W. 720.

It is contended that the court committed prejudicial error in receiving and considering the testimony of plaintiff's husband. An examination of his evidence shows that, though it was erroneously admitted, it could not have operated to the defendants' prejudice, since all of the material facts to which he testified supported the defendants' claims in the case and impeached plaintiff's case. Under this state of his evidence no prejudicial error resulted from its admission.

The defendants assert that the evidence does not support the court's findings to the effect that the defendants Frances L. White and Mary A. Stewart maliciously confederated together to injure the plaintiff through the alienation and the loss of affection and the society of her husband, and that their acts and conduct caused such alienation and loss

of affection and society as resulted in an abandonment and separation from her. The proof relevant and material to these findings of the court embraces nearly all of the facts and circumstances disclosed by the evidence. The evidence is in positive and direct conflict on this issue. The inferences from the evidence depend, however, upon the weight and the credibility of the different witnesses testifying in the case considered in connection with the positive testimony contained in the letters and other evidence in the case. In determining whether the defendants did maliciously conspire to accomplish the alienation of the husband and the loss of his affection and society by the wife, the evidence should be considered in view of the rights of the parents and their obligations respecting their child's welfare and happiness. As stated in the recent case of *Jones v. Monson*, 137 Wis. 478, 129 Am. St. Rep. 1082, 119 N. W. 179: "The true test to be applied to the evidence in this class of cases is: Were the defendants in what they did actuated with reasonable parental regard for their child, or were they actuated ⁵⁴⁶ by unreasonable ill-will toward the husband or wife, as the case may be?"

"Acts done by a stranger might well be regarded as malicious, while similar acts by the parents would not give rise to a well-grounded suspicion of bad intention."

It is strenuously urged that the evidence in this case fails to show that the defendants Frances L. White and Mary A. Stewart maliciously confederated together for the unlawful purpose charged, and that there is nothing to show that they attempted to carry out such purpose. As stated, the voluminous evidence on this issue embraces well-nigh all the material facts and circumstances in the case, and cannot profitably be restated here. The record contains positive evidence supporting the claim that these defendants combined and took actual steps to poison the mind of the plaintiff's husband against her and to induce him to separate from her as his wife. The circumstances of their conduct in the matter are cogent in support of this claim. True, much of the direct evidence of the defendants is a denial of any such purpose, and an endeavor to explain the circumstances tending to show guilt. The court's conclusions, however, are clearly supported by the facts and circumstances shown, if the witnesses testifying thereto are worthy of credit and belief. The conclusions of the court as to the facts must stand, unless we can say from the record before us that the evidence of the witnesses in support thereof is incredible, or not of sufficient weight to warrant the court in finding these defendants guilty of the wrong alleged against them. After an attentive reading and consideration of the evidence, we cannot say that the

witnesses testifying in support of the cause of action were not entitled to credit, and that such evidence was insufficient in weight to sustain the findings. Upon the record it must be held that these defendants were guilty of maliciously confederating together to injure the plaintiff by effecting the alienation and the loss of affection and society of her husband.

⁵⁴⁷ It is asserted that the award of punitive damages is illegal because they are evidently allowed and fixed at the sum awarded upon the evidence of the wealth of the defendant Frances L. White. There is nothing in the case showing that the trial court awarded the punitive damages upon this ground. The claim that punitive damages are not proper in view of the fact that one of the defendants is without property and that another defendant is possessed of considerable means is not well founded. The cause of action arises out of the malicious conduct of the parties, and the wrongdoers can be subjected to punishment by the award of punitive damages therefor. We cannot say as matter of law that the trial court allowed an excessive amount of either compensatory or exemplary damages under the facts and circumstances of the case. The record presents no grounds for disturbing the judgment.

By the COURT. The judgment is reversed as to the defendant Frederick H. White, Jr., and the cause remanded with directions to dismiss the action as to him. The judgment is affirmed in all respects as to the other defendants.

Actions by a Wife for the Alienation of Her Husband's Affections are discussed in the note to *Clow v. Chapman*, 46 Am. St. Rep. 472. Such actions when prosecuted against her mother in law or father in law are considered in the recent cases of *Leucht v. Leucht*, 129 Ky. 700, 130 Am. St. Rep. 486; *Scott v. O'Brien*, 129 Ky. 1, 130 Am. St. Rep. 419; *Boland v. Stanley*, 88 Ark. 562, 129 Am. St. Rep. 114; *Jones v. Monson*, 137 Wis. 478, 129 Am. St. Rep. 1082.

In an Action by a Wife Against the Mother of Her Husband for alienating his affections, statements made by the husband to the wife or to third persons in the absence of the defendant, indicating the defendant's purpose to effect a separation, are said to be hearsay evidence, and not admissible to establish the offense: *Leucht v. Leucht*, 129 Ky. 700, 120 Am. St. Rep. 486. But see *Scott v. O'Brien*, 129 Ky. 1, 130 Am. St. Rep. 419.

That Exemplary Damages may be Allowed in Actions for Alienation of affections, see *Callis v. Merrieweather*, 98 Md. 361, 103 Am. St. Rep. 404; *Scott v. O'Brien*, 129 Ky. 1, 130 Am. St. Rep. 419.

PETERMAN v. KINGSLEY.

[140 Wis. 666, 123 N. W. 137.]

PARTITION.—Premises in Possession of Lessee.—A tenant in common is not precluded from bringing partition proceedings by the fact that the premises have been leased and are in possession of the lessees. (p. 1108.)

PARTITION.—Lessees of Premises who purchase the interest of one of the co-owners succeed to his right to bring partition proceedings. (p. 1108.)

PARTITION.—Lessees of the Premises are not Necessary Parties in an action between the co-owners for partition in which the premises are sold subject to the leases. (pp. 1108, 1109.)

Van Hecke & Fisher, for the appellants.

M. C. Porter and F. J. & A. H. Smith, for the respondents.

⁶⁶⁶ BARNES, J. In February, 1905, R. G. Kingsley and John Ross were the owners of certain real estate in the city of Merrill on which had been erected a business block. During that month a portion of the block was leased by the plaintiffs W. F. and A. F. Peterman for a period of five years at an annual rental of twelve hundred dollars, payable monthly in advance. Other portions of the block were leased to other tenants, and a portion of the ⁶⁶⁷ real estate was not leased to anyone at the time this action was commenced. The said lessees, together with R. J. Peterman, on or about March 1, 1907, purchased the interest of John Ross in such real estate. Since such purchase the lessees have been paying to the defendant R. G. Kingsley one-half the amount provided for in their lease. One-half the rent received from the other tenant has been paid to the defendant Kingsley, and the remaining half to the purchasers of the Ross interest. This was an action for partition, in which it was prayed that a sale of the premises be made in case partition could not be had without prejudice to the owners of the property. The court found that the property could not be partitioned and ordered a sale thereof. The defendants R. G. and Margaret Kingsley appeal from such order.

The appellants contend that at the time the Petermans purchased the interest of Ross in the real estate sought to be partitioned they were in possession of a portion thereof as tenants under a lease from the defendant Kingsley and their grantor, Ross, which has not yet expired, and that they are still in possession under such lease, and that such possession is not sufficient to support an action for partition. Furthermore, that a sale of the premises in the partition proceeding might destroy the relation of landlord and tenant existing between Kingsley and the Petermans.

and that a tenant cannot change his relationship to his landlord in any such manner. Section 3101, Statutes of 1898, provides that joint tenants, or tenants in common, of lands may have partition thereof, and that such an action may be brought by any person ⁶⁶⁸ who has an estate in possession of the lands which it is sought to partition. Manifestly Kingsley and Ross were tenants in common of the parcel of land in question prior to the sale of the Ross interest. The possession of their lessees was their possession, and either might bring partition proceedings under the statute. It would be anomalous to hold that owners as tenants in common did not have an estate in possession of premises occupied by their lessees. When the Petermans purchased the interest of their landlord, Ross, they acquired all the rights in the property which he possessed and became tenants in common with their co-owner, Kingsley, and acquired the same right to bring partition proceedings that he had. It is true they were liable to Kingsley for one-half the stipulated rent under the lease, and that their possession thereunder was his possession. But it is also true that by virtue of their purchase, and the tenancy in common with Kingsley which resulted therefrom, they were in possession as owners of a half interest in the premises. The situation is not different from what it would be had the lease been made after the purchase and covered the half interest of Kingsley only. The plaintiffs would then be in possession of a one-half interest in the property by virtue of their ownership, and of the remaining moiety by virtue of their lease. This latter possession would also be the possession of Kingsley. The plaintiffs have clearly brought themselves within the provisions of section 3101, Statutes of 1898, and were entitled to bring this action: *Hill v. Reno*, 112 Ill. 154, 54 Am. Rep. 222; *Eberts v. Fisher*, 44 Mich. 551, 7 N. W. 211; *Hunt v. Hazelton*, 5 N. H. 216, 20 Am. Dec. 575.

It is claimed that the various lessees in possession of the premises were necessary parties to the suit. A lessee has no right to prevent his landlord from selling the leased property subject to the lease, at least in the absence of covenants therein affecting such right. Neither can the land owner avoid a lease by making a sale of the demised property, unless it is so stipulated in the lease. Neither could the rights of the tenants ⁶⁶⁹ in this case be affected by the partition suit. We perceive no good reason why the lessees should be made parties to the action, or how their rights could be affected thereby, unless it should be held that they might resist a probable change of landlords. This they could not do: *Woodworth v. Campbell*, 5 Paige, 518. The court probably directed the premises to be sold subject to the leases, and the lessees had no such interest in the ac-

tion as would entitle them to litigate the right of their landlords to make a sale of the premises, through legal proceedings or otherwise, subject to the outstanding leases.

By the COURT. Judgment affirmed.

As to Who are Entitled to Partition, see the note to *Nichols v. Nichols*, 67 Am. Dec. 703. As a general rule every cotenant is entitled to partition as a matter of right: *O'Brien v. Mahoney*, 179 Mass. 200, 88 Am. St. Rep. 371. A lessee of lands, the reversion in fee of which is in tenants in common may, upon purchasing a part of the reversion, demand a partition, even though it will necessarily result in a sale of the premises: *Hill v. Reno*, 112 Ill. 154, 54 Am. Rep. 222. See, however, *Barlow v. Dahm*, 97 Ala. 414, 38 Am. St. Rep. 192; *Cannon v. Lomax*, 29 S. C. 369, 13 Am. St. Rep. 739.

To a Petition for Partition, a Plea That the Respondent Held an Unexpired Lease of the petitioner's interest for a term of years is not a sufficient answer: *Hunt v. Hazelton*, 5 N. H. 216, 20 Am. Dec. 575.

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1. **CHARITABLE INSTITUTION**—Whether a Governmental Agency.—An institution of a charitable character, such as the "House of the Good Shepherd," maintained for the reformation and preservation of girls and women, does not take on the character of a state institution or governmental agency, with consequent immunity from private suit, by reason of a statute which permits certain magistrates and courts under some circumstances to commit offenders to the institution. (Mich.) *Gallon v. House of Good Shepherd*, 387.

2. **CHARITABLE INSTITUTION—Liability for Unlawful Detention of Girl.**—An institution of a charitable character, such as the "House of the Good Shepherd," maintained for the reformation and preservation of girls and women, is liable in damages to a girl taken there under the false impression that a position will be found for her and thereafter unlawfully detained against her will. (Mich.) *Gallon v. House of Good Shepherd*, 387.

3. CHARITABLE INSTITUTION—Liability for Unlawful Detention of Girl.—An institution of a charitable character, such as the "House of the Good Shepherd," cannot escape responsibility for unlawfully detaining a girl against her will, by the plea that to pay damages for the wrong will divert a trust fund. (Mich.) *Gallon v. House of Good Shepherd*, 387.

4. CHARITABLE INSTITUTION—Unlawful Detention of Girl—Respondeat Superior.—The duty of an institution of a charitable character, such as the "House of the Good Shepherd," not to imprison a girl therein without lawful authority, is not one which may be delegated to servants or agents so as to relieve the principal from responsibility. (Mich.) *Gallon v. House of Good Shepherd*, 387.

5. CHARITABLE INSTITUTION—Release of Action for Unlawful Detention.—Where a girl who has been reclaimed by her relatives from the "House of the Good Shepherd," where she has been unlawfully detained without their knowledge and against her will, a document signed by her, releasing the institution from liability and stating that while there she was treated with kindness and left reluctantly, does not necessarily bar her action for the unlawful detention. (Mich.) *Gallon v. House of Good Shepherd*, 387.

6. CHARITABLE INSTITUTION—Unlawful Detention of Girl—Motive.—An institution of a charitable character, such as the "House of the Good Shepherd," cannot justify its unlawful detention of a girl, on the ground that the persons in control believed they were acting for her best interests; and to prove a motive other than a charitable one for the detention, it is proper to show that the girl was required to work at labor profitable to the institution, and that after her disappearance her relatives tried to find her by advertising and employing detectives. (Mich.) *Gallon v. House of Good Shepherd*, 387.

7. CHARITABLE INSTITUTION—Measure of Damages for Unlawful Detention.—A judgment of two thousand five hundred dollars for unlawfully detaining a girl in the "House of the Good Shepherd" for seven years is not excessive. (Mich.) *Gallon v. House of Good Shepherd*, 387.

CHARIVARI PARTY.

See Municipal Corporations, 11.

CHATTEL MORTGAGES.

In General.

1. CHATTEL MORTGAGE—Whether a Lien or Transfer.—A chattel mortgage constitutes a lien upon the property; the title to the property does not pass until foreclosure. (S. D.) *Northwestern Port Huron Co. v. Iverson*, 920.

2. CHATTEL MORTGAGE—Whether a Lien or a Transfer.—In Oregon a chattel mortgage does not transfer the title to the property, but is only a lien thereon. (Or.) *Ayre v. Hixson*, 819.

3. CHATTEL MORTGAGE—Identification of Property.—To create a lien by chattel mortgage, the property must be identified at the time of the execution of the instrument. (Or.) *Ayre v. Hixson*, 819.

4. CHATTEL MORTGAGE—Whether Includes Increase of Animals.—If a chattel mortgage of sheep does not transfer the title, but creates only a lien on the property, it does not cover the increase of the animals unless made to do so in terms. (Or.) *Ayre v. Hixson*, 819.

5. CHATTEL MORTGAGE—Intermingling Mortgaged Sheep With Others.—A mortgagor of sheep in possession who, through his

own fault, commingles them with his other sheep, so that it is impossible to ascertain the relative proportion of mortgaged and unmortgaged animals, must suffer the loss, but the mortgagee can take only sufficient property to pay the mortgaged debt. (Or.) *Ayre v. Hixson*, 819.

6. CHATTEL MORTGAGE—Confusion of Properties—Rights of Purchaser.—Where the mortgagor of sheep through his own fault mingles them with other sheep not mortgaged, so that the mortgaged ones cannot be identified, he must bear the loss, and purchasers from him, with notice of the mortgage, stand in no better position. (Or.) *Ayre v. Hixson*, 819.

Registration and Notice.

7. CHATTEL MORTGAGE—Pleading Want of Notice by Purchasers.—Defendants in a suit to foreclose a chattel mortgage who claim as innocent purchasers must affirmatively allege in their answer that at the time of their purchase they had no actual or constructive notice of the mortgage. (Or.) *Ayre v. Hixson*, 819.

8. CHATTEL MORTGAGE—Burden of Proof to Show Want of Notice.—Persons claiming to be purchasers without notice of a prior chattel mortgage have the burden to prove want of notice, either actual or constructive. (Or.) *Ayre v. Hixson*, 819.

9. CHATTEL MORTGAGE—Actual Notice to Purchaser.—A person about to purchase sheep, who is told in a conversation that there is a mortgage on the animals, is put upon inquiry and cannot afterward claim to be an innocent purchaser. (Or.) *Ayre v. Hixson*, 819.

10. CHATTEL MORTGAGE—Proof of Registration.—A Certificate on the Back of a chattel mortgage of the time and place of its registration is not a part of the mortgage, but an independent instrument which must itself be identified and offered in evidence in order to be evidence of the recording of the mortgage; it is not enough that the mortgage is identified and offered in evidence. (Or.) *Ayre v. Hixson*, 819.

11. CHATTEL MORTGAGE—Record of Mortgage of Realty and Personalty.—Under the Oregon statute providing that a mortgage covering both real and personal property shall be recorded in the book of mortgages of real estate and indexed in the general index of mortgages of personal property, the indexing of such a mortgage as thus prescribed is an essential part of its recording, without which it is not constructive notice. (Or.) *Ayre v. Hixson*, 819.

Foreclosure.

12. CHATTEL MORTGAGE—Foreclosure not Complying With Statute.—Where a mortgagee of personal property takes possession of the goods for the purpose of foreclosing the mortgage without a substantial compliance with the statute, he converts the property and his lien is extinguished. (S. D.) *Northwestern Port Huron Co. v. Iverson*, 920.

13. CHATTEL MORTGAGE—Foreclosure must Conform to Statute.—The statutory provisions relating to sales of property under chattel mortgages by advertisement must be substantially complied with. (S. D.) *Northwestern Port Huron Co. v. Iverson*, 920.

14. CHATTEL MORTGAGE—Foreclosure After Removal to Another County.—Where a chattel mortgage is executed and filed in one county and subsequently the property is removed into another, an attempted foreclosure in the latter county, without there filing the mortgage or a copy of it, is unauthorized and void, in view of the statute providing that "notice of sale shall be published in a newspaper,

published nearest the place of sale in the county wherein the mortgage or a certified copy shall have been filed." (S. D.) *Northwestern Port Huron Co. v. Iverson*, 920.

15. CHATTEL MORTGAGE—Foreclosure—Counterclaim for Conversion.—Where a mortgagor, sued on the indebtedness, counterclaims for the value of the property which the mortgagee has converted, he may recover the value thereof without deduction of the mortgage debt, if the mortgage notes are still outstanding and unpaid, the mortgagee having disposed of them before the trial and having offered no evidence as to the amount due on them. (S. D.) *Northwestern Port Huron Co. v. Iverson*, 920.

CLEARANCE CARD.

See Master and Servant, 2, 3.

COAL-HOLES.

See Municipal Corporations, 12, 13.

COMMERCE.

CONSTITUTIONAL LAW—Interstate Commerce—Taxation.—Congress has the sole power to regulate commerce among the several states, and therefore interstate commerce cannot be taxed by a state. (Colo.) *Leonard v. Reed*, 77.

COMPETITION IN BUSINESS.

See Fraud, 2.

CONDITIONS SUBSEQUENT.

CONDITIONS SUBSEQUENT—Manner of Enforcing Breach. When real property is conveyed on condition that title shall revert upon failure to perform certain conditions, the grantor cannot declare a forfeiture and recover the premises without giving notice of his intention to claim a forfeiture and of the particular default relied upon, after which the grantee will have a reasonable time within which to comply. (Mich.) *Treat v. Detroit United Ry.*, 347.

CONFESSION.

See Criminal Law, 2.

CONFUSION OF GOODS.

CONFUSION OF GOODS—Right of Parties to Assert Ownership.—Where through mistake or accident, or by consent of the owners, goods are commingled, neither party will lose his property but each will be treated as a tenant in common in proportion to his interest; but where the commingling is wrongful or willful, the commingler or wrongdoer forfeits his interest unless he can identify his goods. (Or.) *Ayre v. Hixson*, 819.

See Chattel Mortgages, 5, 6.

CONSTITUTIONAL LAW.

In General.

1. CONSTITUTIONAL LAW—Limitation of Legislative Power. State constitutions are limitations of power; and while a legislature may enact any statute not prohibited by the organic law, when it reaches that limit it must stop. (Ky.) *Commonwealth v. International Harvester Co.*, 256.

2. CONSTITUTIONAL LAW—Statutes—Construction.—The federal constitution is the paramount law of the land, and a state statute in conflict with it is void. When state statutes come within the domain of the powers of government over which the federal constitution extends, they must be construed with reference to the provisions of that instrument. (Ky.) *Commonwealth v. International Harvester Co.*, 256.

3. CONSTITUTIONAL LAW.—Statutes on the same subject enacted at different sessions of the legislature are to be treated *en pari materia*, and read in conjunction with the state and federal constitutions. (Ky.) *Commonwealth v. International Harvester Co.*, 256.

Amendments to Constitution.

4. CONSTITUTIONAL LAW—Contradictory Amendments to the Constitution Adopted at the Same Time, Effect of.—Where a section of the constitution is amended at the same time by two different amendments and the amendments adopted are directly in conflict, and it is impossible to determine which should stand as a part of the constitution or to reconcile the same, then they must both fail. (Idaho) *Utter v. Moseley*, 94.

5. CONSTITUTIONAL LAW—Contradictory Amendments to the Constitution, One of Which is not Properly Submitted or Adopted.—If, however, one of such proposed amendments is not submitted in accordance with the provisions of the constitution and is not adopted or made a part of the constitution, and the other amendment is regularly submitted in accordance with the provisions of the constitution and adopted, then there can be no conflict between two amendments, and the latter will not fail because of conflict. (Idaho) *Utter v. Moseley*, 94.

6. CONSTITUTIONAL LAW—Contradictory Amendments, Rule Respecting, on What Founded.—The rule of law, that where two conflicting amendments are adopted at the same time, they both must fail, is based upon the assumption that both amendments are regularly submitted and adopted in accordance with the provisions of the constitution and are amendments to the constitution. (Idaho) *Utter v. Moseley*, 94.

7. CONSTITUTIONAL LAW—Amendments, When Do not Become Effective.—A question submitted as a constitutional amendment does not become a constitutional amendment unless submitted and adopted in accordance with the provisions of the constitution. (Idaho) *Utter v. Moseley*, 94.

Police Power.

8. POLICE POWER—Determination of Necessity for Exercise of, by Whom must be Made.—Though the legislature, in the exercise of the police power, must determine whether a proposed law is within the constitution, such determination is not final, but is subject to review by the courts. (Mass.) *Durgin v. Minot*, 276.

9. POLICE POWER—Regulations Which may Impose and Enforce.—The enjoyment of private property must be held subordinate to such reasonable regulations as are essential to the peace, safety, good order and morals of the community, but, under the guise of enactments for its protection, lawful property cannot be confiscated. (Mass.) *Durgin v. Minot*, 276.

Class Legislation.

10. CONSTITUTIONAL LAW—Class Legislation Construction of Statutes.—Statutes which, when construed by the canons of statutory construction, confer the right upon one class of citizens to do an act,

which is a criminal offense if done by any other class, contravene the fourteenth amendment to the federal constitution. (Ky.) Commonwealth v. International Harvester Co., 256.

11. CONSTITUTIONAL LAW—Class Legislation—Fourteenth Amendment to Federal Constitution—Effect of.—The fourteenth amendment to the federal constitution does not prohibit the state from enacting a measure favorable to any class of persons within its jurisdiction. It acts automatically upon the laws of the state to raise the complainant class to the level of the favored one, securing to all the same benefits. (Ky.) Commonwealth v. International Harvester Co., 256.

Alteration of Rules of Evidence.

12. CONSTITUTIONAL LAW—Retroactive Operation of Statute Altering Rules of Evidence.—By the enactment of chapter 373 of the Laws of 1907, the legislature altered the rule of evidence as it then existed forbidding the introduction of parol or other proof to amend or correct the sheriff's return in proceedings to forfeit school land, and provided that if the return shows that the notice was posted in the office of the county clerk, it shall be prima facie evidence of legal service notwithstanding the omission therein of recitals required by law. Held, that it was competent for the legislature to provide what shall be prima facie evidence of legal service, and that this provision of the act is not objectionable on the ground that it disturbs vested rights. (Kan.) Jones v. Hickey, 190.

See Health Regulations; Licenses; Master and Servant, 2, 3; Monopolies, 4-6; Taxes, 3-7.

CONTEMPT.

1. CONTEMPT OF COURT by Attempting to Evade Its Judgment or Order.—The court rendered a final judgment ousting a city from the exercise of the unwarranted power of in effect licensing the sale of intoxicating liquors under the guise of collecting fines by simulated prosecutions for the violation of the prohibitory law. To evade the effect of the judgment a number of saloon-keepers raised a fund from which they for a time paid the salaries of some of the city's officers and employes. Held, that all concerned in the carrying out of this arrangement, whether or not they are to be regarded as having violated an injunction directed against them, are guilty of contempt of court in virtue of their having attempted to defeat the purpose of the judgment. (Kan.) State v. Pittsburg, 227.

2. CONTEMPT—Adjudication and Commitment.—Contempt of Court is a specific criminal offense; the adjudication is a conviction, and the commitment in consequence thereof is an execution. (Mo.) In re Shull, 496.

3. CONTEMPT—Commitment must State Particular Facts not Conclusions.—A commitment of a witness for contempt does not meet the statutory requirements that it shall contain "the particular circumstances" of the offense and plainly and specially charge the contempt itself, where the order leading up to the adjudication simply recites that the witness was asked "proper and legal questions," which he refused to answer when directed by the court, and the adjudication merely recites that he was adjudged guilty of contempt "in treating the court disrespectfully," without stating the particular questions asked nor finding and adjudging the facts constituting the disrespect. (Mo.) In re Shull, 496.

4. CONTEMPT.—The Order of Adjudication for Contempt must State Facts which show the prisoner guilty of the offense, and not mere conclusions. (Mo.) In re Shull, 496.

5. **CONTEMPT—Presumptions to Sustain Conviction.—**Since Punishment for contempt is a criminal proceeding by which the citizen is deprived of his liberty, presumptions and intendments will not be indulged to sustain a conviction therefor. (Mo.) *In re Shull*, 496.

CONTRACTS.

Construction.

1. **CONTRACTS.—In Applying the Rule That Contemporary Construction** of a contract by acts of the parties is entitled to great weight, it should appear with reasonable certainty that they were acts of both parties, done with knowledge and in view of a purpose at least consistent with that to which they are sought to be applied. (Pa.) *Sternbergh v. Brock*, 877.

2. **CONTRACTS.—The Rule That Contemporary Construction by Acts** of the parties is entitled to great weight applies only where the contract is ambiguous and the intention doubtful. (Pa.) *Sternbergh v. Brock*, 877.

Building Contracts.

3. **BUILDING CONTRACTS—Substantial Performance, What Amounts to.—**Whether there was a substantial performance of a building contract is to be determined in reference to the entire contract and what was done or omitted under it, and not in reference to one specification. (Mass.) *Bowen v. Kimbell*, 302.

4. **BUILDING CONTRACTS—Pleading Where There has not Been a Complete Performance.—**If the plaintiff, relying on a building contract, declares upon the contract alone, he cannot recover unless there has been a complete performance. (Mass.) *Bowen v. Kimbell*, 302.

5. **BUILDING CONTRACT—Quantum Meruit, When will not Sustain a Recovery.—**A plaintiff contracting to erect a building cannot recover on a quantum meruit unless he has acted in good faith under the contract in endeavoring to perform it. (Mass.) *Bowen v. Kimbell*, 302.

6. **BUILDING CONTRACTS—Abandonment.—**A person contracting to erect a building who abandons his contract without excuse when he has only half performed it has no remedy. (Mass.) *Bowen v. Kimbell*, 302.

7. **BUILDING CONTRACTS, Substantial Departure, When Precludes Recovery.—**Where a builder, with respect to one specification of his contract, intentionally employs material containing less of a designated ingredient than such specifications require, he cannot recover, even on a quantum meruit, though the difference in value between the resulting building and what it would have been had the specification been followed is much less than he would be entitled to recover if he could maintain a quantum meruit under the circumstances. The action of the contractor must be regarded as lacking in good faith, and does not amount to a substantial performance of the contract. (Mass.) *Bowen v. Kimbell*, 302.

Restraint of Trade.

8. **RESTRAINT OF TRADE—Reasonableness of Contracts.—**A contract in restraint of trade will not be enforced unless the restraint is no more extensive than is reasonably required to protect the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. (N. J. Eq.) *Taylor Iron & Steel Co. v. Nichols*, 753.

9. **CONTRACTS not to Sell or Deal in the Goods of Any Other Person, When Permissible.—**A contract between a corporation en-

gaged in the business of selling patterns for garments and in publishing periodicals and catalogues thereof and a dry-goods merchant, providing that the corporation should sell and deliver to the merchant, for a stated period, patterns at a designated price, should allow him each year to make exchange for new patterns, should permit certain credits, and that the merchant would at all times keep on hand such patterns, and would not sell, or permit to be sold, on his premises, during the term of the contract, any other make of patterns, does not violate section 1 of chapter 56 of the Revised Laws of Massachusetts, making it a crime to impose a condition in the sale of goods "that the purchaser shall not sell or deal in the goods of any other persons." (Mass.) *Butterick Pub. Co. v. Fisher*, 283.

10. **STATUTES, Construction of Penal.**—A statute prohibiting and punishing an agreement in the sale of goods that the purchaser shall not sell or deal in the goods of any other person is highly penal, and must, therefore, be construed strictly and not as prohibiting a sale at a reduced rate in consideration of an agreement to sell the vendor's goods alone. (Mass.) *Butterick Pub. Co. v. Fisher*, 283.

Breach and Remedies.

11. **CONTRACT.**—The Refusal of One Party to Perform an Executory contract unless the other party consents to a modification amounts to a total breach of the agreement. (Wis.) *Richards v. Manitowoc & Northern Traction Co.*, 1063.

12. **CONTRACT.**—Performance by One Party After Breach by the Other.—Where the party for whom work is to be done, while the contract is still executory, orders the other party to go no further, the latter has no right to proceed to perform the agreement and recover the value of the completed job; his remedy is to recover damages for the breach. (Wis.) *Richards v. Manitowoc & Northern Traction Co.*, 1063.

13. **CONTRACT.**—Remedies for Breach—Election.—Where a person for whom work is to be done breaches the contract, the other party may either sue upon his contract and recover so far as he has performed as well as for loss of profits, or he may waive the contract, sue upon a quantum meruit and recover the value of his labor. But he cannot pursue both remedies, for they bear a different measure of damage. (Wash.) *Gabrielson v. Hague Box & L. Co.*, 1032.

CONVERSION.

See *Trover and Conversion*.

CORPORATIONS.

In General.

1. **CORPORATION.**—Contract Ultra Vires—Admission in Answer. A statement in an answer that, if a contract was executed by a corporation, it is void because ultra vires, is an admission that the contract was made, notwithstanding a general denial in another paragraph of said pleading. (Neb.) *Clague v. Tri-State Land Co.*, 637.

2. **CORPORATION.**—Effect of Transfer of Assets to Partnership. If the assets of a corporation transferred to a partnership exceed the corporate debts assumed by the partnership, a creditor of the corporation may make his debt out of the transferred assets, and is entitled to a lien thereon enforceable if the partnership does not pay, but he cannot hold the firm "personally responsible." (Mich.) *Midland County Sav. Bank v. T. C. Prouty Co.*, 401.

3. **CORPORATIONS.** Minutes of, When may be Contradicted by Parol Evidence.—Where the verity of the records of a corporation is

attacked by minority stockholders, who deny that the transactions therein purporting to be recorded ever occurred, and they contend that the true minutes of a given meeting show the very contrary of that shown by the official record, parol evidence is admissible to show what actually occurred at such meeting. (Idaho) *Just v. Idaho Canal & Imp. Co.*, 140.

Liability for Representations in Charter or by Incorporators.

4. **CORPORATION—Liability for Representations in Charter.**—A creditor cannot rely upon statements made in the articles of association filed by a business corporation, and upon proof of the falsity thereof recover against the persons signing the articles in an action for fraud and deceit, since these representations are not made to secure credit, but to the Secretary of State to procure a charter. (Mo.) *McKee v. Rudd*, 529.

5. **STATUTE OF FRAUDS.**—Representations Made by the Incorporators and Officers of a corporation with reference to its financial standing are made with reference to the credit or ability of "another person" within the meaning of the statute of frauds, and hence are not actionable if not in writing. (Mo.) *McKee v. Rudd*, 529.

6. **CORPORATION—Liability for Statements of Incorporators.**—A judgment of a creditor against incorporators of an insolvent company, in an action for deceit founded on their oral representations of solvency which the statute requires to be in writing, cannot be sustained on the ground that inasmuch as they are officers and stockholders who have not paid for their stock in money or anything equivalent thereto, the judgment is a righteous one which should be upheld. (Mo.) *McKee v. Rudd*, 529.

Preferred Stock.

7. **CORPORATION.**—Preferred Stockholders are Entitled to Share with the common stockholders in all profits distributed after the latter have received an amount equal to the stipulated dividend on the preferred stock, in the absence of contract stipulations to the contrary. (Pa.) *Sternbergh v. Brock*, 877.

8. **CORPORATION—Preferred Stock—Participation in Dividends.** Preferred stock, issued by a company incorporated under the act of 1874, is entitled to participate in the distribution of profits remaining after the common stock has received a dividend equal to that paid on the preferred stock, notwithstanding the fact that only ten per cent of the subscription on such common stock has been called and paid. (Pa.) *Sternbergh v. Brock*, 877.

Transactions by Directors Affecting Corporation.

9. **CORPORATION.**—Where the Trust Duty of Directors Conflicts with their personal interest, the latter must give way. (Or.) *Young v. Columbia Land & Inv. Co.*, 844.

9a. **CORPORATION—Stockholders Purchasing Outstanding Notes of Company.**—A corporation is entitled to the benefit of the transaction where majority stockholders personally purchase, at a discount, mortgage notes outstanding against the company, the offer to sell, which it was well able to accept, having been originally made to the company and then so changed at the request of one of the purchasing stockholders as to make it a personal offer, and the acting directors being either parties to the purchase or acquiescing in the transaction. (Or.) *Young v. Columbia Land & Inv. Co.*, 844.

10. **CORPORATION.**—Directors' Purchase of Outstanding Notes of Company.—When outstanding mortgage notes against a corporation are offered to it at a discount, it is the duty of the directors to take care of the notes and mortgage for the benefit of the corporation,

and they may not purchase them for their own benefit. (Or.) *Young v. Columbia Land & Inv. Co.*, 844.

11. A CORPORATION cannot be Charged With Laches in not Questioning the Purchase, by certain directors, of notes outstanding against the company, where such directors have constituted a majority of the board and are chargeable with the delay. (Or.) *Young v. Columbia Land & Inv. Co.*, 844.

12. CORPORATION—Transactions Between Director and the Company.—The director of a corporation occupies a position of trust or agency for his company of such a character that dealings between him and the company, where his interest is opposed to that of the company, will be subject to close scrutiny and not sustained against the stockholders unless consistent with good faith and fair dealing on the part of the director. (N. J. Eq.) *Marr v. Marr*, 742.

13. CORPORATION—Action by Director to Enforce His Debt Against Company.—A director, who is at the same time a creditor of his corporation, may, for the purpose of collecting his debt, assume a position antagonistic to his company and its stockholders by bringing action and proceeding to judgment and execution for the recovery of the debt. (N. J. Eq.) *Marr v. Marr*, 742.

14. CORPORATION—Action by Director to Enforce His Debt Against Company.—But a director, who is also creditor of his company, must, on taking legal proceedings for collection of his debt, relinquish his trust *pro hac vice*, not covertly, but openly, and with fair notice to his company. Whether such notice should be given to the stockholders or to the directors may depend on circumstances. (N. J. Eq.) *Marr v. Marr*, 742.

15. CORPORATION—Purchase by Director at Execution Sale of Company's Property.—Under the circumstances of the present case—held, that the defendant director, who purchased at sheriff's sale all the property of the company under executions issued at his suit, and for a consideration not exceeding one-half the value of the property, took the title subject to an option on the part of his cestui que trust to have the benefit of the purchase. (N. J. Eq.) *Marr v. Marr*, 742.

16. CORPORATION—Sale to Director—Laches of Infant in Seeking Relief.—Relief, under the circumstances, granted to a single stockholder who by reason of infancy was not chargeable with laches, notwithstanding that the other stockholders might be debarred on the ground of their acquiescence or laches. (N. J. Eq.) *Marr v. Marr*, 742.

Suit by Stockholders.

17. CORPORATIONS—Stockholders, Right of to Maintain Suit for Matters Occurring Before the Acquisition by Them of Their Stock.—A stockholder suing on behalf of his corporation which is unable or unwilling to bring suit, and pleading a good cause of action, may maintain the same, though he was not an owner of stock at the time the breach of duty was committed or the cause of action accrued, except in cases where it is shown that he purchased the stock with the purpose of bringing suit, or where his vendor was for some reason estopped from maintaining the action and the purchaser had notice of such bar. (Idaho) *Just v. Idaho Canal & Imp. Co.*, 140.

18. CORPORATIONS—Minority Stockholders, When Should be Permitted to Sue.—Where two competing corporations enter into a contract, and before the same is fully performed and the debt thereby contracted is due one of the corporations obtains control of the other and elects a board of directors, and thereafter the directors and officers

of the one corporation refuse to pay the debt contracted, and the directors and officers of the other corporation refuse to prosecute an action for the collection of such debt and obligation, such a conflict of interest and duty arises among the directors and officers, aside from and independently of any fraudulent motive, that a court of equity is warranted in permitting the minority stockholders to maintain their action on the contract. (Idaho) *Just v. Idaho Canal & Imp. Co.*, 140.

Criminal Liability of Corporation.

19. **A CORPORATION is Liable to be Indicted Either for Nonfeasance or Misfeasance**, the limitations on such liability being in the former case that the corporation must be capable of doing the act for the nonperformance of which it is charged, and that in the second case the act for the performance of which it is charged must not be beyond its authorized powers. (N. Y.) *People v. Rochester Ry. & Light Co.*, 770.

20. **A CORPORATION may be Liable Criminally for an Offense of Which a Specific Intent is a necessary element.** (N. Y.) *People v. Rochester Ry. & Light Co.*, 770.

21. **A CORPORATION cannot be Convicted of a Homicide Under a Statute** defining that crime as "the killing of one human being by the act, procurement or omission of another." Homicide as thus defined means the killing of one human being by another human being. (N. Y.) *People v. Rochester Ry. & Light Co.*, 770.

Dissolution and Receivership.

22. **CORPORATION—Dissolution and Receivership—Who may Apply.**—One who is a stockholder and a director in a corporation, and who is the administrator of an estate that owns nearly one-third of the stock in the company, is beneficially interested in proceedings instituted by another stockholder which result in ex parte orders dissolving the company and appointing a receiver, and hence may bring certiorari to review such orders. (Nev.) *Hettel v. District Court*, 731.

23. **CORPORATION—Dissolution and Receivership Without Notice.** A court has no power, upon the application of a stockholder, to order a dissolution of the corporation and the appointment of a receiver, without notice to the persons in interest and opportunity for hearing; and the Nevada statutes do not attempt to confer such authority. (Nev.) *Hettel v. District Court*, 731.

24. **CORPORATION.—An Appearance on the Part of a Corporation**, not made until after ex parte orders dissolving it and appointing a receiver on the application of a stockholder, confers no jurisdiction upon the court to make such previous orders. (Nev.) *Hettel v. District Court*, 731.

25. **CORPORATION.—Where a Stockholder has Instituted Proceedings** and obtained ex parte orders dissolving the corporation and appointing a receiver, another stockholder who files a petition alleging that there was no necessity or authority to dissolve the corporation and appoint a receiver, and who afterward filed a motion to vacate such orders, is not estopped to question by certiorari the jurisdiction of the court to make the orders. (Nev.) *Hettel v. District Court*, 731.

Foreign Corporations—Process and Attachment.

26. **FOREIGN CORPORATION—Effect of Failure to Comply With Law.**—A foreign corporation transacting local business in a state without complying with its laws is estopped to set up the unlawfulness of its transactions in bar of remedies which would exist were it doing business lawfully. (Mich.) *Showen v. J. L. Owens Co.*, 376.

27. FOREIGN CORPORATION—Process and Actions.—The tendency of the statutes and decisions has been toward putting corporations on the same footing as natural persons in regard to the jurisdiction of suits by or against them. (Mich.) *Showen v. J. L. Owens Co.*, 376.

28. FOREIGN CORPORATION—Process, Remedies and Actions.—The provisions of section 10,442 of 3 Compiled Laws, that actions may be commenced against foreign corporations by service of process within the state on any agent or officer of the company, applies only to foreign corporations transacting interstate commerce business in the state; the effect of other statutes of the state regulating the transaction of local business therein by foreign corporations is to make them, as to such business, domestic corporations, entitled to and subject to the same remedies as such corporations in the courts of the state. (Mich.) *Showen v. J. L. Owens Co.*, 376.

29. FOREIGN CORPORATION.—The Service of a Writ of Attachment upon the resident agent of a foreign corporation confers jurisdiction in personam under 3 Compiled Laws, section 10,477 et seq. (Mich.) *Showen v. J. L. Owens Co.*, 376.

See *Mandamus*, 13.

Note.

Corporations, conspiracy, criminal liability for, 779.

crime, capacity of to commit, 775, 777.

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COSTS.

1. COSTS, When may be Allowed.—The allowance of costs is a matter dependent wholly on the statute, and where there is no statute authorizing it no costs can be allowed. (Idaho) *Schmelzel v. Board of County Commrs.*, 89.

2. COURTS OF JUSTICE, Inherent Authority of Respecting Expenses.—Courts of justice have the inherent power and authority to incur and order paid all such expenses as are necessary for the hold-

ing of court and the discharge of the duties thereof in the administration of justice. (Idaho) *Schmelzel v. Board of County Commrs.*, 89.

See Jury, 5-7.

COUNCILMEN.

See Mandamus, 12.

COUNTERCLAIM.

See Setoff and Counterclaim.

COURTS.

Death of Judge.

1. **COURTS.**—The Death of a Trial Judge does not end the term of court; and if his successor signs all the papers and acts upon the motion for a new trial, it will be presumed that he was appointed within term time. (Tex. Cr.) *Ellis v. State*, 953.

Jurisdiction—Judge at Chambers.

2. **JURISDICTION**—Hearing of Motion by Judge in Another County.—Where the attorneys in divorce proceedings stipulate that a motion to vacate the decree therein shall be heard at the county seat of another county before the superior judge of a third county, the judges consenting thereto, the judge so sitting has jurisdiction (the parties appearing before him), and his order denying the motion is *res judicata*. (Wash.) *Meisenheimer v. Meisenheimer*, 1005.

3. **JURISDICTION**—Estoppel of Party to Deny.—A Party cannot Appear before a superior judge or court acting at his instance, have a full and fair hearing upon the merits in a matter over which the constitution gives such court general jurisdiction, and afterward raise the question of jurisdiction. (Wash.) *Meisenheimer v. Meisenheimer*, 1005.

4. **JURISDICTION**—Judge at Chambers.—A Superior Judge has Jurisdiction at chambers to hear a motion to vacate a divorce decree, in view of the constitutional provision that the superior court shall always be open. (Wash.) *Meisenheimer v. Meisenheimer*, 1005.

Opinions and Dicta.

5. **COURTS**—Opinions and Dicta.—No Case is Considered Authority except upon the questions actually decided. (Mich.) *First Nat. Bank v. Union Trust Co.*, 362.

CREDITOR'S BILL.

CREDITOR'S BILL—Lien Persists After Death of Debtor.—Where a judgment creditor files a creditor's bill, and obtains an injunction against the transfer of the debtor's property or secures the appointment of a receiver therefor, a lien is thereby acquired which, on the death of the debtor, is superior to the claims of unsecured creditors and the rights of the personal representative. (Mich.) *Saginaw County Sav. Bank v. Duffield*, 354.

CRIMINAL LAW.

In General.

1. **CRIMINAL LAW**—Mental Responsibility for Crime.—Where the evidence shows that a person accused of crime is twenty-three years old and a man of low order of intellect and morality, that he has had defective vision from birth, that he attended school when a child and could read and write fairly well, that in his early teens he developed a propensity for stealing and on that account has been

committed to reformatories on two occasions, and in the last case was released only a few months before the crime in question, the question of his responsibility for crime is properly submitted to the jury, and their verdict that he knew the nature and quality of his act and that it was wrong will not be disturbed. (N. Y.) *People v. Scott*, 789.

2. **CRIMINAL LAW—Confession Obtained by Deception.**—A confession obtained from a prisoner by a private citizen under a promise that he will aid the prisoner to escape, the district attorney and sheriff not entering into such agreement but having knowledge thereof, is not rendered inadmissible in evidence because thus obtained through deception. (N. Y.) *People v. Scott*, 789.

3. **CRIMINAL LAW—Imposing Sentence While Motion for New Trial is Pending.**—Rendering judgment and pronouncing sentence upon the defendant while his motion for a new trial, which was filed in season, is pending, is in effect a denial of the motion; it is not his duty, when asked if he has any cause to show why judgment should not be pronounced, to call the court's attention to the fact that the motion is pending, and by failing to do so he does not waive the benefits of the same, but is entitled to a full hearing upon the errors assigned in the motion. (Mo.) *State v. Jackson*, 477.

4. **CRIMINAL LAW—Motion to Discharge Accused, Preservation for Appeal.**—The record proper on appeal should show the filing of a motion for the discharge of the defendant for want of jurisdiction, to warrant a review of the matter on appeal; it is not enough that the bill of exceptions preserves the motion, and recites the action of the court upon it and the exceptions of the defendant thereto. (Mo.) *State v. Jackson*, 477.

Former Jeopardy.

5. **FORMER JEOPARDY—Effect of Pending Appeal.**—A Former Conviction for unlawfully selling liquor, from which an appeal is pending, is not a bar to another prosecution for the same offense, since the appeal deprives the judgment of its character of finality. (Tex. Cr.) *Dupree v. State*, 998.

Failure of Accused to Testify.

6. **CRIMINAL LAW—Comment on Failure of Accused to Testify.** Where one on trial for felony testifies in his own behalf, it is error to permit the district attorney to bring out on cross-examination, and then comment on the fact in his argument, that the accused did not take the stand on a former trial of the case. (Tex. Cr.) *Hare v. State*, 950.

7. **CRIMINAL LAW—Comment on Failure of Accused to Testify.** A statute providing that the failure of a defendant to testify in his own behalf shall not be taken as a circumstance against him nor be referred to by counsel, is mandatory, and covers the proceedings on a former trial. (Tex. Cr.) *Hare v. State*, 950.

Presence of Accused.

8. **CRIMINAL TRIAL—Presence of Accused When Verdict Received.**—In a felony case the accused is entitled to and must be present when the verdict is received, unless his absence is voluntary or willful. The word "voluntary," as thus used, implies that the absence must result from choice or exercise of the will. An unavoidable absence is not voluntary, nor is an unintentional absence, where, under the circumstances, his presence could not be reasonably required. Even an absence, though in somewhat serious negligence, which is neither purposeful, deliberate, nor under circumstances for which an intention can be presumed, is not voluntary. (Tex. Cr.) *Derden v. State*, 986.

9. CRIMINAL TRIAL—Presence of Accused When Verdict Received.—Where the accused in a felony case, while the court is not in session but the jury is deliberating, is at his boarding-place within two blocks of the courthouse, and immediately starts for the courthouse when notified by telephone that the jury has reached a verdict, but while on the way the verdict is received and the jury discharged, his absence is not voluntary, nor willful, and the reception of the verdict under such circumstances is reversible error. (Tex. Cr.) *Derden v. State*, 986.

See Corporations, 19-21.

DAMAGES.

1. DAMAGES, Award of, When cannot be Sustained for Want of Proof as to the Amount.—Where, in a suit to enjoin the violation of a written agreement, such violation is found, and also that it resulted in damages which were more than nominal, but there is no proof of the amount in dollars and cents, the award of twenty-five dollars cannot be sustained. (Mass.) *Butterick Pub. Co. v. Fisher*, 283.

2. DAMAGES—Measure of Recovery for Injury to Boy.—A verdict of ten thousand dollars in favor of a boy ten years old, for the loss of his entire left arm and for cuts and bruises on his head and face, is not so excessive that it will be disturbed on appeal. (Wis.) *Schwind v. Chicago etc. Ry. Co.*, 1055.

3. DAMAGES for Personal Injuries—Loss of Profits or Earnings. Profits are not earnings simply because a business is very small, and earnings are not necessarily considered as profits because they happen to be large, within the rule that in actions for personal injuries damages may be recovered for loss of personal earnings, but not for uncertain business profits proceeding from invested capital. (N. Y.) *Gombert v. New York etc. R. R. Co.*, 794.

4. DAMAGES for Personal Injuries—Loss of Profits or Earnings. In an action for personal injuries evidence is not admissible of an asserted loss consisting of profits which are essentially the uncertain fluctuating increment of invested capital, no matter how small it may be; but if a loss is due to the destruction or impairment of personal earning capacity, evidence thereof is not to be excluded simply because it may be large. (N. Y.) *Gombert v. New York etc. R. R. Co.*, 794.

5. DAMAGES for Personal Injuries—Loss of Profits to Contractor. A contractor engaged in the business of constructing buildings, in which he buys material, employs labor, oversees the work, and looks for his returns in the difference between what he gets and what he expends in performing his contracts, is not one who depends upon his personal earnings, but upon the profits of his business. Hence in an action by him for personal injuries evidence of his income from his business for three years preceding the action is incompetent. (N. Y.) *Gombert v. New York etc. R. R. Co.*, 794.

See Carriers; Charitable Institutions; Intoxicating Liquors; Negligence.

DEATH.

1. DEATH—Presumption from Absence.—Proof of Diligent Search and Inquiry is not necessary to establish the presumption of the death of a person who has been absent and unheard of from his home or place of residence for seven years. (Wis.) *Miller v. Sovereign Camp W. O. W.*, 1095.

2. DEATH—Presumptions from Absence, Letters from Wife to Strengthen.—Where a man has been absent and unheard of for seven

years, letters from his wife are admissible to strengthen the presumptions of death, by showing that his relations with his family were such as not to be a cause for his disappearance. (Mich.) Samberg v. Knights of Modern Maccabees, 396.

DEEDS.

1. **DEEDS.**—Where the Description of Lands by Metes and Bounds as given in a deed actually closes, and the only apparent error is in one of the distances which is controlled by a division line as a monument, the location of which is not disputed, the question is one of construction of the deed and for the court; it is not a question of locating the description upon the ground, which would be for the jury. (N. J. Eq.) Schmitt v. Traphagen, 739.

2. **DEEDS—Reservation or Exception of Growing Timber.**—A clause in a deed to land "reserving the pine and cedar timber now growing or being thereon and the right to cut and remove the same" creates an exception, not a reservation. The timber remains the property of the grantor, and he is not required to remove it within a reasonable time after the conveyance. (Wis.) Bardon v. O'Brien, 1066.

3. **DEEDS—Delivery—Sufficiency—Declaration of Grantor at the Time.**—If a deed is delivered by the grantor to the mother of the infant grantee, to be placed among the grantor's papers, and not with the intention of parting with the possession or control of it, that is not a delivery which passes title to the child. (Ky.) Pittmon v. Flowers, 273.

4. **DEEDS—Delivery—Sufficiency—Declaration of Grantor at the Time.**—If a deed is delivered by the grantor to the mother of the infant grantee for such infant, the title then passes to the infant. (Ky.) Pittmon v. Flowers, 273.

5. **DEEDS—Delivery—Sufficiency—Presumption from Grantor's Silence.**—If a deed is delivered by the grantor to the mother of the infant grantee without any direction with reference thereto, the presumption is that it is for the benefit of the child, and the title passes to the child. (Ky.) Pittmon v. Flowers, 273.

See Acknowledgment; Conditions Subsequent; Husband and Wife, 1; Vendor and Vendee.

DEFINITIONS.

See Words and Phrases.

DEPOSIT SLIP.

See Banks and Banking, 1; Forgery.

DEPOT.

See Carriers, 9-12.

DESCENT AND DISTRIBUTION.

DESCENT—Estoppel of Heir to Claim Estate.—One may be estopped by declarations or conduct from claiming under the statutes of descent. (Iowa) McDowell v. McDowell, 170.

See Adoption; Executors and Administrators; Partnership, 2.

DEVICES.

See Wills.

DIRECTORY.

See Injunction, 1.

DISCOVERY.

BILL FOR DISCOVERY—Sufficiency of Description of Property.—Where a bill for discovery sets forth that the defendant has equitable interests in certain property, giving a description of a long list of the same, a lien does not fail to attach for want of a specific description of the property and assets. (Mich.) *Saginaw County Sav. Bank v. Duffield*, 354.

DISMISSAL.

See *Actions*, 5, 6.

DIVORCE.*In General.*

1. **ESTOPPEL**.—A Man Who Successfully Defends a Prosecution for perjury in obtaining his decree of divorce on the ground that the decree is void for want of service of process is not thereby estopped from asserting the validity of the decree when it is questioned by the wife on motion or in a suit to vacate. (Wash.) *Meisenheimer v. Meisenheimer*, 1005.

2. **DIVORCE**—Validation by Subsequent Conduct of Party.—Whether under any circumstances of aggravation a decree of divorce entered by a court of a state, of which neither plaintiff nor defendant were residents at any time, could be validated by any subsequent conduct—*quaere*. (Minn.) *Sammons v. Pike*, 425.

3. **DIVORCE**.—Where a Husband Conceals a Large Amount of Community property in obtaining a decree of divorce, his wife may afterward institute proceedings to have her rights in the property determined. (Wash.) *Meisenheimer v. Meisenheimer*, 1005.

Res Judicata.

4. **DIVORCE**—*Res Judicata*.—Where a Wife Brings a Suit for Divorce on the ground of cruelty, and such suit is finally determined against her on the merits, she cannot afterward, in a suit for divorce brought by her husband charging her with desertion, plead the facts upon which she depended to establish the charge of cruelty as an excuse for such desertion. (Neb.) *Wilkins v. Wilkins*, 618.

5. **DIVORCE**—*Res Judicata*.—Where a wife was the recipient of an income sufficient for her support, and much larger than could be derived from the property of the husband, and the husband shortly before their separation accounted and paid to her the entire amount of the income derived from her property during the existence of the marriage relation, a judgment of the district court granting a divorce to the husband for the wife's desertion will not be reversed nor modified because such court refuses to allow the wife alimony. (Neb.) *Wilkins v. Wilkins*, 618.

Estoppel Against Party.

6. **DIVORCE**—*Estoppel Against Victim of Fraud*.—Where a decree of divorce by a court within the jurisdiction of which the person seeking a divorce was a resident at the time involved is voidable only because of fraud in connection with the service of the summons or in the conduct of the case, the victim of the fraud may by unexplained delay, lasting until after the death of the perpetrator of the fraud, or by other conduct operating by way of waiver or estoppel, be prevented from successfully asserting a right to a distributive share of the estate of the original wrongdoer. (Minn.) *Sammons v. Pike*, 425.

7. **DIVORCE**—*Estoppel Against Victim of Fraud and Her Heirs*.—Where a resident of Minnesota brought an action for divorce in Dakota, which his wife, a resident of New York living apart from

him for good cause, answered, whereupon he dismissed the action, and afterward he brought a second action for divorce in Nebraska, which she answered, and while the proceedings therein were pending he filed a third action for divorce in Dakota, and obtained a decree, committing fraud and perjury in the matter of jurisdiction and service of process, and thereafter both parties died without again marrying, the inaction of the wife, even after knowledge of the decree, does not estop her or those claiming through her from claiming a distributive share of his estate. (Minn.) *Sammons v. Pike*, 425.

8. **DIVORCE—Estoppel Against Heirs of Wife.**—The failure of the wife in this case to attack the invalid decree, and her other conduct complained of, did not operate to prevent persons claiming under her from securing her distributive share in his estate as the law determined it to be. (Minn.) *Sammons v. Pike*, 425.

Attack on Foreign Decree.

9. **DIVORCE—Collateral Attack on Decree in Foreign Court.**—One Higbie, at all times involved a resident of Minnesota, initiated in 1886 a divorce proceeding in Dakota against his wife, who lived in New York. She answered. He dismissed the action. In 1887 he brought another suit in Nebraska. She answered, and set up a cross-bill for a divorce on her part. While this action was pending, and in 1888, he began a third divorce proceeding in Dakota. Fraud in service of summons was claimed and denied. The wife did not appear. Decree for absolute divorce was granted in 1889. Neither party remarried. The wife had actual knowledge of the existence of the decree for some seven years before her death. The husband died in 1905. The wife died in 1906. In an action of ejectment, brought later in 1906 by persons claiming under her to recover possession of the homestead and other property from persons claiming under him, it is held that a decree of divorce may be impeached collaterally in the courts of another state by proving that the court granting it had no jurisdiction because of the plaintiff's want of domicile, even where the record purports to show such jurisdiction. (Minn.) *Sammons v. Pike*, 425.

Counsel Fees and Alimony.

10. **DIVORCE—Liability of Husband for Fees of Wife's Attorney.** A husband is not liable for counsel fees incurred by his wife in bringing a suit for divorce, which she dismisses without the consent of the attorney. (Wash.) *Humphries v. Cooper*, 1036.

11. **DIVORCE—Liability of Wife for Counsel Fees.**—A woman is liable for the fees of attorneys employed by her to prosecute her action of divorce which she dismisses without their consent. (Wash.) *Humphries v. Cooper*, 1036.

12. **DIVORCE—Amount of Suit Money Allowable.**—The amount of money to be allowed a wife to pay the expenses of defending a suit for divorce is largely within the discretion of the district court, and its action will not be reviewed where it does not appear that the wife has been hampered in making her defense, or is financially unable to pay expenses necessarily incurred. (Neb.) *Wilkins v. Wilkins*, 618.

13. **DIVORCE—Alimony in Case of Decree Against Wife.**—While alimony may be awarded to a wife against whom a divorce is decreed, this is upon the theory that she directly or indirectly assisted in the accumulation of the property acquired during marriage, and that when the family tie is severed she should receive a just proportion of what she has helped to create; but the mere legal liability of the husband to support her should not be enforced after her desertion of him. (Neb.) *Wilkins v. Wilkins*, 618.

14. **JUDGMENT for Alimony in Installments, Lien of.**—Notwithstanding the statute making judgments liens on the real estate of the debtor within the county, an allowance of permanent alimony payable in installments does not create a lien on any property of the husband unless the record affirmatively discloses that the court intended it to have that effect. (Kan.) *Scott v. Scott*, 217.

Custody and Support of Children.

15. **DIVORCE—Custody of Child may be Subject to Further Order.** An award of the custody of an infant child made upon granting a divorce, where neither parent is shown to be disqualified, should be made subject to the further order of the court. (Neb.) *Wilkins v. Wilkins*, 618.

16. **DIVORCE—Provision for Father to Visit Child.**—Where neither parent is unfit to have the custody of a child, but the decree of divorce awards the child to the mother, a provision in the decree that the father may visit the child at any reasonable time and have the child visit with him "in the village of Cook, not exceeding one hour," is a totally inadequate recognition of his rights. (Neb.) *Wilkins v. Wilkins*, 618.

17. **DIVORCE—Amount Awarded for Support of Child.**—An order to the father to pay seventy-five dollars annually for the support of a girl of eight years awarded on divorce to the mother, while perhaps adequate for the time being, will be modified by the court so as to require him to pay a larger amount for increasing expenses which he voluntarily fails to meet. (Neb.) *Wilkins v. Wilkins*, 618.

DOMICILE.

1. **RESIDENCE.**—Intention is Almost Invariably a Controlling Element in determining residence. (Wis.) *Miller v. Sovereign Camp W. O. W.*, 1095.

2. **RESIDENCE—How Lost or Changed.**—Intention to Acquire a New residence without removal avails nothing, neither does removal without intention. (Wis.) *Miller v. Sovereign Camp W. O. W.*, 1095.

3. **RESIDENCE.—A Temporary Absence from Home** with the intention of returning does not deprive one of his residence. (Wis.) *Miller v. Sovereign Camp W. O. W.*, 1095.

4. **RESIDENCE.**—Where a Son Resided With His Widowed Mother until he reached his majority, and thereafter returned to her home frequently and made it his headquarters, this may be regarded as his residence in the absence of evidence that he acquired or attempted to acquire any new residence. (Wis.) *Miller v. Sovereign Camp W. O. W.*, 1095.

DRAINAGE COMMISSIONERS.

See *Mandamus*, 14.

DYING DECLARATIONS.

See *Homicide*, 8.

EARNINGS.

See *Damages*, 3-5.

EASEMENTS.

EASEMENT OF LIGHT, Air and Access in Public Street.—The owner of real property abutting upon a public street has an easement therein of light, air and access to and from his property by means of the street; and that easement is property of which he can-

not be deprived without just compensation. (Mo.) *Rourke v. Holmes St. Ry. Co.*, 468.

See Private Way.

EJECTMENT.

1. EJECTMENT—Time for Action Against One Claiming Under Life Tenant.—An action of ejectment is prematurely brought against one claiming under a life tenant, if begun before the death of such tenant. Such action, however, is no bar to a subsequent action seasonably instituted. (Neb.) *Currier v. Teske*, 602.

2. EQUITABLE EJECTMENT—Satisfaction of Judgment by Taking Lease.—Where, in an action in the nature of an equitable ejectment, a decree is rendered requiring the defendant to vacate the premises, but he, failing to comply therewith, is charged with contempt and granted five days in which to observe the decree, but within that time takes a lease of the premises in dispute from the plaintiff's grantee, the effect of the lease is to satisfy the decree, which deprives such grantee of the right to invoke the aid of the court under the decree to recover possession. (Or.) *Elwert v. Marley*, 850.

See Partition, 1.

ELECTIONS.

1. ELECTIONS.—A Ballot on Which Three Crosses are Stamped opposite the name of a candidate, two within and one without the square, is properly rejected. (Nev.) *Strosnider v. Turner*, 710.

2. ELECTIONS.—A Ballot on Which the Crosses are not Stamped, but are apparently made by using one corner of the stamp as a pencil, is properly rejected. (Nev.) *Strosnider v. Turner*, 710.

3. ELECTIONS.—A Ballot Which Contains Two Rectangular Marks or Blotches in squares opposite the names of two candidates is properly rejected. (Nev.) *Strosnider v. Turner*, 710.

4. ELECTIONS.—A Ballot Which Contains Two Distinct Crosses deliberately stamped in the square opposite the name of a candidate is illegal. (Nev.) *Strosnider v. Turner*, 710.

5. ELECTIONS.—Marks on a Ballot are not Double Crosses in the sense that they are distinguishing marks, if they have the appearance of an attempt to make a second impression of the stamp in order to make the first clearer or to rectify some defect, the second stamping not covering the first. (Nev.) *Strosnider v. Turner*, 710.

6. ELECTIONS—Ballots.—Where There is a Double Cross in the Square opposite the name of a candidate, the voter evidently having first marked a cross using one corner of the stamp as a pencil, and, upon discovering his error, having made a proper cross beside the illegal one, the ballot should be rejected. (Nev.) *Strosnider v. Turner*, 710.

7. ELECTIONS.—A Ballot not Stamped as Required by Law, but Marked With a Lead Pencil throughout, is properly rejected. (Nev.) *Strosnider v. Turner*, 710.

8. ELECTIONS—Ballots.—Where the Crosses are Stamped Between the Name of the Candidate and the party designation, instead of in the square after the candidate's name, the ballot must not be counted. (Nev.) *Strosnider v. Turner*, 710.

9. ELECTIONS.—A Ballot is not Invalid Because a Cross, Plainly Visible, is blurred, evidently by the use of too much ink or by some other accident. (Nev.) *Strosnider v. Turner*, 710.

10. ELECTIONS.—Where a Small Portion of a Cross Projects Over the line dividing the squares opposite the names of two candidates,

but the main portion of the cross is opposite one of the names, the ballot will be counted for the latter. (Nev.) *Strosnider v. Turner*, 710.

11. **ELECTIONS—Ballot—Imperfect Crosses.**—A Ballot is not to be Rejected because some of the crosses stamped are imperfect. (Nev.) *Strosnider v. Turner*, 710.

ELECTRICITY.

See Master and Servant, 11, 12.

ELEVATED RAILWAYS.

See Street Railways, 1-4

EMBEZZLEMENT.

EMBEZZLEMENT—Funds Received by Officer Without Authority.—Since a policeman assigned to the position of jailer has no authority to receive money in payment of fines assessed in the corporation court of the city, he cannot be convicted of misappropriation of such funds under a statute making it a crime for any officer of a city to convert money belonging to the city and coming into his possession by virtue of his office. His authority in such a case is defined by law, not by custom; and the principle of estoppel cannot be invoked against him. (Tex. Cr.) *Hartnett v. State*, 971.

EMINENT DOMAIN.

1. **EMINENT DOMAIN—DAMAGES—Election of Remedies.**—A railroad company which had leased its road to another company instituted proceedings in the county court for the purpose of condemning the real estate of a land owner for right of way purposes. The land owner appeared and contested the jurisdiction of the court upon the ground that the company seeking to exercise the right of eminent domain was not the real party in interest. His objection was overruled, and the report of the appraisers awarding two thousand seven hundred dollars was confirmed. He then appealed to the district court, alleging the same facts, and averred that his damages were seven thousand dollars. He also sought to enjoin the proceedings, alleging the want of jurisdiction. The injunction being denied, he then amended his petition, claiming the increase of damages as demanded in his first petition. Held, that his proceeding to defeat the condemnation was not such an election of remedies as would prevent him from litigating as to the amount of damages. (Neb.) *Beckman v. Lincoln etc. R. R. Co.*, 655.

2. **EMINENT DOMAIN—Damages for Land Taken or Injured.**—In a proceeding to condemn real estate for the purposes of right of way for a railroad company, "the land owner is entitled to full compensation for the land actually taken, and for such damages to the residue of the land as are equivalent to the diminution in value thereof": *Fremont, E. & M. V. R. Co. v. Meeker*, 28 Neb. 94. (Neb.) *Beckman v. Lincoln etc. R. R. Co.*, 655.

3. **EMINENT DOMAIN—Damages for Danger from Fire or to Stock.**—In an inquiry whether and how much the part of a farm not taken for railroad right of way is depreciated in value by the appropriation of a part, it is proper for the jury to consider the liability of stock being killed, and the danger from fire from passing trains: See *Fremont, E. & M. V. R. Co. v. Bates*, 40 Neb. 381. (Neb.) *Beckman v. Lincoln etc. R. R. Co.*, 655.

4. **EMINENT DOMAIN—Instruction as to Amount of Damages.**—The trial court instructed the jury that, if the amount of damages found by them did not exceed two thousand seven hundred dollars,

no interest should be allowed, but, if it exceeded that sum, they should compute interest on the amount. The giving of the instruction was excepted to for the reason that, by inference, it informed the jury of the sum awarded by the appraisers. Defendant offered another one, which directed the jury to find damages and interest separately and unadded, which instruction was refused. Held, that while the instruction refused might, under the circumstances, have been the better, yet the giving of the one submitted would not require a reversal of the judgment. (Neb.) *Beckman v. Lincoln etc. R. R. Co.*, 655.

EMPLOYER'S LIABILITY.

See Master and Servant.

EQUITY.

1. **EQUITY—Laches, When not Fatal to the Complainants.**—The doctrine of laches in the prosecution of an action, when the delay does not amount to a bar by any statute of limitations, does not apply where the relative position of the parties has not been materially changed since the time when the cause of action accrued, and the delay has worked no wrong or serious inconvenience to the adverse party, so that substantial justice can still be done between the parties. (Idaho) *Just v. Idaho Canal etc. Co.*, 140.

2. **EQUITY—Rule That Plaintiff Must Do Equity—Statute of Limitations.**—If a litigant asks affirmative equitable relief, he will be required to do justice himself with regard to any equity arising out of the subject matter of the action in favor of his adversary, and the statute of limitations is no bar to the imposition of such conditions. (Neb.) *Bank of Alma v. Hamilton*, 676.

See Mistake.

ESTATES OF DECEDENTS.

See Executors and Administrators; Descent and Distribution; Wills.

ESTOPPEL.

1. **ESTOPPEL—Whether Paramount to Statute of Frauds or Wills.**—A property right created by estoppel is superior to the statute of frauds and the statutory provisions with reference to the execution of wills and conveyances of real and personal property. (Iowa) *McDowell v. McDowell*, 170.

2. **ESTOPPEL of Heir Who Induces Ancestor not to Make Will.**—Where a man, realizing that dissolution is near, states to his wife and mother that he desires the wife to have all his property, to which the mother expressly consents, and he dies a few hours later without making any will or conveyance, the mother is estopped to assert any interest under the statutes of succession. (Iowa) *McDowell v. McDowell*, 170.

See Descent and Distribution; Divorce; Landlord and Tenant, 1.

EVIDENCE.

Admissibility, Weight and Credibility.

1. **EVIDENCE—Instruction as to Weight or Credibility.**—Where, in an action for personal injuries sustained at a railroad crossing from a collision with a train, the defendant calls the gateman, who is deaf, as a witness, and he and his wife testify that his hearing was good at the time of the accident but deafness came on suddenly about a month thereafter, the court, after charging that there is no direct evidence that he was not in complete possession of his hearing at the time of the accident, may properly refuse to charge that there is no

"indirect evidence to the contrary"; and there is no impropriety in leaving it to the jury to decide whether his deafness within the time stated is consistent with the possession of unimpaired hearing when the accident happened. (N. Y.) *Gombert v. New York etc. R. R. Co.*, 794.

2. **APPEAL AND ERROR—Excluded Evidence—Curative Admission.**—No prejudice has been sustained by a party on whose behalf evidence is at first rejected but subsequently admitted; the error, if any, is thereby cured. (Ala.) *Dumas v. State*, 17.

3. **EVIDENCE, Sufficiency of.**—Evidence in this case examined, and held sufficient to support the verdict. (Idaho) *Just v. Idaho Canal etc. Co.*, 140.

4. **EVIDENCE.—Documents Executed Contemporaneously With a Transaction** in dispute become landmarks by which to correct, adjust and supply the imperfections and uncertainties of memory; they supply convincing evidence of controverted facts and will be construed most strongly against their author. (Neb.) *Bank of Alma v. Hamilton*, 676.

5. **EVIDENCE.—Erroneous Admission of Evidence is not Prejudicial** to the opposing party if it supports his claim and impeaches the case of his adversary. (Wis.) *White v. White*, 1100.

6. **EVIDENCE—Right of Court to Disregard as Impossible.**—It requires an extraordinary case to authorize the court to regard sworn testimony as manifestly impossible and untrue. (Wis.) *Bates v. Chicago etc. Ry. Co.*, 1069.

Judicial Notice.

7. **EVIDENCE—Judicial Notice of Facts Generally Known.**—Courts usually take notice of whatever should be generally known within the limits of their jurisdiction. (S. D.) *Kellogg v. Finn*, 945.

8. **EVIDENCE—Judicial Notice of Federal Officers.**—Courts take judicial notice of the more important federal officers, no matter where located, and of inferior federal officers located within the state. (S. D.) *Kellogg v. Finn*, 945.

9. **EVIDENCE—Judicial Notice of Former Conviction.**—In a prosecution for unlawfully selling liquor, the court will take judicial notice that an appeal is pending on its former judgment convicting the accused of the same offense. (Tex. Cr.) *Dupree v. State*, 998.

10. **EVIDENCE—Judicial Knowledge of Liquors—Metheglin (Mead).**—The courts do not judicially know that mead or metheglin is an alcoholic, spirituous, vinous, malt, or intoxicating liquor or beverage, or that, if it is drunk to excess, it will produce intoxication. (Ala.) *Marks v. State*, 20.

Value of Property.

11. **EVIDENCE—Value of Crops and Livestock.**—A Farmer who is engaged in raising farm crops and livestock is competent to testify to the value of such crops and livestock. (Neb.) *Anderson v. Chicago etc. Ry. Co.*, 626.

12. **EVIDENCE—Value of Land and Crops.**—A Farmer who has resided upon his farm for many years, and is actively engaged in agriculture, is competent to testify as to the value of his land and the crops raised thereon by him. (Neb.) *Anderson v. Chicago etc. Ry. Co.*, 626.

13. **EVIDENCE—Value of Tract of Land.**—A Farmer actively engaged in agriculture, and who is acquainted with a particular tract of land, and has a knowledge of the value of lands in its vicinity, is competent to give an opinion as to the value of the particular tract. (Neb.) *Anderson v. Chicago etc. Ry. Co.*, 626.

Public Records.

14. **EVIDENCE—Certificate of Officer in Custody of Records.**—A copy, from the records of the land office, of the government surveyor's field-notes required by law to be there recorded, certified to by the surveyor general, is admissible in evidence without being sworn to and without the testimony of witnesses that they have compared it with the original and found it a true copy. (S. D.) Kellogg v. Finn, 945.

15. **EVIDENCE—Parol Affecting Judicial Record—Matters Adjudicated.**—Though it is never permissible to introduce extrinsic evidence to vary or contradict a judicial record which does not on its face show the precise questions which were determined, parol or other extrinsic evidence which is not in conflict with the record may be introduced to aid and explain it by showing the precise questions which were determined, or that certain questions were not passed upon, or otherwise clear up existing doubts. (S. D.) McPherson v. Swift, 907.

Parol to Explain Writings.

See ante, 15.

16. **EVIDENCE—Parol to Contradict Writing.**—In an action to recover personal property, wherein the issue is whether the defendant agreed to hold the property as bailee for the plaintiff, evidence is admissible, without any pleading, that a stipulation in the receipt given for the property is not binding on the plaintiff because inserted without his knowledge and contrary to agreement. (Iowa) Dee v. Sears-Nattinger Auto. Co., 182.

17. **CONTRACT, Parol Evidence, When will not Vary Written Contract.**—Parol evidence to place upon one of the parties to a contract a greater burden than was imposed by such contract, though admitted without objection, cannot have the effect of changing a contract in writing. (Mass.) Butterick Pub. Co. v. Fisher, 283.

18. **EVIDENCE—Parol to Vary Contract.**—A contract for the sale of land must be gathered from the writing; no outside conversation or oral statement can modify it except to impeach it for previous fraud or mistake. (Ky.) Anthony v. Hudson, 231.

See Constitutional Law, 12; Homicide, 7-10; Witness.

EXECUTION.

1. **JUDGMENT—Enforcement.**—An execution is a remedy afforded by law for the enforcement of a judgment; it is not an action, and no action is necessary to obtain it. (Colo.) Brown v. Bell, 54.

2. **JUDGMENT—Enforcement.—An Execution,** otherwise issuable as of right, may issue on a justice's judgment, and be of force after the six years' statute of limitations has run against an action on the judgment. (Colo.) Brown v. Bell, 54.

3. **EXECUTION—Receiving in Evidence Without Proof of Judgment.**—As a general rule, an execution cannot be received in evidence without proof of the judgment on which it was issued. (Neb.) Hoover v. Jones, 647.

4. **EXECUTION on Separate Judgments, When Sufficiently Identifies Them and is not Void.**—An execution which recites that "whereas, on the thirteenth day of April, 1898, in an action pending before George I. Robinson, a justice of the peace of Elkhorn township, Lincoln county, in the state of Kansas, John H. Dugan recovered two judgments against W. P. Harman and Lucy A. Harman for the sum of three hundred and sixty-eight dollars and seven cents, and the further sum of six dollars and twenty-three cents as

costs of suit, with interest at the rate of ten per cent per annum from the ninth day of April, 1898, and afterward the said John H. Dugan duly filed his abstract of said judgment in the district court of Lincoln county, Kansas," is not void. And such execution, issued less than five years after the thirteenth day of April, 1898, is sufficient to prevent two judgments rendered on that date by the same court in favor of the same plaintiff and against the same defendants, for separate sums aggregating three hundred and sixty-eight dollars and seven cents, and six dollars and twenty-three cents costs, from becoming dormant for a period of five years from the date of such execution. (Kan.) *Dugan v. Harman*, 209.

5. EXECUTION SALE—Redemption—Full Amount.—If a judgment creditor, desiring to redeem, pays to the officer the proper amount, and the officer errs in distributing the money, so that he holds insufficient to effect the redemption, but the creditor at once tenders him the deficiency, his rights are unaffected by the sheriff's mistake. (Colo.) *Brown v. Bell*, 54.

See Officers.

Note.

Execution, time within which may issue, 64-72.

EXECUTORS AND ADMINISTRATORS.

In General.

1. ADMINISTRATORS.—Adopted Children of a Decedent have **No Right** to administer his estate, to select an administrator, or to object to an appointment by the register of wills. (Pa.) *Smith's Estate*, 894.

2. ESTATE OF DECEDENT—Rights of Judgment Creditor of Heir.—A judgment recovered against an heir after the death of his ancestor attaches to the heir's interest in the estate subject to the condition that the land may be sold to pay the debts of the decedent and the expenses of administration. (Minn.) *Kolars v. Brown*, 410.

3. ADMINISTRATION—Exemption for Widow.—The Undivided One-half Interest of a decedent in exempt articles may be set apart for the use of his widow, where he is not the owner in severalty of sufficient personalty to satisfy the statute. (N. Y.) *Matter of Hal-lenbeck*, 782.

Creditors' Claims.

4. ESTATE OF DECEDENT—Payment of Creditors' Claim.—A Decree in the Alternative in a creditor's suit revived against an executor, allowing him to pay a judgment out of the assets of the estate or deliver them to that amount to the receiver, does not work any hardship against the executor. (Mich.) *Saginaw County Sav. Bank v. Duffield*, 354.

5. ESTATE OF DECEDENT—Effect of Filing Claim.—One Who by Creditor's Bill obtained a lien on the assets of his debtor releases no right, on the death of the debtor, by filing his claim with the commissioners of claims, giving a complete history of it and the proceedings by which it was obtained. (Mich.) *Saginaw County Sav. Bank v. Duffield*, 354.

Sale of Property.

6. EXECUTOR'S SALE—Whether Converts Land into Personalty.—A probate sale of real property changes the character thereof only so far as is necessary to effect the purpose of the sale, and any surplus after such purpose has been effected should be treated as real estate. (Minn.) *Kolars v. Brown*, 410.

7. EXECUTOR'S SALE—Heir's Right to Surplus Proceeds.—When land is sold in proceedings in the probate court for the payment of debts and expenses of administration, the surplus proceeds, if any, go to the heir who would have taken the land. (Minn.) *Kolars v. Brown*, 410.

8. EXECUTOR'S SALE—Right to Proceeds of Judgment Creditor of Heir.—When real estate is sold under the direction of the probate court for the purpose of paying debts and expenses, the conversion of the real estate into money is complete only to the extent and for the purpose for which the sale was authorized. So far as these purposes do not extend, the property retains its former character in respect of the rights of the owner. Therefore any surplus must be applied to the payment of a judgment obtained against the heir, and duly docketed after the death of the ancestor and before the sale. (Minn.) *Kolars v. Brown*, 410.

Unsafe Premises.

9. ADMINISTRATOR—Duty to Keep Property in Safe Condition.—An administrator lawfully in possession of the property of the intestate is bound to keep it in a safe condition so as to prevent injury to travelers along the street. (Mich.) *Bannigan v. Woodbury*, 371.

10. ADMINISTRATOR—Liability for Unsafe Condition of Premises.—Where the administrator in possession of an estate allows a window to remain out of repair so that the glass falls into the street injuring travelers, he is personally liable therefor; and an allegation in the complaint that he is administrator, and as such in possession of the property, does not negative his personal liability, and may be treated merely as descriptio personae and surplusage. (Mich.) *Bannigan v. Woodbury*, 371.

Actions for Negligence.

11. ESTATE OF DECEDENT—Liability to Action for Negligence. A cause of action for negligence which arose after the death of an intestate cannot be maintained against his estate. (Mich.) *Bannigan v. Woodbury*, 371.

12. ADMINISTRATOR—Pleading in Action Against for Negligence.—In an action against an administrator for negligence, an allegation that he is administrator may be treated as descriptio personae and surplusage, and does not negative his personal liability. (Mich.) *Bannigan v. Woodbury*, 371.

EXEMPTION FOR WIDOW.

See Executors and Administrators, 3.

EXTRADITION.

EXTRADITION—Change of Government from Territory to State.—The right of a state to extradite a fugitive from justice is not affected by its transition from a territory to a state government between the time of the commission of the offense and the arrest of the prisoner. (Tex. Cr.) *Ex parte McCarty*, 964.

FALSE IMPRISONMENT.

See Charitable Institutions.

FALSE PRETENSES.

1. FALSE PRETENSES—Obtaining Money as a Charity.—The crime of obtaining money by false pretenses is committed by one who

obtains funds as a charity under false representations that he has suffered a loss of property. (Wash.) *State v. Swan*, 1024.

2. **CRIMINAL LAW**—Act Constitutes Two Different Offenses.—It is no defense to a prosecution for obtaining a gift of money by false pretenses that the same act is also punishable as vagrancy. (Wash.) *State v. Swan*, 1024.

FENCES.

See Railroads, 4-7.

FIERI FACIAS.

See Mortgages, 9-11.

FORGERY.

1. **FORGERY**.—A Deposit Slip or Ticket, Such as is Commonly Used in Banking, is an evidence of debt and a subject of forgery. (Mo.) *State v. Jackson*, 477.

2. **FORGERY**.—Deposit Slip—Sufficiency of Indictment.—Where a deposit slip is embraced in the indictment for forgery, and upon its face shows its legal efficacy, there is no necessity for an allegation of any extrinsic matter to give the instrument alleged to have been forged any force and effect beyond what appears on its face. (Mo.) *State v. Jackson*, 477.

3. **FORGERY**.—Name of Instrument in Indictment.—Courts are not disposed to "quibble" about the name of the instrument charged to have been forged. (Mo.) *State v. Jackson*, 477.

4. **FORGERY**.—Name of Instrument in Indictment.—If the Instrument as set out in an indictment for forgery is an evidence of debt, it is a matter of little concern as to what the instrument is called. (Mo.) *State v. Jackson*, 477.

5. **FORGERY**.—Variance Between Indictment and Proof.—A Variance between the deposit slip alleged in an indictment for forgery and the evidence offered by the prosecution is not fatal if not material to the merits of the case nor prejudicial to the offense of the accused. (Mo.) *State v. Jackson*, 477.

6. **FORGERY**.—The Giving of an Instruction in a Prosecution for Forgery "that it is not necessary to prove that defendant is guilty by the testimony of witnesses who may have seen the offense committed; his guilt may be shown by proof of facts and circumstances from which it may be reasonably and satisfactorily inferred"—is not reversible error, although it may have been more appropriate to follow the approved precedents. (Mo.) *State v. Jackson*, 477.

See Bills and Notes, 2.

FORMER JEOPARDY.

See Criminal Law, 5; Evidence, 9.

FRAUD.

1. **FRAUD**.—Action for Deceit.—To Maintain an action for deceit, the statement relied on must be false, and be made with actual or constructive knowledge of its falsity, and it must also be shown that it actually did mislead or deceive. (Ky.) *Southern Express Co. v. Fox*, 241.

2. **COMPETITION IN BUSINESS**, What not Justified by.—One's desire to advance his own business in competition does not justify his attempting to interfere with the business of another by misrep-

resentation and the making of false and misleading publications. (Mass.) *Davis v. New England Ry. Pub. Co.*, 318.

FRAUDS, STATUTE OF.

1. **STATUTE OF FRAUDS—Authority of Agent to Sell Land.**—To render valid and enforceable a contract by an agent for the sale of real property of his principal, his authority to make the same must, under the statute of frauds, be in writing. (Minn.) *Thomas v. Rogers*, 421.

2. **STATUTE OF FRAUDS—Authority of Agent to Sell Land.**—The fact that the principal verbally authorizes the agent to accept by telegram an offer of purchase does not, in the absence of facts or circumstances creating an estoppel, obviate the lack of written authority in the agent, where the acceptance is in the agent's name. (Minn.) *Thomas v. Rogers*, 421.

3. **STATUTE OF FRAUDS—Doctrine of Part Performance.**—A contract so entered into by an agent stands in the position of an oral contract, and enforceable only when there has been a substantial part performance. (Minn.) *Thomas v. Rogers*, 421.

4. **STATUTE OF FRAUDS—Doctrine of Part Performance.**—Facts stated in the opinion held not to constitute part performance, within the rule applicable to such cases. (Minn.) *Thomas v. Rogers*, 421.

5. **STATUTE OF FRAUDS—When not Waived During Trial.**—A Defendant does not waive the statute of frauds, when he has once made timely objection to oral testimony on the issue and been overruled, by not repeating the objection as other similar testimony is produced, nor by afterward testifying to his understanding of the conversation, nor by requesting findings of fact based upon all the testimony, nor by requesting declarations of law not including the statute, nor by failing to mention the statute in his motion for a new trial which alleges the admission of incompetent evidence over objection. (Mo.) *McKee v. Rudd*, 529.

6. **STATUTE OF FRAUDS—Pleading.**—A General Denial is Sufficient to Raise the statute of frauds in an action for fraud based upon representations as to the financial ability of another; and the statute is not waived by further language in the answer that the defendant "denies that at any time, either directly or otherwise, he made any representation to said plaintiff with reference to the solvency of said company." (Mo.) *McKee v. Rudd*, 529.

See Estoppel; Trusts, 6-10.

GAMING.

RAFFLING—Recovery of Property by Successful Party.—Where the owner of an automobile, after disposing of it at a raffle, gives the successful participant an order for the machine on the persons having the actual possession thereof, they cannot refuse delivery because of the illegality of the transaction by which title was transferred, especially after recognizing the order and consenting to hold the machine for the new owner. (Iowa) *Dee v. Sears-Nattinger Auto. Co.*, 182.

GARNISHMENT.

1. **GARNISHMENT—Rights of Third Persons.**—Service of summons in garnishment upon a debtor of a solvent attachment defendant will not revoke an authority theretofore given by said defendant to his debtor to pay a part of said debt to a person not a party to the attachment suit. (Neb.) *Cockins v. Bank of Alma*, 642.

2. **GARNISHMENT—Rights of Third Persons.**—And in such a case the debtor will be justified in acting upon said instructions, if he retains in his hands twice the amount of the attaching creditor's demand. (Neb.) *Cockins v. Bank of Alma*, 642.

GAS COMPANIES.

GAS COMPANY—Liability for Explosion After Notice of Escaping Gas.—Where a gas company employs a man to patrol a street where excavations are being made for a public improvement, with instructions to watch for and immediately report any escape of gas, and at different times he is notified that gas is escaping at certain points but makes no report thereof to the company, and several hours later an explosion occurs which injures workmen engaged in the excavation, the gas company is liable. (Pa.) *Diehle v. United Gas Imp. Co.*, 888.

GRATUITOUS SERVICES.

See Work and Labor.

HABEAS CORPUS.

HABEAS CORPUS—Violation of Order in Excess of Jurisdiction.—One imprisoned for the violation of an order or judgment in excess of jurisdiction can be discharged by writ of habeas corpus. (Mo.) In *re Shull*, 496.

HACKMEN.

See Carriers, 13.

HEALTH REGULATIONS.

1. **HEALTH OFFICER—Scope and Nature of Powers.**—A health officer must necessarily possess large powers and be endowed with the right to take summary action which at times may trench upon despotic rule. (Wis.) *State v. Milwaukee*, 1060.

2. **HEALTH OFFICER—Power to Revoke License of Milk Vender.**—A city with authority to license, restrain, and regulate the sale of milk has power to revoke licenses of milk venders, and may vest this power in the health commissioner with right to exercise the same summarily and even without notice. (Wis.) *State v. Milwaukee*, 1060.

3. **RIGHTS OF WAY, Legislative Interference with Which is not Permissible.**—Though the enjoyment of a private right of way may be subjected to reasonable regulations for the protection of the health of the community, the easement cannot be arbitrarily restricted so as to be practically destroyed in the interests of the public without providing indemnity. (Mass.) *Durgin v. Minot*, 276.

4. **RIGHTS OF WAY—Constitutional Law—Requiring Paving.**—A statute purporting to confer on the board of health of a municipality the arbitrary power to declare a private passageway injurious to the public and to compel the owners to pave or lay the roadway permanently, as such board may direct, is not a reasonable exercise of the police power, and is therefore unconstitutional. (Mass.) *Durgin v. Minot*, 276.

HIGHWAYS.

See Automobiles.

HOMESTEAD.

1. **HOMESTEAD—Purchase-money Mortgage, What is.**—A mortgage executed to secure money borrowed for the specific purpose of satisfying a bid for real estate sold at sheriff's sale, and delivered

simultaneously with the delivery of the officer's deed, is a purchase-money mortgage, valid as against a claim of homestead made by the purchaser's spouse. (Neb.) *Peterson v. Fisher*, 688.

2. **HOMESTEAD—Validity of Lease not Joined in by Wife.**—The lease of a homestead, without the signature of the wife, is without validity, if it will exclude any enjoyment of the premises by her; it is an "alienation" of the homestead, which the statute declares invalid unless signed by the wife. (Mich.) *Mailhot v. Turner*, 333.

HOMICIDE.

In General.

1. **HOMICIDE—Cause of Death.**—The physical condition of the slain man when the wounds were inflicted, even though "at first trifling," does not justify or minimize the act of the slayer, if the causal connection between the wounds and the death is shown; the fact that the deceased suffered from a disease which contributed to the extreme result does not interrupt the order of causation. (Ala.) *Dumas v. State*, 17.

2. **HOMICIDE—Instruction as to Provocation or Adequate Cause.** Where a statutory ground of "provocation or adequate cause" is shown by the evidence, it is the duty of the court to inform the jury that such cause is adequate, leaving to the jury the determination as to whether or not there was sudden passion engendered by reason of adequate cause. (Tex. Cr.) *Hightower v. State*, 966.

Assault to Murder.

3. **ASSAULT TO MURDER—Instruction as to Adequate Cause.**—In a prosecution for assault to murder, where the evidence shows that the wife and mother in law of the accused threw him down and were beating him at the time of the alleged offense, the court should not leave to the jury to determine under the facts what is provocation or adequate cause, when the statute provides that an assault creating pain or bloodshed is adequate cause. (Tex. Cr.) *Hightower v. State*, 966.

4. **ASSAULT TO MURDER—Use of Weapon—Intent.**—In a prosecution for assault to murder, where the evidence shows that the wife and mother in law of the accused threw him down and were beating him when he used on them a pocket knife with a blade some two and a half inches long, the jury should be instructed that unless there was a specific intent to kill they should acquit him of assault to murder. (Tex. Cr.) *Hightower v. State*, 966.

5. **ASSAULT TO MURDER—Prior Threats of the Injured Person.** On the trial of a man for assault to murder his wife and mother in law, where there is evidence of their previous threats to kill him, and of their having assaulted him, whereupon his alleged offense was committed, the instruction to the jury should be based not on the knowledge of the accused of the threats, but on his belief that such threats had been made, and that acting on such belief he had defended himself from the attack made on him. (Tex. Cr.) *Hightower v. State*, 966.

6. **ASSAULT TO MURDER—Instruction Limiting Self-defense.**—Where the state's evidence in a prosecution for assault to murder is to the effect that the accused made an assault upon his wife and mother in law, while his evidence shows that they threw him down and were beating him and calling for a near-by gun, whereupon he used a pocket-knife to free himself, wounding the wife to some extent, it is error in charging self-defense to instruct the jury that if he exercised more force than was necessary to protect himself, then he would be the aggressor and guilty of an assault to murder or an aggravated assault. (Tex. Cr.) *Hightower v. State*, 966.

Evidence.

7. **HOMICIDE—Evidence.**—Expert opinion as to the relative attitude of the deceased and the instrument or person inflicting the wound is properly rejected; it relates to an inference of fact to be drawn by the jury. (Ala.) *Dumas v. State*, 17.

8. **HOMICIDE.—Dying Declarations, Whether Tendered by Prosecution or Defense,** are inadmissible unless preceded by the requisite predicate. (Ala.) *Dumas v. State*, 17.

9. **APPEAL AND ERROR—Homicide—Evidence of Threats by Deceased—Reply of Defendant.**—Where evidence that threats by the deceased against defendant were communicated to him was admitted, it was not prejudicial to defendant also to admit that he said in reply thereto, "If he is going to kill me, I will go home." (Ala.) *Dumas v. State*, 17.

10. **CRIMINAL TRIAL—Res Gestae—Declarations After Separation of Parties.**—In a prosecution for homicide, where it appears that the parties separated after the combat in which the deceased was mortally wounded, but shortly afterward again met at a drug-store where they had gone to have their wounds dressed, their acts and declarations there in the course of a second altercation are admissible. (Tex. Cr.) *Derden v. State*, 986.

Self-defense.

11. **CRIMINAL LAW—Self-defense.—An Instruction** that "where a party is assaulted, and his adversary apparently abandons the difficulty, he has no right to pursue or fire upon him, unless it is necessary to do so in order to protect himself from a renewal of the unlawful attack," is not erroneous in using the word "apparently," when it is evident that the court used it in the same sense of "evidently," "obviously," or "clearly." (Tex. Cr.) *Derden v. State*, 986.

See Corporations, 21.

HOUSE OF GOOD SHEPHERD.

See Charitable Institutions.

HUSBAND AND WIFE.*Contracts and Conveyances.*

1. **HUSBAND AND WIFE.—A Deed of Conveyance Direct from Husband to Wife** without the intervention of a trustee, made in good faith, and not in fraud of creditors, is valid both in law and equity, and operates to pass the full title and estate which it purports to convey. In so far as *Aultman, Taylor & Co. v. Obermeyer*, 6 Neb. 260, and *Johnson v. Vandervort*, 16 Neb. 144, hold to the contrary, such cases are overruled. (Neb.) *Currier v. Teske*, 602.

2. **HUSBAND AND WIFE—Wife's Contract.**—Kentucky Statutes of 1903, section 2128, authorize married women to contract as though single, except as to real property; section 2137 makes her estate liable for debts contracted by her after marriage. Her liability on a contract for services to be rendered is unaffected by section 2130, which provides for the husband's liability for necessities furnished to the wife after marriage. (Ky.) *Hardiman v. Crick*, 248.

Right of Consortium.

3. **HUSBAND AND WIFE.—The Right of Consortium** is a right growing out of the marriage relation, which the husband and wife have respectively to enjoy the society, companionship and affection of each other in their life together. (Mass.) *Fenell v. New York etc. R. R. Co.*, 291.

4. HUSBAND AND WIFE—Her Right to Recover for Loss of Consortium Due to the Negligent Injury of the Husband by the Defendant.—Where the husband has suffered personal injuries by the negligence of another and has recovered damages therefor, his wife cannot recover for loss of consortium due to the same negligence and injury. (Mass.) *Feneff v. New York etc. R. R. Co.*, 291.

Alienation of Affections.

5. ALIENATION OF AFFECTIONS—Action by Wife—Parties.—Where through conspiracy the parents of a man alienate and separate him from his wife, he is not a joint tort-feasor with them and hence is not a proper party defendant in her action for the wrong. (Wis.) *White v. White*, 1100.

6. ALIENATION OF AFFECTIONS—Action by Wife—Evidence. In an action by a wife against her husband's parents for their alienation of his affections, she may testify to his declarations to her and others of inducements held out to him by his parents to abandon her. (Wis.) *White v. White*, 1100.

7. ALIENATION OF AFFECTIONS—Action Against Parents of Husband.—In determining whether parents maliciously conspired to accomplish the alienation of their son's affections from his wife, the evidence should be considered in view of the rights of the parents and their obligations respecting their son's welfare and happiness. (Wis.) *White v. White*, 1100.

8. ALIENATION OF AFFECTIONS.—Exemplary Damages may be Awarded in an action by a wife against the parents of her husband for a malicious conspiracy to alienate his affections, although one of the defendants is without property while the other has considerable means. (Wis.) *White v. White*, 1100.

9. ALIENATION OF AFFECTIONS—Measure of Damages.—An award of five thousand dollars compensatory damages and fifteen hundred dollars exemplary damages is not excessive in an action by a wife against her husband's parents for alienating his affections. (Wis.) *White v. White*, 1100.

Abandonment of Wife.

10. ABANDONMENT OF WIFE—Constitutionality of Statute.—A statute directing that a fine imposed upon a man for abandoning his wife shall be paid to her violates the constitutional prohibition against appropriations for private purposes. (Tex. Cr.) *Ex parte Smythe*, 976.

11. ABANDONMENT OF WIFE—Suspension of Sentence.—A statute authorizing a court to release from custody a man convicted of abandoning his wife upon his entering into a recognizance to pay her a certain sum weekly violates the constitutional prohibition against the suspension of any law except by the legislature. (Tex. Cr.) *Ex parte Smythe*, 976.

12. ABANDONMENT OF WIFE—Deprivation of Rights to Jury Trial.—A statute authorizing a court, instead of imposing the punishment therein provided, or in addition thereto, to release from custody a man charged with abandoning his wife, upon his entering into a recognizance to pay her a certain sum weekly, deprives him of his constitutional right to a trial by jury. (Tex. Cr.) *Ex parte Smythe*, 976.

See Acknowledgment.

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IDEM SONANS.

See Names, 2.

INDICTMENT.

1. **INDICTMENT—Omission of Date of Offense—Intoxicating Liquors.**—It is a fatal objection to an indictment to omit the date of an offense when the statute creating such offense came into operation only five months before filing the charge. In such case time is a material ingredient. (Ala.) *Marks v. State*, 20.

2. **INDICTMENT—Filing and Indorsement.**—The Failure of the Clerk to indorse on an indictment for forgery the filing and the date of the return of the indictment into court does not authorize the discharge of the accused. (Mo.) *State v. Jackson*, 477.

3. **INDICTMENT.—An Indictment for Forgery is Filed in Contemplation of law when it is returned into open court, presented to the court, and deposited with the clerk.** (Mo.) *State v. Jackson*, 477.

INJUNCTION.

1. **INJUNCTION Against Publication Misrepresenting or Ignoring Complainant and His Business.**—One who carries on an express business in a city is entitled to enjoin the publication of a directory which apparently purports to contain the names of all persons and corporations in such business, but omits the complainant's name and business with the purpose of injuring him and securing the business for others. (Mass.) *Davis v. New England Ry. Pub. Co.*, 318.

2. **INJUNCTION — Joinder of Parties — Multifariousness.**—The publishers of a directory, apparently purporting to contain the names of all the persons carrying on a designated business in a large city, who refuse to insert therein the name of a person carrying on such business, with a view to injuring him and promoting the interests of other persons carrying on a like competing business in the same city, and are instigated to so refuse by such business rivals, may, with them, be joined in one suit to enjoin the continuance of such direc-

tory without inserting the plaintiff's name and business therein. The complainant has the right to prevent the rivals from attempting to procure this wrongful kind of publication in the future and to have the publishers of the directory relieved from the temptation to continue the wrongful publication. (Mass.) *Davis v. New England Ry. Pub. Co.*, 318.

3. MANDATORY INJUNCTION to Compel the Removal of a Foundation Wall Erected Without Right Beneath a Private Right of Way.—Where the owner of land adjoining a private court or right of way commences to erect a building and projects his foundation beneath such way, and is notified by the owner of the fee after the foundations have been put in, but before the superstructure is built, that no encroachment will be allowed, nevertheless proceeds with his building and is compelled to project the foundation as essential to its support, a mandatory injunction will issue for the removal of the foundation, though it may impose expense on the defendant disproportionate to the apparent benefit to the complainant. (Mass.) *Curtis Mfg. Co. v. Spencer Wire Co.*, 307.

Note.

Injunction in protection of trade secrets, 765, 768.

INSTRUCTIONS.

See Trial, 5-14.

INSURANCE.

Payment of Premiums and Assessments.

1. INSURANCE—Payment of Assessment, What is not.—Where an assessment association makes a bank its depository, authorizing it to receive assessments from members but directing it not to accept those past due unless specially authorized, and a member, who is a depositor at the bank and there pays his assessments, has an agreement with the cashier to pay his assessment, if he should at any time forget it, and charge the same to his account, such agreement does not constitute payment, so as to prevent a lapse of the policy, of an assessment of which neither the cashier nor the bank has notice. (Iowa) *Griffith v. Merchants' Life Assn.*, 177.

2. INSURANCE—Action on Policy—Amendment After Trial.—Where, in an action on a policy, defended on the ground of nonpayment of an assessment, no issue on the validity of the assessment is raised until after the case is submitted, that issue cannot be raised by an amendment to the petition filed after the trial, without taking steps to set aside the submission and giving the defendant opportunity to meet the changed front. (Iowa) *Griffith v. Merchants' Life Assn.*, 177.

3. LIFE INSURANCE—Nonpayment of Premiums—Days of Grace.—Where a policy of life insurance provides that "after the first premium shall have been paid a grace of thirty days, during which the contract shall remain in force, will be allowed in the payment of premiums," and the insured pays the first premium promptly, but dies twenty-three days after the second payment is due without paying it, the policy is in force at the time of the death and the company is bound to pay it. (Pa.) *Gottlieb v. Mutual Life Ins. Co.*, 856.

Life Insurance.

4. LIFE INSURANCE—Absence of Insured for Seven Years.—Where the beneficiary in a benefit certificate shows that the insured has been absent from his home unheard of for seven years, she is entitled to recover the insurance, if no evidence is offered to rebut

the presumption of death from such absence. (Wis.) *Miller v. Sovereign Camp W. O. W.*, 1095.

5. **LIFE INSURANCE—Waiver of Proof of Death.**—The refusal of a benefit association to recognize any liability based on the presumption of death arising from seven years' absence of the insured is a waiver of its right to insist upon proofs of death as a condition precedent to suing on the benefit certificate. (Wis.) *Miller v. Sovereign Camp W. O. W.*, 1095.

Fire Insurance.

6. **FIRE INSURANCE—Policy Issued by Interested Agent.**—A policy of insurance issued on property of a corporation in which the agent is a stockholder and officer and in which a bank wherein he is a stockholder and cashier owns stock, is voidable only and subject to ratification by the insurer. (Iowa) *Arispe Mercantile Co. v. Queen Ins. Co.*, 180.

7. **INSURANCE—Fire Confined Within Furnace—Damage from Radiated Heat and Smoke.**—Where a fire is started in a furnace with highly inflammable materials not intended for such purpose, and the fire, although confined within the furnace, soon becomes so intense that the heat and smoke char and discolor the furniture, woodwork and finish of the house, without actual ignition thereof, the fire is "hostile" and the injury a "direct loss or damage by fire" within the meaning of the Wisconsin standard policy. (Wis.) *O'Connor v. Queen Insurance Co.*, 1081.

8. **FIRE INSURANCE—Change in Title—Notice to Agent.**—In a suit on fire insurance policies covering certain personal property, and conditioned that a change in the title of the property should avoid the policy, notice to the company of a bill of sale made by the insured to a bank was attempted to be shown from the knowledge of such bill of sale possessed by the agent of the company, who at the time was also assistant cashier of the bank. Held, that while notice to an agent will generally be imputed to his principal, the rule does not apply where the agent's duty to his principal is opposed to his own interest or conflicts with the interest of another party for whom he acts in the transaction where knowledge is obtained. (Neb.) *Exchange Bank v. Nebraska Underwriters' Ins. Co.*, 614.

9. **FIRE INSURANCE—Estoppel to Avoid After Demanding Proof of Loss.**—Where the adjuster, with knowledge that the agent who issued the policy was financially interested in the property insured, proceeds as though the insurance were valid and puts the insured to the trouble and expense of making proofs of loss, the insurer is estopped to urge the invalidity of the policy arising from the agent's dual relation to the parties. (Iowa) *Arispe Mercantile Co. v. Queen Ins. Co.*, 180.

See Benefit Association.

Note.

Insurance, exception in standard policies as to electric current, 1089.

fire, burning of a lamp, 1089, 1090.

fire caused by lawless action of third persons, 1095.

fire caused by riots, 1095.

fire caused by short circuiting of the electric current, 1091.

fire, charring of property as evidence of, 1089.

fire, chimney fires, and smoke and soot from disengaged stove-pipe, 1089.

fire, combustion, what is, 1088.

fire, confinement of to the place intended, 1089, 1090.

fire, damage caused by heat or smoke, 1090.

fire, damage by, when it causes or is caused by an explosion, 1091, 1092.

Insurance, fire, damage from excessive use of, 1090.

- fire, damage to automobile from fire caused by gasoline's leaking after an accident, 1090, 1091.
- fire, definitions of, within the meaning of policies of, 1087, 1088.
- fire, explosion caused by, 1091, 1092.
- fire, explosion in building other than that insured, 1091, 1092.
- fire, explosion preceding, 1091.
- fire, falling walls, damages from, 1094.
- fire, falling walls proximately the cause of, 1094.
- fire, heat short of ignition does not amount to, 1089.
- fire, hostile and friendly considered, 1089.
- fire, lightning, loss by, whether recoverable as a loss by fire, 1093.
- fire, loss by due to the acts of mobs or other lawless organizations, 1094, 1095.
- fire, loss by, what included within, 1091.
- fire, loss by, when includes damage resulting from water used in extinguishing, 1091.
- fire, loss from, when includes damage due to the blowing up of a building, 1091.
- fire, loss or damage must be the proximate result of, 1091.
- fire, loss, when deemed due to an explosion, 1092, 1093.
- fire, slow and rapid combustion, both fall within definitions of, 1088, 1093.
- fire, spontaneous combustion from immersion in water, 1088.
- fire, whether must be visible, 1088.
- heat short of ignition does not amount to, 1089.
- loss by fire, what included within, 1091.

INTERSTATE COMMERCE.

See Commerce.

INTERURBAN RAILWAYS.

See Street Railways, 5.

INTOXICATING LIQUORS.*Recovery by Wife from Liquor Seller.*

1. **INTOXICATING LIQUORS—Right to Recover of the Liquor Seller for Damages Due for the Acts of a Habitual Drunkard.**—A wife cannot recover of a seller of intoxicating liquors for the acts of her habitually drunken husband, done while perfectly sober, though the defendant had contributed to the formation of the habits of intoxication; yet if a man who is a habitual drunkard for a specified period assaults his wife while in a state of such drunkenness, the defendant who, by selling him liquor, had caused him that drunkenness in whole or in part is liable, if his intoxication at that time was the cause of the assault. (Mass.) *Minot v. Doherty*, 281.

2. **INTOXICATING LIQUORS—Damages—Pain of Wife in Miscarriage.**—A married woman entitled to recover for personal injuries causing her miscarriage is not deprived of her right of recovery on the ground that her labor in such miscarriage may not have been greater than would have ultimately or naturally resulted from her pregnancy. (Mass.) *Minot v. Doherty*, 281.

Selling Without License.

3. **INTOXICATING LIQUORS—Retailing Without License**—A mere agent purchasing for himself and others, with no interest in the sale beyond the joint acquisition of liquor, is not guilty of retailing the liquor without a license. (Ala.) *Dial v. State*, 19.

4. INTOXICATING LIQUORS—Retailing Without License.—Where several persons pool money to buy whisky, and one of them buys it for the company and brings it to them, that one cannot be convicted of retailing the liquor without a license. (Ala.) Dial v. State, 19.

Statute Invalidating Saloon Lease.

5. SALOON LEASE—Subsequent Statute Forbidding Sale of Liquor.—The enactment of a local option law after a lease of premises for hotel and saloon purposes has been made, which renders performance by the lessee unlawful, discharges the contract. (Mich.) Hooper v. Mueller, 399.

Prohibition Statutes.

6. INTOXICATING LIQUORS—Statute—Construction.—The "Carmichael bill," which renders it unlawful to sell, etc., alcoholic, spirituous, vinous, or malt liquors, intoxicating bitters or beverages, or other liquors or beverages by whatsoever name called, which if drunk to excess would produce intoxication, does not embrace every liquor or beverage which contains a trace of alcohol or maltose, or even that contains one or both in appreciable quantities, if capable of being used as an intoxicating beverage. (Ala.) Marks v. State, 20.

7. INTOXICATING LIQUORS—Prohibition Statute.—The object of prohibition laws is to remedy the improper use of intoxicating liquors as a beverage, rather than as an ingredient of medicines and articles of toilet, or for culinary purposes, and this object must not be lost sight of in its interpretation. (Ala.) Marks v. State, 20.

8. INTOXICATING LIQUORS—Unnamed Beverage—Jury Question.—Where, under the "Carmichael bill," it was unlawful to sell certain named liquors and others unnamed, which latter, if drunk to excess, would produce intoxication, the fact that certain liquor, mead or metheglin, the subject matter of a charge, contained about two and one-half teaspoonfuls of alcohol to the pint does not of itself bring such liquor within the inhibition of the statute, and it is a question for the jury whether the liquor sold did so come within the statute; it was a question of fact, not law. (Ala.) Marks v. State, 20.

9. INTOXICATING LIQUORS—Prohibition.—In section 1 of General Acts of 1907, known as the "Carmichael bill," which renders it unlawful to sell, etc., alcoholic, spirituous, vinous or malt liquors, intoxicating bitters or beverages, or other liquors or beverages by whatsoever name called, which if drunk to excess will produce intoxication, the words "which if drunk to excess will produce intoxication" apply only to the "other liquors or beverages by whatsoever name called." (Ala.) Marks v. State, 20.

10. INTOXICATING LIQUORS—Statute—Construction.—When a prohibition statute names, designates or enumerates the kinds, classes or species of beverages or liquors against which its provisions are directed, there is no room for further inquiry into the scope of such statute. (Ala.) Marks v. State, 20.

11. INTOXICATING LIQUORS.—The Power of the Legislature to Absolutely Prohibit the sale of intoxicating liquors is undoubted, to say what are intoxicating and what are prohibited, and to frame laws so as to effect the purpose of the legislation; and courts will not so construe the law as to render it void if dependent upon only one of these legislative powers, when it would be perfectly valid if referred to the other or both powers. (Ala.) Marks v. State, 20.

12. INTOXICATING LIQUORS—Prohibition Statute—Construction.—When a statute uses merely general terms, such as alcoholic,

spirituous, etc., it is a question for the courts or juries to determine, in each case, whether a given liquor is within the inhibition of the statute. (Ala.) Marks v. State, 20.

Definitions of Terms.

13. **WORDS AND PHRASES—Intoxicating Liquors—Prohibition Statute—Definitions.**—"Spirituous liquor" is that which is in whole or in part composed of alcohol extracted by distillation, such as whisky, brandy or rum. (Ala.) Marks v. State, 20.

14. **"VINOUS LIQUOR"** Means Liquor made from the juice of the grape or from other fruit or berries by a like process of fermentation when sugar and alcohol are added. (Ala.) Marks v. State, 20.

15. **"MALT LIQUORS"** are the Product of a process by which grain is steeped in water to the point of germination, the starch of the grain being thus converted into saccharine matter, which is kiln-dried, then mixed with hops, and by a further process of brewing, made into a beverage, such as porter, ale or beer. (Ala.) Marks v. State, 20.

16. **"INTOXICATING LIQUORS"** are those capable of being used as a beverage which contain alcohol in such per cent that they will produce intoxication when imbibed in such quantities as may practically be drunk. The phrase is not synonymous with "spirituous liquors." All spirituous liquors are intoxicating, but all intoxicating liquors are not spirituous. (Ala.) Marks v. State, 20.

17. **"INTOXICATING BITTERS"** include those decoctions in which the distinctive character and effect of intoxicating liquors are present, so that they may be used as a beverage, notwithstanding the other ingredients they may contain. (Ala.) Marks v. State, 20.

18. **"ALCOHOL"** is a Volatile Organic Body, a limpid, colorless fluid, hot and pungent to the taste, with a slight but not offensive scent. Its one source is fermentation, and it is extracted from its by products by distillation. (Ala.) Marks v. State, 20.

19. **"WHISKY"** is Alcohol diluted with water and mixed with other elements or ingredients. (Ala.) Marks v. State, 20.

20. **"LIQUOR"** or "Liquors" commonly include all kinds of intoxicating decoctions, liquids or beverages, whether spirituous, vinous, malt or alcoholic. (Ala.) Marks v. State, 20.

21. **"ALCOHOLIC LIQUORS"** do not Necessarily Include every article or compound which contains alcohol, but do include those containing alcohol or maltose which may be used as an intoxicating beverage. (Ala.) Marks v. State, 20.

See Evidence, 10.

IRRIGATION.

See Waters and Watercourses, 22-25.

JUDGES.

See Courts.

JUDGMENTS.

In General.

1. **JUDGMENTS, Joint and Several, Nature of.**—A personal judgment against two defendants is a joint and several obligation, which the plaintiff may enforce against either of them at his option. (Kan.) Richardson v. Painter, 224.

2. **JUDGMENT, Revivor of Against One Defendant After the Death of the Other.**—The fact that one of two judgment debtors dies and there is no revivor or proceeding had to keep the judg-

ment alive as to his estate does not extinguish the liability of the other, nor bar a proceeding to revive the judgment as against such surviving defendant. (Kan.) *Richardson v. Painter*, 224.

Default Judgments.

3. **DEFAULT JUDGMENTS—Conclusiveness and Vacation.**—Judgments by confession or upon default remain indefinitely within the control of the court, and upon proper cause shown may be opened or vacated at any time. In this respect they differ from judgments obtained adversely. (Pa.) *Pennsylvania Stave Company's Appeal*, 875.

Entry on Warrant of Attorney.

4. **JUDGMENT—Entry on Warrant of Attorney—Second Judgment.**—The entry of judgment on a bond and warrant of attorney exhausts the power of the warrant, and a second judgment entered thereon will be set aside. This rule applies where the judgment is on a bail bond. (Pa.) *Commonwealth v. Massi*, 892.

5. **JUDGMENT—Entry on Warrant of Attorney.—A Second Judgment** entered under a warrant of attorney, on a bail bond, will be set aside, although the first judgment was prematurely and improvidently entered, and hence voidable as to the defendant but otherwise valid. (Pa.) *Commonwealth v. Massi*, 892.

Presumption of Jurisdiction from Recitals.

6. **JUDGMENT—Presumption of Jurisdiction from Recitals.**—The rule that recitals in a judgment of facts sufficient to confer jurisdiction raise a presumption of jurisdiction should not be extended to cases where the recitals are not in the judgment but in the findings of fact. (Wash.) *Holly v. Munro*, 1028.

7. **JUDGMENT—Presumption of Jurisdiction from Recitals.**—The presumption of jurisdiction arising from the recital in a judgment of due service of process is prima facie only, and may be overthrown by evidence that no summons, other than a void one, was issued. (Wash.) *Holly v. Munro*, 1028.

Amendment of Return of Process.

8. **JUDGMENT, Amendment of, Return of Process in Support of.** Where actual service of summons issued from a justice or probate court has been made, but the return of service was insufficient and did not show a good service, and the default of the defendant was entered and judgment was taken against him, it is proper to thereafter allow an amended return of service to be made so as to show that a good and valid service had in fact been made. (Idaho) *Call v. Rocky Mountain Bell Tel. Co.*, 135.

Mistake in Name of Defendant.

9. **JUDGMENT Against Widow Where the Published Summons Gives the Christian Name of Her Husband Instead of Her Own Given Name.**—An assignment of a mortgage was made to "Jessie L. Williams, wife of Edward H. Williams," and was duly recorded. In a suit to quiet title, brought afterward by the holder of a tax deed to the mortgaged lands, this assignee of the mortgage was made a party by the designation "Mrs. Edward H. Williams," and by that name was given notice by publication. She had assigned the mortgage to another party (under whom the plaintiff in this suit claims) before the judgment in the suit to quiet title, but this assignment was not recorded until afterward. Mrs. Williams was a widow at the date of the publication, and resided in Massachusetts. Judgment was rendered in that suit by default against the defendants therein, including Mrs. Edward H. Williams, quieting title and barring the defendants named from any interest in the land. The plaintiff in that

suit then sold and conveyed the land to another, under whom Doyle holds through mesne conveyances by warranty deed for a valuable consideration, and Doyle was in possession claiming such title when this suit was brought by the investment company to foreclose the mortgage which it so held by assignment. Held, that under the facts stated in the opinion the designation of Jessie L. Williams as "Mrs. Edward H. Williams" in the petition and notice published was sufficient to permit an adjudication of the interest and claims of the plaintiff, holding under her by an assignment not recorded when the publication was made, the title to the mortgage appearing at that time by the records to be in her. (Kan.) *Doyle v. Hays Land & Inv. Co.*, 199.

Res Judicata.

10. **RES JUDICATA.**—Unless Rendered on the Merits a Decree is not a bar to a subsequent action on the same demand. (S. D.) *McPherson v. Swift*, 907.

11. **RES JUDICATA.**—A Voluntary Dismissal by the Plaintiff is not a bar to subsequent action, especially if expressed to be without prejudice. But the mere fact that the dismissal is not expressed to be "without prejudice" does not necessarily establish that it was a decision on the merits. (S. D.) *McPherson v. Swift*, 907.

Persons Bound by Judgment.

12. **JUDGMENT**—Person Employing Counsel, When not a Party. The mere fact that a person not a party to a pending suit employs counsel to assist in the defense thereof will not make him a party or privy to such proceedings, nor estop him from questioning the issues determined therein. (Neb.) *Cockins v. Bank of Alma*, 642.

13. **JUDGMENT to Quiet Title, When Binds Persons not Named.** A judgment in a suit to quiet title brought by the holder of a tax deed, where there is no one in possession, is conclusive against persons holding unrecorded conveyances and encumbrances from the original owner of which the party named had no notice. (Kan.) *Doyle v. Hays Land & Inv. Co.*, 199.

14. **JUDGMENT, Effect of Against Assignee of an Unrecorded Mortgage not a Party Thereto.**—A judgment quieting title to real property binds the assignee of an unrecorded mortgage who is not a party thereto. (Kan.) *Leslie v. Gibson*, 219.

Enforcement of Judgment.

15. **JUDGMENTS—Enforcement.**—Every Court has the Inherent Power and authority, and upon it rests the duty, of enforcing its own judgments and decrees by proper orders and directions to ministerial officers to that end. If it fails, the exercise of its duty will be compelled by a writ of mandamus, which will specify the exact mode of performance. (Colo.) *People v. Jefferson Dist. Court*, 84.

16. **JUDGMENT—Enforcement.**—Two Distinct Remedies are open to a judgment creditor for the enforcement of his judgment—an execution and an action in some other court upon it. (Colo.) *Brown v. Bell*, 54.

17. **JUDGMENT—Enforcement.**—If a party has two remedies for the enforcement of a right, the one he chooses is not barred, because the other, if chosen, would have been. (Colo.) *Brown v. Bell*, 54.

Vacation and Setting Aside.

18. **JUDGMENT**—Motion to Vacate—Conclusiveness of Order.—Where one against whom a decree of divorce has been rendered seeks to vacate it by motion, that method is exclusive, and the same relief

cannot again be sought in an independent suit upon facts which existed and were known when the former method was adopted. The decree on the motion becomes conclusive, if not appealed from. (Wash.) *Meisenheimer v. Meisenheimer*, 1005.

19. JUDGMENT—Vacation for Fraud of Attorney.—A decree will not be vacated on the ground that the party's attorney conspired to defeat his client's rights in stipulating to dismiss an appeal when it appears that he simply erred in judgment and intended to bring another action. (Wash.) *Meisenheimer v. Meisenheimer*, 1005.

20. JUDGMENT—Vacation After Term.—The Common-law Power of a court to set aside a judgment regular on its face, which has been adversely recovered as distinguished from a judgment by confession or upon default, ends with the expiration of the term at which it was entered; and the fact that a petition was presented on the last day of the term asking for the vacation of the order, and that a rule had issued thereon, does not change the situation. (Pa.) *Pennsylvania Stave Company's Appeal*, 875.

21. JUDGMENT—When Adverse—Vacating After Term.—When an appeal is taken to the common pleas from a decision of the county commissioners in the matter of tax assessments, but before the appeal is heard the court enters a judgment pursuant to an agreement reached by the parties, the judgment is adverse and hence cannot be set aside after the expiration of the term at which it was rendered. (Pa.) *Pennsylvania Stave Company's Appeal*, 875.

22. JUDGMENT, Vacating of, Right of One Bound by, but not a Party to the Record, to Move for.—A person whose interest in real estate has been barred by a judgment quieting title rendered against his grantor in an action to which he was not a party, wherein service was made by publication only, has the same right to have the judgment opened and to make his defense that the party from whom he obtained such interest has under section 77 of the Civil Code. (Kan.) *Leslie v. Gibson*, 219.

23. JUDGMENT, Vacating of at the Instance of a Person Acquiring Title After Its Entry.—This rule should be applied to a person who holds title under a conveyance or assignment made after the judgment in such a proceeding has been entered, if there is no imputation of bad faith and no intervening equities are affected. (Kan.) *Leslie v. Gibson*, 219.

Vacating on Appeal for Want of Service.

24. JUDGMENT, Vacating on Appeal for Want of Service of Process and not on Its Return.—Jurisdiction to enter a judgment against a defaulting defendant rests upon the fact of service itself, and the return of service is simply the evidence of the jurisdictional fact, and is subject to amendment so as to make it conform to the facts. Jurisdiction of the person of the defendant is acquired by service of process, and attaches on the service and not upon the return. (Idaho) *Call v. Rocky Mountain Bell Tel. Co.*, 135.

25. JUDGMENT, Vacating on Appeal for Want of Service of Process, Amending the Return to Prevent.—It would be a manifest miscarriage of justice to allow a defendant who has been actually served with process and who has permitted a default judgment to be entered against him to thereafter procure a vacation of the judgment either in the court in which it was rendered or on appeal, simply because the proof of service is insufficient, where the plaintiff is at the very time in court presenting a sufficient and amended proof of service, and asking for the opportunity to file the same and have it made a part of the record in the case. (Idaho) *Call v. Rocky Mountain Bell Tel. Co.*, 135.

See Execution; Limitation of Actions, 5.

Notes.

Judgments, appeal from, right of, whether prevents maintaining actions upon, 72-75.

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JUDICIAL NOTICE.

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JURISDICTION.

See Courts, 2-4; Judgments, 6-9; Process; Venue.

JURY.

When Jury Trial Demandable.

1. **JURY TRIAL**—Question Whether Action is at Law or in Equity.—In an action to recover a debt where the plaintiff alleges that he has accepted promissory notes from the defendant on account of the indebtedness which have never been paid, and that he has given the defendant a receipt in full which he asks to have vacated and annulled, and prays for a judgment for the amount of the debt with

interest, the allegation in regard to the receipt does not turn the action into a case for the cognizance of a court of equity, but the action is a common-law action in which the defendant is entitled to a jury trial. (N. Y.) *Ross v. McCaldin*, 787.

Misconduct of Juror.

2. **TRIAL—Misconduct of Juror, When not Material.**—After the rendition of the verdict, affidavits of a number of jurors were filed, showing that during the deliberations of the jury one of their number stated that another railroad company had constructed its road across his land, and that he knew the inconvenience of it, and that his vote was for a larger sum than that returned by the verdict. It being shown that substantially the same statement was made by the juror on his voir dire examination, it is held that defendant cannot be heard to complain, there being no showing that it could not have excluded him. The question of the propriety of receiving such affidavits for the purpose of impeaching the verdict is not decided. (Neb.) *Beckman v. Lincoln etc. R. R. Co.*, 655.

Coercion of Verdict.

3. **JURY—Coercion of Verdict by Undue Means.**—Though the trial court in its discretion may urge upon a disagreeing jury a further consideration of the case, in the hope that an agreement may be reached, it exceeds proper limits when it attempts to coerce a verdict by undue means. (Minn.) *Mar v. Shew Fan Qui*, 460.

4. **JURY—Improper Coercion by Court.**—The jury reported their inability to agree, whereupon the court said to them, among other things: "The facts are plain. There is no law in this case . . . and I do not feel that I can let you go until you return a verdict." Held, an improper coercion of the jury. (Minn.) *Mar v. Shew Fan Qui*, 460.

Expenses of Juror Chargeable to County.

5. **JURY, Expenses of for Which County is Liable.**—Under sections 7900 and 7901, Revised Codes, it is provided that the county commissioners shall provide a room with suitable furniture, fuel, lights and stationery for the use of the jury upon their retirement for deliberation, and that when the jury are kept together, they must also be provided, at the county's expense, with suitable and sufficient food and lodging. (Idaho) *Schmelzel v. Board of County Commrs.*, 89.

6. **JURY, Expenses of Shaving and Cutting Hair of.**—Sections 7900 and 7901 are not sufficiently broad and comprehensive to include or authorize the payment by the county of a bill for shaving and hair-cutting for jurors while kept together, either in the progress of the trial or during their retirement for deliberation. (Idaho) *Schmelzel v. Board of County Commrs.*, 89.

7. **JURY, EXPENSES OF—Barbers' Work.**—An expense incurred by order of the court for shaving jurors and hair-cutting while the jury was kept together in the progress of the trial is not such a necessary expense incident to and necessary in the administration of justice as to become a county charge. The necessity for a juror shaving and having his hair cut does not arise out of or depend upon his services on a jury, and is no more necessary while serving on a jury than at any other time. (Idaho) *Schmelzel v. Board of County Commrs.*, 89.

LACHES.

See Equity.

LANDLORD AND TENANT.

In General.

1. **LESSOR AND LESSEE—Estoppel to Deny Lessor's Title.**—Where judgment is recovered against the defendant in an action in the nature of equitable ejectment, and thereafter he leases the premises from the plaintiff's grantees and continues in the enjoyment thereof, he becomes the tenant of such grantees and estops himself from further disputing their title. (Or.) *Elwert v. Marley*, 850.

2. **LANDLORD—Waiver of Forfeiture for Nonpayment of Rent.**—The leniency of a landlord in not insisting upon prompt payment of rent when due does not constitute a waiver of his right to a forfeiture of the lease for nonpayment of rent. (Neb.) *O'Connor v. Timmermann*, 668.

Quiet Enjoyment—Vacation and Eviction.

3. **LEASE—Implied Covenant.**—Unless expressed to the contrary, a lease contains, of necessity, an implied covenant for the quiet enjoyment of the leased premises. (Colo.) *Milheim v. Baxter*, 50.

4. **LANDLORD AND TENANT—Voluntary Vacation Equal to Eviction, When.**—A willful act of a landlord justifying a tenant's vacating the leased premises amounts to an eviction. (Colo.) *Milheim v. Baxter*, 50.

5. **LANDLORD AND TENANT—Justification for Vacation of Premises.**—Where a tenant has leased premises for lawful purposes, and has been driven therefrom during his term by the conduct of persons occupying, under the same landlord, adjacent premises for immoral purposes known to and permitted by the landlord, such vacation is justifiable, and amounts to an eviction in respect of which the tenant is entitled to damages. (Colo.) *Milheim v. Baxter*, 50.

6. **LANDLORD AND TENANT—Summary Vacation by Tenant for Want of Quiet Possession.**—Where a tenant discovers that her landlord has knowingly let the adjoining house for immoral purposes, no notice of her intention to quit and claim damages appears to be necessary. (Colo.) *Milheim v. Baxter*, 50.

7. **LANDLORD AND TENANT—Breach of Covenant for Quiet Possession—Measure of Damages.**—A tenant cannot recover as damages for eviction anticipated profits on a business not established. Except such special damage as she might be entitled to, she is entitled only to the difference between the actual rental value and the rent she agreed to pay, from the time she was evicted. (Colo.) *Milheim v. Baxter*, 50.

Leases—Termination, Renewal, Holding Over.

8. **LEASE—When an Executed Rather Than an Executory Agreement.**—A proposition to lease, signed by the lessor when presented to him by the lessee, under which the lessee is placed in possession to estimate the value of the stock in trade, will be regarded as a present lease rather than an agreement for a lease, no other writing having been demanded or thought necessary by the lessee. (Mich.) *Mailhot v. Turner*, 333.

9. **LEASE—Severable Provisions.**—Where an Agreement Provides for the leasing of stores and the purchasing of the stock and fixtures therein, the two provisions being mutually dependent, and neither party being bound by the lease of the real estate, then neither is bound by the agreement as to the personal property. (Mich.) *Mailhot v. Turner*, 333.

10. **LANDLORD AND TENANT—Renewal of Lease, When not Affected by Continuing in Possession With the Privilege.**—If a lease provides that at its expiration the lessees shall have the privilege of renewing the lease for a further term of two years, the holding

over and payment of rent due at the rate fixed in the original lease does not renew or create a new lease without a formal renewal or something equivalent to it, nor extend the term through the additional period. (Mass.) *Leavitt v. Maykel*, 323.

11. LANDLORD AND TENANT, Holding Over by Lessees, There Being a Privilege of Renewal—Tenancy Created by.—If a lease gives the lessees the privilege at its expiration to renew for the period of two years, and they remain in possession paying rent, but without any actual renewal, the tenancy thereby created is not at sufferance, but at will, and cannot be terminated, against the objection of the landlord, without the notice required in a tenancy at will. (Mass.) *Leavitt v. Maykel*, 323.

12. LANDLORD AND TENANT—Lease, Termination of, When Does not Extend to an Implied Tenancy.—Though a lease provides that the lessees named will pay rent not only during the term, but for such further term as the lessees or any other person claiming under them shall hold the premises, yet if the lessees remain in possession, paying rent, under circumstances from which the law implies a new leasing at will, an action cannot be maintained against such lessees under the original lease, for they are not holding under it, but under a new and implied lease. (Mass.) *Leavitt v. Maykel*, 323.

13. LANDLORD AND TENANT, Action to Recover Rent Upon Lease Which has Terminated and not Been Renewed.—If, after the expiration of a lease, the lessees remain in possession, paying rent, the lease giving them the privilege of renewal, of which they have not availed themselves, the landlord cannot maintain an action of covenant for rent under the expired lease, because the circumstances give rise to a tenancy at will, which is an implied new contract, and it is only under the latter tenancy that the rent can be recovered. (Mass.) *Leavitt v. Maykel*, 323.

See Homestead, 2; Partition, 3-5.

LEGACIES.

See Wills.

LIBEL AND SLANDER.

1. LIBEL.—To Maintain an Action for Libel It must Appear not only that the publication was written of and concerning the plaintiff, but also that it was so understood by some third person who read or heard the words. (Wash.) *Dunlap v. Sundberg*, 1050.

2. LIBEL—Publication Respecting Physicians.—A Complaint in libel which alleges that the defendants published a circular reciting that they, as reputable physicians in a certain office building, demand the removal therefrom of osteopaths, chiropractors, criminal practitioners, patent medicine fakers, quacks and other fraudulent concerns, and which further alleges that the plaintiff is a duly licensed and reputable physician in such building, is demurrable, for the latter allegation negatives the idea that the words were spoken of or concerning him, and expressly excludes him from the classes of alleged objectionable persons mentioned in the circular. (Wash.) *Dunlap v. Sundberg*, 1050.

3. LIBEL—Charging Officer With Graft and Jobbery.—A newspaper article charging a sidewalk inspector with being part of a system of jobbery and graft in the management of city contracts is libelous per se. (Wash.) *Quinn v. Review Pub. Co.*, 1016.

4. LIBEL—Charge Against Officer.—The Truth is a Defense to a newspaper publication charging an officer with being part of a system of jobbery and graft. (Wash.) *Quinn v. Review Pub. Co.*, 1016.

5. **LIBEL—Charge Against Officer.**—Though Made in Good Faith a newspaper publication falsely charging an officer with being part of a system of jobbery and graft is not privileged. (Wash.) Quinn v. Review Pub. Co., 1016.

6. **LIBEL—Truth of Charge Against Officer, When not Established.**—The truth of a charge that a sidewalk inspector is part of a system of jobbery and graft is not necessarily established by evidence that many sidewalks have been poorly constructed and not in accordance with the terms of the contracts, and that the inspector has been discharged for incompetency. (Wash.) Quinn v. Review Pub. Co., 1016.

7. **EVIDENCE.**—Error in Permitting the Plaintiff in a Libel Case to prove his reputation for honesty is cured by the court expressly withdrawing the evidence and instructing the jury not to consider it. (Wash.) Quinn v. Review Pub. Co., 1016.

LICENSES.

1. **LICENSE TAX—Power of City to Impose for Revenue.**—Under the statutes of Michigan a city of the fourth class may impose license fees for revenue on transient tradesmen. (Mich.) People v. Grant, 329.

2. **LICENSE—Revocation for Misconduct of Holder.**—The power to license, regulate, and restrain a business includes the power to revoke an individual license for misconduct of the holder. (Wis.) State v. Milwaukee, 1060.

3. **CONSTITUTIONAL LAW.**—The Itinerant Venders' Act, which imposes a license fee for conducting business upon anyone except commercial travelers who temporarily sell merchandise, and does not impose any fee upon the permanent seller thereof, is such a tax upon nonresidents bringing goods into the state as renders it invalid. (Colo.) Leonard v. Reed, 77.

4. **CONSTITUTIONAL LAW—Taxation—Citizens of Other States.**—The federal constitution, article 41, section 2, does not permit a state statute which charges a license fee for conducting temporary business on the citizen of another state, while it allows those of its own state in permanent business to go free, and such a statute is invalid for attempting to confer privileges and immunities on its own residents which it denies to those of other states. (Colo.) Leonard v. Reed, 77.

5. **CONSTITUTIONAL LAW—State License Fee—Uniformity.**—A state may require a license to engage in business, but such license must be uniform and not discriminate in favor of one class and against another. (Colo.) Leonard v. Reed, 77.

6. **LICENSE TAX—When Reasonable in Amount on Transient Traders.**—A license fee imposed by a city on transient traders of two dollars a day for each day less than a week, ten dollars for a week, twenty-five dollars for a month, fifty dollars for three months, and two hundred dollars for a year, is not oppressive, unjust, or unreasonable. (Mich.) People v. Grant, 329.

7. **LICENSE TAX—Reasonableness as to Amount.**—In View of 1 Compiled Laws, section 3108, license fees imposed by cities, whether for regulation or for revenue, must be reasonable in amount and not so heavy as to be prohibitory, and the question of reasonableness is for judicial determination. (Mich.) People v. Grant, 329.

See Health Regulations, 2; Intoxicating Liquors, 3, 4.

Note.

Lightning, definitions of, 1093.

LIMITATION OF ACTIONS.*In General.*

1. **LIMITATION OF ACTIONS.**—A Cause of Action Does not Accrue until the party owning it is entitled to begin to prosecute an action thereon; it accrues at the moment when he has a legal right to sue on it, and not earlier. (S. D.) McPherson v. Swift, 907.

2. **PLEADING.**—The Statute of Limitations must always be specially pleaded, and if shown on the complaint, special demurrer is the proper remedy. (Colo.) Brown v. Bell, 54.

Mortgage Foreclosure.

3. **LIMITATION of Actions upon Suit to Foreclose a Mortgage Which the Grantee of the Property has Agreed to Pay.**—Upon the acceptance of such deed the debt becomes the independent debt of the grantee to the holder of the mortgage. The limitation of the time for bringing a suit thereon begins to run upon such acceptance, and the running of the statute may be suspended by the absence of the obligor from the state, as in other cases. (Kan.) Hendricks v. Brooks, 186.

4. **LIMITATIONS OF ACTIONS to Foreclose Mortgage Where Mortgagor Remains Liable to Suit.**—One to whom the grantee in such deed conveys the land takes the title subject to the mortgage lien, if such mortgage be of record, and the lien of the mortgage subsists against the land so long as a suit may be maintained on the indebtedness against his grantor; in other words, a suit to enforce the mortgage lien is not barred by limitation until an action against the debtor for a personal judgment is also barred. (Kan.) Hendricks v. Brooks, 186.

Enforcement of Judgments.

5. **STATUTE OF LIMITATIONS—Effect.**—Where a Statute of Limitations prescribes the time within which actions upon judgments may be brought, and such time has elapsed, the statute does not extinguish the debt, but simply puts to repose the remedy for its enforcement. (Colo.) Brown v. Bell, 54.

See Adverse Possession; Equity, 2; Partnership, 17-18.
Note.

Limitation of Actions, execution, right to issue, when barred by the statutes of limitation, 64, 66, 67, 70-72.

payment, partial of a judgment, effect of, 71.

upon judgments, effect of upon of the right to issue execution, 71.

upon judgments in the several states, 64-70.

upon judgments, time from which begins to run, 72.

upon judgments, what suspends or prevents the running of, 76, 77.

LINEMEN.

See Master and Servant, 11, 12.

LIQUORS.

See Intoxicating Liquors.

LIVESTOCK.

See Carriers, 3-5.

LOCAL OPTION.

See Intoxicating Liquors.

LOGS AND LOGGING.

See Timber.

MANDAMUS.*In General.*

1. **MANDAMUS.—Except Where a Specific Right is Involved**, not possessed by citizens generally, mandamus will not issue to compel the performance of public duties by public officers. (Mich.) *Wilson v. Cleveland*, 352.

2. **MANDAMUS—Absence of Adequate Remedy at Law.**—Mandamus will not issue where the petitioner has a plain, speedy, and adequate remedy at law. (Nev.) *State v. Jumbo Extension Min. Co.*, 715.

3. **MANDAMUS.—The Right of the Relator Must Appear Plain and Beyond Dispute** before a writ of mandamus will issue. (Nev.) *State v. Jumbo Extension Min. Co.*, 715.

4. **MANDAMUS—Conditions Precedent to Issuance.**—To entitle one to mandamus, he must not only have a clear legal right which can become effective only by the act of another, but it must be the clear duty of the latter to perform such act. (Wis.) *State v. Waggenson*, 1075.

5. **MANDAMUS—Conditions Which Petition must Show.**—Where the right to have an act done at the time and in the manner demanded is dependent upon some other act having been done or some condition existing, facts must be stated in the petition showing that such preliminary act has been done or condition created. (Wis.) *State v. Waggenson*, 1075.

6. **MANDAMUS—Act Requiring Expenditure of Money.**—Where the doing of an official act requires the expenditure of money, performance will not be coerced by mandamus in the absence of a showing that the money therefor is presently available. (Wis.) *State v. Waggenson*, 1075.

7. **MANDAMUS—Order to Show Cause.**—When an Application for a Writ of mandamus is filed, the practice of the supreme court is to issue an order to the respondents to show cause why the relief sought should not be granted. (Nev.) *State v. Jumbo Extension Min. Co.*, 715.

8. **MANDAMUS—Manner of Raising Objections or Issues.**—While there is little difference in the way issues are raised in mandamus proceedings, whether by motion to quash the citation or by demurrer, the better practice is to raise any objections to the petition by demurrer or answer. (Nev.) *State v. Jumbo Extension Min. Co.*, 715.

9. **MANDAMUS—Demurrer by Directors of Corporation.**—In mandamus proceedings entitled against a corporation and individuals who are its directors, separate demurrers filed by the directors individually are not improper. (Nev.) *State v. Jumbo Extension Min. Co.*, 715.

Parties Where Lodge is Involved.

10. **MANDAMUS—PARTIES.**—In Mandamus Against the Grand Lodge of a beneficial association it is proper to make parties all its officers who have a duty to perform in maintaining the legal rights of the relator. (Mich.) *Golden Star Lodge No. 1 v. Watterson*, 404.

Cases Where Writ Lies.

11. **MANDAMUS—Jurisdiction—Peremptory Writ.**—Where suit is brought in condemnation against the owners for possession of property, and results in such possession being expressly ordered on payment of damages and costs, which are duly paid, and the owners refuse possession on the ground that the purpose for which their lands were taken is not yet ripe, and are upheld in their recalcitrance by the court's refusal to order such possession to be given, a

peremptory **mandamus** should issue to such court ordering it to the performance of its duty. (Colo.) *People v. Jefferson District Court*, 84.

12. MANDAMUS by Mayor to Compel Attendance of Councilmen. The mayor of a village is not entitled to mandamus to compel members of the common council to attend the meetings and transact the business pertaining to their office. (Mich.) *Wilson v. Cleveland*, 352.

13. MANDAMUS to Compel the Issuance and Delivery of Corporate Stock will not lie unless the shares have some pecuniary or special value peculiar to themselves, differing from any other like number, or unless they are detained and the control of some corporation is at issue, and by securing them the person applying for the writ will obtain control; and in all such exceptional cases it must affirmatively appear from the petition that the relator has a clear, legal right to the possession of the stock, and that he has no plain, speedy, and adequate remedy at law. (Nev.) *State v. Jumbo Extension Min. Co.*, 715.

14. MANDAMUS to Compel Drainage Commissioners to Repair a Ditch will not issue at the suit of a proprietor suffering damage from the ditch clogging up, in the absence of a showing that there is money available therefor, or that the conditions precedent to making the repairs have been complied with, the only default on the part of the commissioners, shown by the petition, being a failure to file the statutory report necessary to obtain funds. (Wis.) *State v. Waggenson*, 1075.

15. MANDAMUS—Whether Lies to Prevent Change of Venue.—Mandamus lies to compel a court, after it has erroneously granted a change of venue, to proceed with the trial of the case. The remedy by appeal, in such event, is inadequate. (Wash.) *State v. Superior Court*, 1030.

Note.

Mandamus, historical epitome of law of, 724.

is not a new remedy, 724.

restricting to cases where there is no other adequate remedy, 723, 724.

to compel issuing of stock by corporations, 727, 728.

to compel transfer of stock of corporations, 724-727.

MANDATORY INJUNCTION.

See Injunction, 3.

MARRIAGE.

1. MARRIAGE—Presumption in Favor of Validity.—Whenever a marriage has been shown the law indulges the presumption that it is valid, and the burden is cast upon those who question its validity to show its invalidity by strong and persuasive evidence, leaving no room for reasonable doubt in the mind of the chancellor; this is a presumption of more than ordinary strength, it is one of the strongest known to the law. (Mo.) *Maier v. Brock*, 513.

2. MARRIAGE—Presumption of Dissolution of Prior Marriage.—Where a man first marries in Germany, and after immigrating to America there contracts not less than three other marriages, all of which are valid if the first marriage has been dissolved, it will be presumed after his death, when the first wife demands dower in his estate, that the first marriage has been dissolved by divorce, and she has the burden to prove the contrary. This presumption is strengthened by the fact that he lived a number of years in another state

before taking up his permanent abode and contracting the three last marriages in the jurisdiction where he died, that he once visited the first wife after he had married again and requested their daughter to return to America with him, and that his reputation in the community was good; and the presumption is not rebutted by the fact that the first wife never again married, that no divorce was ever granted in the jurisdiction of her domicile, and that in Germany his name was "Josef Maier," but in America he was known as "Joseph G. Meyer." (Mo.) *Maier v. Brock*, 513.

See Husband and Wife.

MARRIED WOMEN.

See Husband and Wife.

MASTER AND SERVANT.

Employment Agreements.

1. **MASTER AND SERVANT—Agreement to Give Exclusive Service to Employer.**—An agreement by an employé to serve for five years and during that time to devote his entire time, skill, labor and attention to the service of the employer, though valid, is not enforceable under the circumstances of this case, even if the court of chancery will ever enforce by injunction a contract for ordinary personal services. (N. J. Eq.) *Taylor Iron & Steel Co. v. Nichols*, 753.

Certificate Showing Cause of Discharge.

2. **MASTER AND SERVANT—Police Regulations—Statute Requiring Certificates to be Given Showing the Cause of Discharge of Employés.**—The duty imposed upon employers by section 2422 of the General Statutes of 1901 is not a police regulation, and is an interference with the personal liberty guaranteed to every citizen by the state and federal constitution. (Kan.) *Atchison etc. Ry. Co. v. Brown*, 213.

3. **CONSTITUTIONAL LAW—Statute Requiring Employers to Give Their Employés Certificates Showing the Cause of Discharge.** A statute which requires an employer of labor, upon request of a discharged employé, to furnish in writing the true cause or reason for such discharge is repugnant to section 11 of the Bill of Rights of this state, and is invalid. (Kan.) *Atchison etc. Ry. Co. v. Brown*, 213.

Employment of Minors in Violation of Statute.

4. **MASTER AND SERVANT—Employment of Minor in Violation of Law.**—Where a boy under fourteen years of age is employed in violation of statute, the employer cannot escape responsibility for an injury to the boy by showing that when he received it he was doing an act in a negligent manner which he had been ordered not to do. The illegal employment, not the imprudence or negligence of the employé is the proximate cause of the injury. (Pa.) *Stehle v. Jaeger Automatic Machine Co.*, 884.

5. **MASTER AND SERVANT—Employment of Minor in Violation of Law.**—One who employs a minor under fourteen years of age in violation of statute cannot escape liability for injuries received by him, by showing that a factory inspector advised that as the boy had been employed prior to the enactment of the statute he was not within its terms. Every man is presumed to know the statute law and to construe it aright, and when one violates it through ignorance he must abide by the consequences. (Pa.) *Stehle v. Jaeger Automatic Machine Co.*, 884.

Employer's Liability Generally.

6. **EMPLOYER'S LIABILITY—Rule of Ordinary Care.**—The common law requires no more of a master than to exercise ordinary care to furnish his servant with reasonably safe appliances, reasonably competent fellow-servants, and a reasonably safe place in which to work; and while a correspondingly greater measure of care is always required whenever the hazard is greater, the exercise of ordinary care, as this expression must be interpreted in the light of the circumstances of each case, always discharges the master from liability. (Mont.) *Monson v. Le France Copper Co.*, 549.

7. **EMPLOYER'S LIABILITY—Proximate Cause of Injury.**—Even when a master has been guilty of a failure to exercise ordinary care for the safety of his servant, there must be shown a causal relation between his fault and any injury for which it is sought to hold him liable. (Mont.) *Monson v. La France Copper Co.*, 549.

Railway Employés.

8. **RAILWAY ENGINEER OPERATING DEFECTIVE LOCOMOTIVE.**—A railroad engineer owes a duty to the public, as well as to his employers, and is justified in taking much greater risks than employés in other occupations, without necessarily forfeiting the right of action for injuries resulting from his master's negligence of which he has knowledge. And while the emergency of railroad traffic will not excuse him for running the risk of almost certain injury, it is only in extreme cases that he will not be warranted in operating a temporarily repaired engine until he reaches the next station. (Minn.) *Koreis v. Minneapolis & St. Louis R. R. Co.*, 462.

9. **RAILWAY ENGINEER OPERATING DEFECTIVE LOCOMOTIVE.**—Where a railway engineer, who, when half way between two stopping places, finds that the fastenings of the eccentric straps on the engine are defective, but who, after making imperfect repairs, proceeds to the next station, a distance of nineteen miles, and when within half a mile of that station, one of the straps breaks, throws back the lever, and breaks his arm, his contributory negligence and assumption of risk in operating the locomotive while thus out of repair are questions for the jury. (Minn.) *Koreis v. Minneapolis & St. Louis R. R. Co.*, 462.

10. **RAILWAY ENGINEER OPERATING DEFECTIVE LOCOMOTIVE.**—Where a railway engineer is injured by the breaking of an eccentric strap or fastening which he has temporarily repaired while running between two stations, and there is evidence that the defective condition of the fastening was previously reported to the railway company and that the bolts by which the straps were attached were old and threadworn, the negligence of the railway company, and whether it is the proximate cause of the injury to the engineer, are questions for the jury. (Minn.) *Koreis v. Minneapolis & St. Louis R. R. Co.*, 462.

Linemen—Dangerous Wires.

11. **EMPLOYER'S LIABILITY—Electric Wires—Compliance With Ordinance.**—An employé of a telephone company directed by his master to fasten a cable to an overhead messenger wire thirty feet above a pavement, unless warned to the contrary by his master or by obvious conditions, is justified in relying upon an ordinance of the city forbidding the maintenance of wires carrying an electric current for light or power purposes within five feet of telephone wires, and commanding that all such electric light wires be insulated and defects therein repaired at once. (Neb.) *Olson v. Nebraska Tel. Co.*, 660.

12. **EMPLOYER'S LIABILITY—Safe Place—Telephone Poles and Wires.**—Notice to an employé that a master does not and will not inspect poles, cross-arms, wires or implements used by a lineman, but

that the duty to make such inspection is cast upon the servant, that he must satisfy himself of their safety before climbing upon or about poles or working with such wires, and that it is his duty to report any defect therein, does not relieve the master from the duty he owes said servant to exercise reasonable care to furnish him a reasonably safe place, independent of such poles, cross-arms and wires, to work in, the nature of the work to be performed being considered. (Neb.) *Olson v. Nebraska Tel. Co.*, 660.

Statutory Precautions for Safety of Employés.

13. EMPLOYER'S LIABILITY—Construction of Statute.—The words "or person" in the Montana statute, providing that iron cages must be used for lowering and elevating men in deep mines, were omitted by the commissioner in revising the codes, evidently through inadvertence, and should be inserted in the text as it now stands. (Mont.) *Monson v. Le France Copper Co.*, 549.

14. EMPLOYER'S LIABILITY—Constitutionality of Statute.—The Montana statute providing that iron cages of a specified kind must be used for lowering and elevating men in deep mines is sustainable as a proper exercise of the police power. (Mont.) *Monson v. Le France Copper Co.*, 549.

15. EMPLOYER'S LIABILITY—Statutory Precautions for Safety. Where the statute declares that a master shall adopt specific precautions for the safety of his servants, as that he shall use iron cages of a specified kind for lowering and elevating men in deep mines, the rule of reasonable care is no longer the measure of his duty. His compliance with the command of the legislature becomes imperative, and any failure to observe the required precautions or to provide the prescribed appliance is such a breach of duty as renders him liable for any injury caused by his disobedience. (Mont.) *Monson v. La France Copper Co.*, 549.

16. EMPLOYER'S LIABILITY—Statutory Precautions for Safety. Where the legislature declares the duty of an employer to provide for the safety of employés, its judgment is binding; and it is beyond the power of courts to inquire whether the particular precaution or appliance required is the best or wisest. (Mont.) *Monson v. La France Copper Co.*, 549.

17. EMPLOYER'S LIABILITY—Statutory Duty—Proximate Cause. In an action for injuries to an employé based on the failure of the employer to furnish safe appliances prescribed by statute, the plaintiff must not only prove the injury but he also has the burden to show that it was proximately caused by the master's disobedience of the statute. (Mont.) *Monson v. La France Copper Co.*, 549.

18. EMPLOYER'S LIABILITY—Evidence of Proximate Cause of Injury.—While the efficient cause may be shown by indirect evidence in an action for injuries to an employé based on the failure of the employer to furnish safe appliances prescribed by statute, yet it cannot be established by that character of evidence unless the circumstances are such that they not only furnish support to the particular theory advanced, but also tend to exclude any other reasonable theory. (Mont.) *Monson v. La France Copper Co.*, 549.

See Work and Labor.

MECHANICS' LIENS.

1. MECHANIC'S LIEN—Amendment Changing Name of Contractor.—A statement of a mechanic's lien is ineffectual if it names

the wrong person as contractor, and it cannot be cured by amendment in proceedings to enforce the lien. (Mich.) *Lacy v. Piatt Power & Heat Company*, 360.

2. MECHANIC'S LIEN—Amendment of Statement.—Section 10736 of 3 Compiled Laws, providing for amendments in actions to enforce mechanics' liens, refers, not to the statement of liens, but to the process, pleadings, or proceedings in actions for their enforcement. (Mich.) *Lacy v. Piatt Power & Heat Co.*, 360.

MILK VENDER.

See Health Regulations, 2.

MINES AND MINERALS.

Forfeiture of Claim.

1. MINING—Enforcement of Forfeitures—Pleading and Proof.—Courts are reluctant to enforce a forfeiture of a mining claim for failure to perform the work or improvements required by law, and one who claims such a penalty to defeat the title of his adversary must plead it specially and establish it by clear and convincing proof. (Mont.) *Copper Mountain Min. etc. Co. v. Butte & Corbin Consol. etc. Min. Co.*, 595.

Locations and Relocations.

2. MINING CLAIMS.—The Filing of a Certificate of Location is not essential to the validity of the claim, but relates to matters of proof. (Nev.) *Nash v. McNamara*, 694.

3. MINING CLAIMS.—A Location Made upon Ground Already Covered by a Valid existing location will not prevail over a subsequent location made on the same ground after a failure to do the required work on the senior location. (Nev.) *Nash v. McNamara*, 694.

4. MINING CLAIMS.—Where a Claim is Located by Posting Notice, and by marking the boundaries within ninety days thereafter, the right to the ground relates back to the time of the posting of the notice, and the land becomes segregated from the public domain, so that a subsequent location cannot be initiated until after failure to do the work required by statute to be done within ninety days from the posting of notice; but if the notice is posted and the claim is not staked or monumented within ninety days thereafter, the location is not completed and the land not segregated from the public domain, although the posting carries the right to define the boundaries within ninety days. (Nev.) *Nash v. McNamara*, 694.

5. MINING CLAIMS.—Where the Location of a Claim is not a Valid and existing location at the time of a subsequent location on the same ground, the junior locator becomes entitled to hold the claim for the ninety days allowed for doing work, and by instituting suit prior to that time may recover judgment for possession and damages to the end of that period. If he fails to do the required work within ninety days, the claim will become subject to relocation by others. (Nev.) *Nash v. McNamara*, 694.

6. MINING CLAIMS—Manner of Relocation.—Persons can Establish their right as relocators only by proving a prior location, that it became subject to forfeiture, and that they made such forfeiture effectual by complying with acts necessary to make a valid relocation. (Nev.) *Nash v. McNamara*, 694.

7. MINING CLAIMS—Ground Subject to Relocation.—Where the right to make a location is initiated by the making of a discovery and the posting of notice, but no further act is done to perfect the location and segregate it from the public domain, the ground is not

subject strictly to relocation, for no valid location has been perfected. In such a case the land does not cease to be a part of the public domain, and it remains open to location. (Nev.) *Nash v. McNamara*, 694.

Work on One Claim for Benefit of Others.

8. **MINING—Work on One Claim for Benefit of Others.**—Where a person or persons hold several adjacent claims, work may be done on one claim and be credited on the others. (S. D.) *Hawgood v. Emery*, 941.

9. **MINING—Work Done Outside the Limits of a Claim** may be credited thereon if beneficial to it, and this is true even if there are several claims for which credit is asked for outside work, provided they are held in common. (S. D.) *Hawgood v. Emery*, 941.

10. **MINING—Work on One Claim for Benefit of Others.**—Where there are several adjacent claims held by different persons, development work may, under an agreement between the owners, all be done on one claim and credited to the several claims, such work being beneficial to all the claims and a part of the general plan or scheme for their development. (S. D.) *Hawgood v. Emery*, 941.

11. **MINING—Work on One Claim for Benefit of Others Owned in Common.**—One of the owners in common of two mining claims cannot prevent the forfeiture of his rights therein by his co-owner, by performing work on adjacent claims in which his co-owner has no interest, in the absence of any agreement between them for the doing of such work or of any showing that it was part of a general plan for the development of the mines in question in connection with those on which the work was done. (S. D.) *Hawgood v. Emery*, 941.

12. **MINING—Work on One Claim for Benefit of Group.**—The annual expenditure required by the federal statute to preserve the title to mining claims may be made in work or improvements within the boundaries of the claims themselves, or upon one of a group of contiguous claims, or upon adjacent patented land, or even upon adjacent public land, provided only it is made for the purpose of developing the claims and to facilitate the extraction of ore therefrom. (Mont.) *Copper Mountain Min. etc. Co. v. Butte & Corbin Consol. etc. Min. Co.*, 595.

13. **MINING—Work of One Claim for Benefit of Group.**—If representation work is not a part of a general plan having in view the development of a group or a consolidated claim, so that the ore may be more readily extracted, and has no reasonable adaptation to that end, then no matter what the amount of work is, it cannot be said to have been done in the development of the group. In such cases it is usually a question of fact for the court or jury, as the case may be, to say upon the evidence whether the requirements of the law have been met. (Mont.) *Copper Mountain Min. etc. Co. v. Butte & Corbin Consol. etc. Min. Co.*, 595.

14. **MINING—Work on One Claim for Benefit of Group—Burden of Proof.**—If the defendant claims a forfeiture for default in representation work, but the plaintiff contends that work done on one of the group of claims was for the benefit of all, the burden shifts to the plaintiff to show that such work was adapted and intended for that purpose. (Mont.) *Copper Mountain Min. etc. Co. v. Butte & Corbin Consol. etc. Min. Co.*, 595.

15. **MINING—Work on One Claim for Benefit of Group.**—It is primarily a question for the trial court to determine whether the proof that representation work done upon one claim will inure to the benefit of others in the group; and in equity cases, though the

supreme court may examine the evidence and determine the question of fact for itself, it will not overturn the findings of the trial court unless there is a decided preponderance of evidence against them. (Mont.) *Copper Mountain Min. etc. Co. v. Butte & Corbin Consol. etc. Min. Co.*, 595.

16. MINING—Work on One Claim for Benefit of Group.—The purpose for which representation work on a claim is alleged to have been done, when it is sought to be availed of for the benefit of adjacent claims, must always be manifested by the relation which it bears to the claim itself; if the plan pursued can have no reasonable adaptation to its alleged purpose, the mere assertion that it was pursued for that purpose does not suffice, even though good faith in its pursuit be conceded. (Mont.) *Copper Mountain Min. etc. Co. v. Butte & Corbin Consol. etc. Min. Co.*, 595.

MISTAKE.

MISTAKE OF LAW—Whether Ground for Equitable Relief.—In no case is ignorance or mistake of law, with full knowledge of the facts, per se a ground for equitable relief. (Pa.) *Pennsylvania Stave Company's Appeal*, 875.

MOBS.

See *Municipal Corporations*, 10, 11.

MONOPOLIES, TRUSTS AND POOLS.

1. TRUSTS AND POOLS—Constitutional Provision—Construction of.—Constitution, section 198, delegates to the General Assembly power to enact laws to repress illegal trade combinations, and does not repeal act May 20, 1890. (Ky.) *Commonwealth v. International Harvester Co.*, 256.

2. MONOPOLIES—Offenses at Common Law and by Statute—Distinction.—At the common law the test of monopolies by fraud and coercion absorbing any of the necessities of life was if the result brought the price of the commodities greatly above their real value, while under the Kentucky statutes, if the price is enhanced above or reduced below the real value, the offense is complete. (Ky.) *Commonwealth v. International Harvester Co.*, 256.

3. INDICTMENT—Omission of Essential Element.—An indictment charging a violation of the law regulating pools and trusts, act of May 20, 1890 (Kentucky Statutes 1903, section 3915), must aver that the purpose or effect of the alleged combination or pool which the defendant entered into was to enhance the articles named in the indictment above their real value. (Ky.) *Commonwealth v. International Harvester Co.*, 256.

4. CONSTITUTIONAL LAW—Act of 1906, Page 429, Chapter 117, and Constitution, Section 198—Construction.—The act of 1906, page 429, chapter 117, conflicts with the constitution, section 198, but is not on that account wholly void; it is valid so far as it permits farmers to combine to obtain better prices, provided those prices do not exceed the real value. (Ky.) *Commonwealth v. International Harvester Co.*, 256.

5. CONSTITUTIONAL LAW—Statutes and Constitutions Superimposed Construction.—The combined effect of act of May 20, 1890 (Kentucky Statutes 1903, section 3915), act of 1906, page 429, chapter 117, constitution, section 198, and the fourteenth amendment to the federal constitution, is that of permitting persons to pool their property or combine their capital and other resources so as to get no more than the real value of their property when sold in the market. (Ky.) *Commonwealth v. International Harvester Co.*, 256.

6. CONSTITUTIONAL LAW—Statutes Invalid for Uncertainty. The act of May 20, 1890 (Kentucky Statutes of 1903, section 3915), and act of 1906, page 429, chapter 117, construed with constitution, section 118, are not invalid for uncertainty in legislating against combinations depreciating articles below or enhancing them above their real value, inasmuch as the real value is the market value. (Ky.) *Commonwealth v. International Harvester Co.*, 256.

MORTGAGE.

In General.

1. MORTGAGE—Whether Grantee is a Mortgagee or a Trustee.—A grantee under an agreement to sell the land, apply the proceeds to an indebtedness thereon, and account to the grantors for the sum remaining, is not a mortgagee, but a holder of the legal title, liable only to account as trustee for the proceeds of sales when made, and entitled to maintain a suit in his own name with reference thereto. (Or.) *Kollock v. Bennett*, 840.

2. MORTGAGE, Identity of, When a Question of Fact.—The identity of a mortgage, dated November 1st and acknowledged November 20th, with a mortgage described in a deed as for the same amount and as dated on the twentieth day of the same month, is a question of fact which may be proved by evidence aliunde. (Kan.) *Hendricks v. Brooks*, 186.

3. MORTGAGE—What Amounts to the Assumption of a Personal Obligation to Pay.—The acceptance of a deed by the terms of which the grantor warrants the land to be free and clear of all encumbrances, "except a mortgage of five hundred dollars, dated November 20, 1888, which grantee assumes and agrees to pay," makes it a contract in writing binding upon the grantee to pay the mortgage, and suit can be instituted upon it and the same rights maintained as though the deed were also signed by the grantee; and a subsequent conveyance of the land by the grantee is conclusive evidence of his acceptance of the deed and of the contract therein contained. (Kan.) *Hendricks v. Brooks*, 186.

4. MORTGAGE—Acceptance of a Conveyance Made by a Mortgagor Containing a Promise of the Grantee to Pay the Debt, What Sufficient Evidence of.—If a conveyance is made of property which is subject to a mortgage, and such conveyance contains an agreement on the part of the grantee to pay the mortgage debt, and the grantee subsequently conveys such property to another, this conveyance constitutes conclusive evidence of the acceptance of the debt by the grantee and his assumption of the obligations referred to. (Kan.) *Hendricks v. Brooks*, 186.

Mortgagee in Possession.

5. MORTGAGEE IN POSSESSION—When Chargeable for Waste. A mortgagee is chargeable for waste committed by him while in possession, including permanent depreciation in the property resulting from failure to make proper repairs or from reckless or improvident management. (Mont.) *Toole v. Weirick*, 576.

6. MORTGAGEE IN POSSESSION—Accounting for Use and Profits.—A mortgagee personally in possession is chargeable, on accounting, with the reasonable value of the use and occupation of the property, amounting to the fair rental value thereof; but if, by reason of his absence or other excuse, he is not personally in possession but depends upon the interposition of an agent whom he selects with due care and who exercises reasonable care to keep the property rented at a fair rental, the mortgagee is chargeable with rents actually received, not with the value of the use and occupation of the property. (Mont.) *Toole v. Weirick*, 576.

Recording Assignment.

7. **MORTGAGE, Recording Assignment of, When Sufficient to Impart Notice.**—A record of the assignment of a mortgage which states the names of the mortgagor and the mortgagee and the book and place of the record of the mortgage is sufficient to impart notice. (Kan.) *Doyle v. Hays Land & Inv. Co.*, 199.

Release by Change in Form of Debt.

8. **MORTGAGE—Release by Change in Form of Debt.**—No change in the form of the debt originally secured will release a mortgage, so long as the identity of the debt can be traced. Hence where a principal has given a mortgage to his surety on a note, as indemnity against loss, payment of the note by money borrowed from another source with the same person as surety does not terminate the suretyship and extinguish the mortgage. (Iowa) *Gribben v. Clement*, 157.

Foreclosure.

9. **MORTGAGE FORECLOSURE—Stopping Sale After Issue of Fieri Facias.**—After the entry of a final decree in foreclosure proceedings and the issuing of a fieri facias thereon, the complainant cannot prevent the sale of the mortgaged premises against the will of junior encumbrancers whose claims have been adjudicated by the decree and commanded to be satisfied by the fieri facias. (N. J. Eq.) *Welsh v. Lawler*, 737.

10. **MORTGAGE FORECLOSURE—Stopping Execution of Fieri Facias.**—A writ of fieri facias issued on a decree in foreclosure for the purpose of satisfying the claims of several encumbrancers, although single in form, is multiform in substance, and the sheriff can be relieved from the duty of executing it only by the consent of all parties for whose benefit it is issued or by the satisfaction of their several encumbrances. (N. J. Eq.) *Welsh v. Lawler*, 737.

11. **MORTGAGE FORECLOSURE—Waiver of Right to Sale After Fieri Facias.**—A waiver by one of several encumbrancers of his right to have the premises sold after the entry of a decree of foreclosure and the issuing of a fieri facias thereon, no matter in what order of priority his debt is entitled to be paid, merely nullifies the writ so far as his own claim is concerned; it has no effect upon the right of his fellow-encumbrancers to have the writ executed for their benefit. (N. J. Eq.) *Welsh v. Lawler*, 737.

12. **MORTGAGE FORECLOSURE—Purchase by Mortgagee and Assignment of Bid.**—A mortgagee purchased at the foreclosure sale through an agent, and the sale was confirmed to him. Prior to the sale the agent had been negotiating with one Schmideke for the sale of the land. After confirmation the agent completed the sale to Schmideke, and caused the sheriff to execute a deed direct to him, reciting that Schmideke was the purchaser at the sale. The agent delivered the deed to Schmideke, and received the amount of the bid therefor. Held, after the lapse of more than twenty years, the mortgagee having made no claim that the deed was void, and by his agent having received the purchase money, that an assignment of the bid and purchase will be presumed, and the sheriff's deed will be held sufficient to pass all the rights of the original purchaser to the grantee. (Neb.) *Currier v. Teske*, 602.

13. **MORTGAGE FORECLOSURE—Title Acquired by Purchaser.** The purchaser at a foreclosure suit buys all the interests of the parties to the suit. (Neb.) *Currier v. Teske*, 602.

14. **MORTGAGE FORECLOSURE.**—The Owner of an Estate by the Curtesy in certain land was made defendant to an action to foreclose a mortgage given by the wife in her lifetime. His son, who

had inherited the estate subject to his life estate, was not brought in. Held, that the sale on foreclosure could only convey the life estate of the defendant, even though the purchaser may have believed he acquired the whole title. (Neb.) *Currier v. Teske*, 602.

15. MORTGAGE—Foreclosure and Redemption—Interest.—Upon foreclosure the mortgage debt becomes merged in the judgment, and the judgment draws interest at the rate of eight per cent under section 5214, Revised Codes. (Mont.) *Toole v. Weirick*, 576.

Redemption.

16. MORTGAGE—Allegation of Tender in Case of Redemption.—It is generally not necessary that a bill to redeem should allege a tender, but it is ordinarily sufficient that the bill discloses a readiness and intention to pay the amount due. (Mont.) *Toole v. Weirick*, 576.

17. MORTGAGE—Allegation of Tender in Case of Redemption.—Where a deed absolute has been decreed a mortgage, and the amount due is unliquidated and uncertain, a bill for redemption need not allege a tender. (Mont.) *Toole v. Weirick*, 576.

See Chattel Mortgages; Homestead, 1; Judgments, 14; Limitation of Actions, 3, 4; Railroads, 1.

MUNICIPAL CORPORATIONS.

City Waterworks—Rates and Profits.

1. MUNICIPAL WATERWORKS—Transfer of Profits to General Fund.—A city will not be enjoined from transferring the profits of its water system to the general fund, when all obligations against the water fund are being met when due and there is no statutory or other rule against such transfer. (Wash.) *Twitchell v. Spokane*, 1021.

2. MUNICIPAL WATERWORKS—Right to Operate at Profit.—A city operating its own water system may charge such rates to consumers as will yield a reasonable profit. (Wash.) *Twitchell v. Spokane*, 1021.

3. MUNICIPAL WATERWORKS—Water Rates as Taxes.—Water rates paid by consumers where the supply is furnished by the city are not taxes. (Wash.) *Twitchell v. Spokane*, 1021.

4. MUNICIPAL WATERWORKS—Free Service for Public Purposes.—A city operating its own water system may furnish water free for municipal and charitable purposes. (Wash.) *Twitchell v. Spokane*, 1021.

5. MUNICIPAL WATERWORKS—Reasonableness of Rates.—In Fixing the Rate to consumers, a city operating its own water system may consider the cost of extending mains and depreciation. The mere fact that a profit is made does not prove a rate excessive. (Wash.) *Twitchell v. Spokane*, 1021.

6. MUNICIPAL WATERWORKS—Discretion in Fixing Water Rates.—A reasonable discretion abides in the officers whose duty it is to fix water rates where the system is operated by the city, and courts will not disturb a rate which they establish if it is not excessive. (Wash.) *Twitchell v. Spokane*, 1021.

7. MUNICIPAL WATERWORKS—Reasonableness of Rates.—A Water Rate of eighty cents per month for a five-room house with bath, toilet and lavatory, and two dollars and eighty cents per year for a lawn sixty by one hundred and thirty-five feet, is reasonable. (Wash.) *Twitchell v. Spokane*, 1021.

City Waterworks—Negligence in Operation.

8. **MUNICIPAL WATERWORKS—Negligence in Operation.**—In maintaining a system of waterworks and selling water to its inhabitants a city acts in its proprietary capacity, and is liable for the negligence of its agents and employes in conducting the business. (Wis.) *Piper v. City of Madison*, 1078.

9. **MUNICIPAL WATERWORKS—Negligence in Operation.**—The fact that a city, in addition to selling and distributing water to its inhabitants, also uses its waterworks system for protection against fire, does not relieve it from liability for negligent acts of its agents and employes in conducting the business, unless performed in the actual work incident to extinguishing fires. (Wis.) *Piper v. City of Madison*, 1078.

Liability for Mobs and Charivari Parties.

10. **MUNICIPAL CORPORATIONS, Mobs for Which Liable—Definition.**—In an action under the statute making cities liable for injuries done by mobs, an instruction that "a mob is an unorganized assemblage of many persons intent on unlawful violence, either to persons or property," is not erroneous because it makes no reference to a determination on the part of those composing the assemblage to resist opposition. (Kan.) *City of Cherryvale v. Hawman*, 195.

11. **MOBS, Unlawful Violence by, What Amounts to.**—Where the members of a charivari party forcibly place a bride and groom in a wagon against their will, and draw them up and down the streets, they are engaged in an act of unlawful violence within the meaning of such definition. The fact that they are good natured and intend no serious harm to anyone does not absolve the corporation from liability. (Kan.) *City of Cherryvale v. Hawman*, 195.

Unguarded Coal-holes in Sidewalk.

12. **PUBLIC STREET—Persons Liable for Open or Unguarded Coal-hole.**—Where the owner of property gives permission to persons delivering him coal to remove the cover of a coal-hole in the sidewalk, and a person falls therein by reason of failure properly to replace the cover, the owner is liable for the injury. But his liability does not relieve the active wrongdoers from the consequences of their acts; the liability is joint, and as between themselves the active wrongdoer stands in the relation of indemnitor to the owner when he has been held liable, and the rule that courts should not interfere as between joint tort-feasors is not applicable. (N. Y.) *Scott v. Curtis*, 811.

13. **PUBLIC STREETS—Persons Liable for Open or Unguarded Coal-hole.**—In an action by the owner of premises against persons alleged to have left a coal-hole in the sidewalk in a dangerous condition, to recover from them the amount of a judgment that has been recovered against him by a person who fell into the hole, he must show that their active negligence caused the injury, and this is not sufficiently done by introducing in evidence the judgment-roll in the action against him, if it does not appear therefrom how the accident happened nor upon what specific acts he bases liability. (N. Y.) *Scott v. Curtis*, 811.

Special Assessments.

See Assessments for Local Improvements.

14. **SPECIAL ASSESSMENT—Personal Liability.**—A Statute is Unconstitutional which makes a special assessment against abutting property for a local improvement the personal obligation of the owner recoverable by an action, regardless of any consideration of benefits, damages, exemptions, due process of law, or the guaranty against tak-

ing property for public use without just compensation. (S. D.) *City of Brookings v. Natwick*, 927.

15. SPECIAL ASSESSMENTS—Remonstrance by Administrator. An executor or an administrator in the possession of and exercising complete control over the real property of his decedent, if his authority to remonstrate is not challenged by the heirs or devisees of said decedent, is an owner of such real estate within the meaning of the statute authorizing the owners of fifty per cent of the foot frontage of real estate subject to special assessments within an improvement district by remonstrating to deprive the city council of power to repave the streets within said district at the expense of the real estate situated therein. (Neb.) *Chan v. City of South Omaha*, 670.

16. SPECIAL ASSESSMENTS—Remonstrance by Guardian.—A guardian in like control of the real estate of his ward is also an owner within the meaning of said statute. So, also, the surviving spouse of the owner of a homestead and a tenant in common are owners. (Neb.) *Chan v. City of South Omaha*, 670.

17. SPECIAL ASSESSMENTS—Remonstrance—Signature of Corporation.—The name of a corporate owner of real estate subject to such an assessment may lawfully be affixed by the president thereof to such a remonstrance. (Neb.) *Chan v. City of South Omaha*, 670.

18. SPECIAL ASSESSMENTS—Remonstrance—Signing by Initials.—Names signed by initial which identify the remonstrant by reference to the property owned by the signer should also be received, where objection is not made by the council to the fact that the first name is not signed in full. (Neb.) *Chan v. City of South Omaha*, 670.

See Assessments for Local Improvements; Mandamus, 12.

MURDER.

See Homicide.

NAMES.

1. NAMES—Abbreviations and Nicknames.—"Mike" is not a universally known abbreviation of "Michael"; it is not an abbreviation at all, accurately speaking, but rather a nickname. (Mo.) *Ohlmann v. Clarkson Sawmill Co.*, 506.

2. NAMES are Idem Sonans if the Attentive Ear Finds Difficulty in distinguishing them when pronounced, or common and long-continued usage has by corruption or abbreviation made them identical in pronunciation; and it is not necessary that they should be spelled alike if the pronunciation is the same. (Mo.) *Maier v. Brock*, 513.

See Judgments, 9; Taxes, 12, 13.

NEGLIGENCE.

In General.

1. NEGLIGENCE—Intermittent Injuries—Successive Actions.—When the cause of an injury to property is permanent, and the resulting damage intermittent, but likely to recur from time to time in the future, the injured person may elect to treat the injury as permanent and recover all his damages in a single action, which bars his right to recover for subsequent injuries from the same cause; but if he elects to treat the injury as of a temporary or continuing character, and sues for damages resulting from one or more specific invasions of his property, a recovery thereunder is no bar to an action for subsequent similar injuries. (Iowa) *Hughes v. Chicago etc. Ry. Co.*, 164.

2. **NEGLIGENCE—Unsafe Premises—Injury to Traveler.**—Where a window remains out of repair until the glass falls into the street to the injury of a traveler, an action therefor lies against the person in possession and control of the premises. (Mich.) *Bannigan v. Woodbury*, 371.

3. **NEGLIGENCE—Violation of Statute.**—It is never a question for a jury whether one violating a positive statute exercised reasonable care and caution in so doing. (Pa.) *Stehle v. Jaeger Automatic Machine Co.*, 884.

4. **NEGLIGENCE—When a Question for Jury.**—Questions of negligence and contributory negligence, where the facts are such that from them different minds may reasonably draw diverse conclusions, are for the jury, and not the court, to determine. (Neb.) *Hair v. Chicago etc. Ry. Co.*, 629.

Proximate Cause.

5. **NEGLIGENCE—Street Railroads—Proximate Cause.**—In natural consequence, the proximate cause of an injury to one known to have been in peril may be the product of simple negligence or of willful or wanton wrong; if the latter, then contributory negligence is in general no defense. (Ala.) *Anniston Elec. etc. Co. v. Rosen*, 32.

6. **NEGLIGENCE—Doctrine of Proximate Cause.**—Where a circumstance or event which concurs with a negligent act in causing an injury might reasonably have been foreseen as likely to occur under the circumstances, the person guilty of the negligent act is liable for the resulting injury. (Pa.) *Stehle v. Jaeger Automatic Machine Co.*, 884.

See Automobiles; Damages; Gas Companies; Railroads.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

NEW TRIAL.

1. **A NEW TRIAL on the Ground of Newly Discovered Evidence** is properly refused, if it appears that with ordinary diligence this evidence might have been produced at the original trial. (Mich.) *First Nat. Bank v. Union Trust Co.*, 362.

2. **A NEW TRIAL for Newly Discovered Evidence Should be Granted**, in case the location of a quarter section corner is in dispute, such evidence being that of the government surveyor who made the survey and who at the time of the trial was a government official in Alaska, but has since returned and states that his survey was made exactly as set forth in his field-notes. (S. D.) *Kellogg v. Finn*, 945.

NOTICE.

See Chattel Mortgages, 7-11; Principal and Agent, 2.

NUISANCE.

See Negligence, 1.

OFFICERS.

OFFICER—Justification Under Execution.—In levying on property under an execution regular on its face and issued by a court of competent jurisdiction, a sheriff is not obliged to ascertain at his peril that the judgment on which the writ issued is valid and unpaid; and when called on to account as a tort-feasor for such action, he may pro-

duce the writ to protect himself from personal liability without proof of the judgment. (Neb.) *Hoover v. Jones*, 647.

OPINIONS.

See Courts, 5.

PARENT AND CHILD.

PARENT AND CHILD—Recovery for Injury to Child.—Where a minor is injured while employed in violation of statute, both the father and child may recover damages from the employer. (Pa.) *Stehle v. Jaeger Automatic Machine Co.*, 884.

Note.

Parent and Child, services rendered by the one for the other, when presumed to have been gratuitous, 252, 253.

PARLIAMENTARY LAW.

LEGISLATIVE BODIES—Compelling Attendance of Members.

The power to control and compel the attendance of members of deliberative and legislative bodies is lodged in them, if it exists at all, not in the courts; and if such bodies are not endowed with that power, then it is nonexistent and courts cannot supply it. (Mich.) *Wilson v. Cleveland*, 352.

PAROL EVIDENCE.

See Evidence, 16-18.

PARTIES.

1. PARTIES—Sheriff Who Made Levy and Sale, When Need not be Joined as a Defendant.—It is not necessary to join a sheriff who made a levy and sale in an action of assumpsit against a judgment creditor to recover the sum actually received by him on the sale of the property. (Idaho) *Dittemore v. Cable Milling Co.*, 98.

2. EQUITY—Parties Defendant—Third Person Interested in the Result, When Need not be Made a Party.—In a suit to enforce a contract whereby the defendant agreed not to sell or permit the selling at his place of business of any goods except those of the complainant, it is not necessary to make a party defendant a rival of the complainant whose goods the defendant is sought to be prohibited from selling. (Mass.) *Butterick Pub. Co. v. Fisher*, 283.

See Judgments, 12-14.

PARTITION.

1. PARTITION—Joinder of Ejectment With Partition.—An heir, denied recognition in his ancestor's estate, may join a count in ejectment with a count in partition, and succeeding in the first may proceed at once with his right to partition. (Mo.) *Grimes v. Miller*, 501.

2. PARTITION—Effect on Absent Heir not Made a Party.—If one leaves the state at a time when he has no property likely to be affected by his absence, remains away some twenty years, and twelve years after his departure his mother dies, leaving an estate which is partitioned the same year in a suit by heirs to which he is not made a party, they representing themselves to be the only heirs and subsequently selling the land to innocent purchasers, his rights in the property remain unaffected, and on his return he may enforce them, he having had no notice of the death, the inheritance or the partition, and there having been no inducement by him to the purchasers to buy

or any act of estoppel except his absence from the state for more than seven years. (Mo.) *Grimes v. Miller*, 501.

3. PARTITION—Premises in Possession of Lessee.—A tenant in common is not precluded from bringing partition proceedings by the fact that the premises have been leased and are in possession of the lessees. (Wis.) *Peterman v. Kingsley*, 1107.

4. PARTITION—Lessees of Premises who purchase the interest of one of the co-owners succeed to his right to bring partition proceedings. (Wis.) *Peterman v. Kingsley*, 1107.

5. PARTITION—Lessees of the Premises are not Necessary Parties in an action between the co-owners for partition in which the premises are sold subject to the leases. (Wis.) *Peterman v. Kingsley*, 1107.

PARTNERSHIP.

In General.

1. PARTNERSHIP—The Relations Between Partners are confidential; they are trustees for one another. (S. D.) *McPherson v. Swift*, 907.

2. PARTNERSHIP—Succession on Death of One Partner.—On the death of one partner the surviving partners succeed to all the firm property, whether real or personal, in trust for purposes of liquidation, even though the deceased was appointed by agreement sole liquidator; and his interest in the ultimate distribution of the assets passes to those who succeed to his other personal property: *Rev. Civ. Code*, secs. 1726-1761. (S. D.) *McPherson v. Swift*, 907.

What Constitutes Partnership—Unincorporated Association.

3. PARTNERSHIP—Joint Venture in Real Estate.—Under an Agreement whereby A purchases real estate for the joint benefit of himself and B, B furnishing the money and taking the legal title, and whereby A is to look after the property and receive for his services one-half the net profits after first deducting therefrom interest on the purchase price, and whereby A is to pay one-half of any ultimate loss and have one-half of any ultimate profits, each party to pay one-half of all costs on the property—A is not an employé whose employment is terminated on the death of B, but they are in effect partners, and the real estate, as to their interests, is regarded as personalty. (S. D.) *McPherson v. Swift*, 907.

4. PARTNERSHIP, Voluntary Association, When is a.—A voluntary unincorporated association of individuals for the purpose of conducting a business whose proportions of ownership in the assets are represented by certificates having a similarity to shares of stock in a corporation is a partnership. (Mass.) *Ashley v. Dowling*, 296.

5. PARTNERSHIP, Limitation of Profits, When Does not Prevent a Voluntary Association from Being a.—The fact that partners having shares or interests in a voluntary unincorporated association are by its by-laws limited in their profits to six per cent, that a sinking fund of five per cent of the profits is provided for, and that the surplus of the profits is to be distributed as dividends to purchasers of goods sold by the association, does not prevent the association from being liable as partners nor constitute them creditors of the association, nor make the purchasers members of the association or subject to any liability as such. (Mass.) *Ashley v. Dowling*, 296.

6. PARTNERSHIP—Voluntary Associations, Liabilities of Members of as.—The fact that there are large numbers of persons holding shares in a voluntary unincorporated association, that they adopted articles of copartnership which were not in all respects

strictly complied with, and called these articles by-laws and themselves stockholders, does not exempt them from the ordinary rules governing partnerships. Persons choosing to avail themselves of a partnership for business purposes cannot escape the responsibilities accompanying such a relation. (Mass.) *Ashley v. Dowling*, 296.

7. PARTNERSHIP—Unincorporated Association, When Bound by Acts of a Purchasing Agent.—If an unincorporated association is formed for the purpose of carrying on a co-operative store, and employs a salesman who assumes general control of the business, doing all the buying and selling for many years, making purchases on credit and giving notes therefor, the members of the association are bound as partners by his acts, and it is not necessary to show that those of them against whom liability is sought to be enforced had knowledge of the particular transaction upon which the liability is founded. (Mass.) *Ashley v. Dowling*, 296.

8. PARTNERSHIP, Liability of Members, When not Prevented by a By-law or Article of Association.—Where members of a voluntary unincorporated association adopt articles of association which they style by-laws, one of which declares that the cash system shall be strictly enforced, this does not govern wholesale purchases of goods nor prevent the shareholders from being liable as partners for purchases made on credit. (Mass.) *Ashley v. Dowling*, 296.

9. PARTNERSHIP in an Unincorporated Association, When Sufficiently Established.—One who pays for a share in an unincorporated association about the time it is established becomes a partner therein and liable as such, though he may not have received the certificate of stock or any interest thereon, nor attended any of the meetings or received notice of them, or had a copy of the by-laws or any knowledge of the business of the firm. (Mass.) *Ashley v. Dowling*, 296.

Power of Firm, Partner or Agent.

10. PARTNERSHIPS, Power of to Purchase on Credit.—The right of a business partnership to purchase on credit and make notes for goods purchased cannot be doubted. (Mass.) *Ashley v. Dowling*, 296.

11. PARTNERSHIP, Authority of One Member.—If a partnership consists of an unincorporated association of many persons, the right of each to act within the apparent scope of the business binds his copartners. (Mass.) *Ashley v. Dowling*, 296.

12. PARTNERSHIP, Power of Agent to Create Liability Against Partners.—An agent of a partnership consisting of a voluntary unincorporated association is empowered, on behalf of the copartnership, to incur such indebtedness as the ordinary conduct of the business requires. (Mass.) *Ashley v. Dowling*, 296.

13. PARTNERSHIP, Authority of Agent of to Execute Commercial Paper.—If one acting as agent of an unincorporated association exercises for years the power to buy on credit and pay with notes, this must be deemed to have been done with the knowledge and consent of those persons who had an interest in the business, and to have bound the association and the partners therein. (Mass.) *Ashley v. Dowling*, 286.

Accounting—Limitation of Actions.

14. PARTNERSHIP.—In an Action for an Accounting of partnership property wherein the plaintiff offered to pay a certain amount in consideration of having his claims in the property recognized, which offer is not essential to his cause of action, his withdrawal thereof long after it has been refused is not a renunciation of his right to an accounting. (S. D.) *McPherson v. Swift*, 907.

15. PARTNERSHIP.—Where the Plaintiff in a Partnership Accounting declines an offer of the defendant to withdraw his prayer for affirmative relief and submit to a decree on such terms as the court may deem just, and withdraws his action, the defendant not having pleaded a counterclaim, he is not estopped to maintain another action for the same relief. (S. D.) *McPherson v. Swift*, 907.

16. PARTNERSHIP—Delay in Demanding Accounting.—Failure to prosecute a partnership accounting until ten years after the death of a partner is not such laches as to preclude the plaintiff, if the defendant is not prejudiced thereby, he having enjoyed the possession of the property and its proceeds during the intervals. (S. D.) *McPherson v. Swift*, 907.

17. PARTNERSHIP—Limitation of Action for Accounting.—When the right of action to sue for the settlement of partnership affairs accrues, so as to set the statute of limitations in motion, depends upon circumstances, and cannot be held as a matter of law to arise at the date of the dissolution, or to be carried back by relation to that date. (S. D.) *McPherson v. Swift*, 907.

18. PARTNERSHIP—Limitation of Action for an Accounting.—An action in equity to ascertain and recover a deceased partner's interest in the ultimate distribution of partnership assets is one for relief "not specially provided for," to be commenced within ten years after the cause of action accrued. (S. D.) *McPherson v. Swift*, 907.

PARTY-WALLS.

PARTY-WALL—Agreement for Payment not Running With Land.—Where an owner of land builds a party-wall under an agreement with the adjoining land owner that when he or his assigns shall use it he or they shall pay the value of the wall, the covenant of payment does not run with the land: there is a distinction, in respect to their running with the land, between agreements contemplating the present construction of a party-wall and those authorizing a construction by either party in the future. (N. Y.) *Crawford v. Krollpfeiffer*, 783.

PASTERS.

See Bills and Notes, 8, 9.

PAVING RIGHT OF WAY.

See Health Regulations, 3, 4.

PERJURY.

1. PERJURY.—An Indictment for Perjury Should in Terms Set Out and charge the substance of the testimony upon which the perjury is assigned, and not the conclusion of the pleader or the meaning of the testimony. (Tex. Cr.) *Schoenfeld v. State*, 956.

2. PERJURY—Whether Assignable upon Construction of Contract.—Perjury cannot be assigned on the testimony of the accused of his interpretation as to the legal effect of an alleged agreement, oral or written, between himself and another. (Tex. Cr.) *Schoenfeld v. State*, 956.

PLEADING.

In General.

1. PLEADING—Stating One Cause of Action in Several Forms.—It is contrary to the spirit of the reformed procedure to set forth a single cause of action in separate counts, one upon contract and one upon the quantum meruit; and while such a defect may be subject to motion, and in a proper case be deemed waived by the opposite party,

it requires reversal on appeal if the trial court submitted both issues to the jury, when there was no evidence to support the latter, and it is impossible to say that the jury rejected the false and rendered its verdict on the true issue. (Wash.) *Gabrielson v. Hague Box & L. Co.*, 1032.

2. PLEADING—Demurrer, Special, When Should be Resorted to. If the litigants do not understand the meaning of the allegations of the complaint and feel that they may be deceived or misled by them, or that they are ambiguous or uncertain, their remedy is by special demurrer to reach such ambiguities and uncertainties, and thereby require the pleader to be more specific and certain. (Idaho) *Dittemore v. Cable Milling Co.*, 98.

3. PLEADING.—If a Defendant Desires an Affirmative Judgment against the plaintiff, he should state in his answer the ultimate facts to support his contention. If he fails to allege an essential fact, but it is pleaded by his adversary, an affirmative judgment in defendant's favor may be sustained by the pleadings. (Neb.) *Snyder v. Collier*, 682.

4. PLEADING—Withdrawal of Statement Mistakenly Made in Petition.—If plaintiff's petition is prepared, signed and verified by his attorney, and by mistake an erroneous statement is included therein, the court should before judgment, upon terms just and equitable to all parties, permit the litigant to withdraw that allegation. (Neb.) *Snyder v. Collier*, 682.

5. PLEADING—Variance.—"There can be No Recovery if there is a material variance between the allegations and the proof. The *allegata et probata* must agree": *Elliott v. Carter White-Lead Co.*, 53 Neb. 458. (Neb.) *Cockins v. Bank of Alma*, 642.

Amendments.

6. PLEADING—Answer to Amended Complaint.—Where at the time of the amendment to a complaint in a suit to foreclose a chattel mortgage, and prior to the taking of any evidence, the defendants, who all joined in the original answer, reserve by consent of court the right to move against or to answer the amended complaint at a subsequent time, they are not bound, in filing their answer to the amended complaint after the testimony is taken, to adhere to the defenses set up in the original answer, nor are they precluded from filing separate answers making any defense otherwise available. (Or.) *Ayre v. Hixson*, 819.

7. PLEADING—Liberality Allowed in Making Amendments.—The code provision for the amendment of pleadings is given a liberal construction to prevent a failure of justice and the dismissal of actions on the ground of variance between the allegations and the evidence. (S. D.) *Wolfinger v. Thomas*, 900.

8. PLEADING—Amendment.—A Complaint by a Vendee of Land may be Amended at the trial so as to change his action to rescind the contract of sale on the ground of fraudulent representations on the part of the vendor to an action to rescind on the ground of mutual mistake of the parties. (S. D.) *Wolfinger v. Thomas*, 900.

Denials on Information and Belief.

9. PLEADING DENIALS on Information and Belief, When Permissible.—Where a plaintiff alleges in general terms that he is "the duly appointed, qualified and acting trustee" of the estate of a bankrupt, and in like general terms alleges the filing of the petition in bankruptcy and the adjudication in bankruptcy, denials by one in no way a party to that proceeding of such allegations for want of information on the subject are sufficient, and should not be stricken out. (Idaho) *Dittemore v. Cable Milling Co.*, 98.

10. PLEADING DENIALS on Information and Belief Though the Defendant Might have Informed Himself.—The rule prohibiting denials on information of matters of record should not be extended to the length of requiring a defendant to inform himself as to the files and records of referees in bankruptcy in the federal courts and bankruptcy courts generally, wherein the proceedings are chiefly had before a referee, to which proceeding the defendant was not a party, nor should it be extended to the records and files of boards and departments of government in matters to which the pleader has not been a party in any respect. (Idaho) *Dittemore v. Cable Milling Co.*, 98.

See Actions; Frauds, Statute of, 6.

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See Constitutional Law, 8, 9.

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PRINCIPAL AND AGENT.

1. PRINCIPAL AND AGENT—Admissions of Agent.—What a shipping agent says while shipping goods is competent against his principal as part of the *res gestae*; his statements after they have left his possession are not. (Ky.) *Southern Express Co. v. Fox*, 241.

2. AGENCY—Notice to Agent as Notice to Principal.—Where an agent's duty to his principal is opposed to, or even remotely conflicts with, his own interest or the interest of another for whom he acts, the law will not hold his acts or his knowledge gained in such transaction obligatory upon his principal. (Neb.) *Exchange Bank v. Nebraska Underwriters' Ins. Co.*, 614.

3. CONTRACT in Name of Agent—Parol to Identify Real Party. A person who enters into a contract with another and causes it to be reduced to writing in the name of his agent may be identified by parol evidence as the real party in interest and thus subjected to liability thereon. (Minn.) *Pleins v. Wachenheimer*, 451.

4. PRINCIPAL AND AGENT—Agent's Liability on Contracts—Intention.—It is the developed intent of the parties to a contract that is alone material to its operation, and when that is ascertained, it is conclusive. When a principal is disclosed, and his agent is known to be acting for him, the agent, in the absence of any provision to that effect, is not personally liable, and conversely where no principal is disclosed either in the contract or its signature, and there is no evidence of the agency, the agent signing is personally liable. (Wash.) *Gordon v. Brinton*, 1038.

5. AGENCY—Personal Liability of Agent on Contract.—Where a contract for the sale of machinery is signed by the sellers in their own names merely, and there is nothing on the face of the contract to show that they are acting as agents, and the agreement is acted upon by the parties, the sellers are personally bound and cannot escape liability on the ground that they were acting as agents, although the buyer states that he supposed they were agents but did not deal with them in that capacity. (Wash.) *Gordon v. Brinton*, 1038.

See Frauds, Statute of, 1, 2.

PRINCIPAL AND SURETY.**SURETY—Whether His Action Against Principal Premature.—**

Where the surety on a note to a bank agrees with the cashier that the amount due on the note shall be charged to his account in the bank, his action on a mortgage given him by the principal debtors as indemnity is not premature because commenced before he pays the bank formally. (Iowa) *Gribben v. Clement*, 157.

PRIVATE WAY.

PRIVATE RIGHT OF WAY, Unauthorized Construction of a Building Foundation in.—The owner of adjacent real property has no right to construct the foundation walls of his building so that their base will rest within a private right of way, the fee of which belongs to another. Such rights exist and are applicable only to public ways. (Mass.) *Curtis Mfg. Co. v. Spencer Wire Co.*, 307.

See Health Regulations, 3, 4; Injunction, 3.

PROBATE LAW.

See Descent and Distribution; Executors and Administrators; Wills.

PROCESS.*In General.***1. JURISDICTION—Presumption in Favor of Service of Process.**

Where a decree is granted the plaintiff in an action of divorce based upon personal service, it must be presumed that the court considered and determined affirmatively the question whether due service was made. And its judgment, though erroneous, is not void. (Wash.) *Meisenheimer v. Meisenheimer*, 1005.

2. APPEAL AND ERROR—Amendment of Return of Service of Process and Certifications of to the Appellate Court.—Where the return of service of summons is insufficient to establish the fact of service, but judgment by default is entered and the defendant appeals to the district court on questions of law alone, and there moves to vacate and set aside the judgment on the ground that there is no valid proof of service, it is not error for the district court to permit the filing of an amended return of service which has been properly made in the justice or probate court in which the judgment was entered, and which return has been duly certified to the district court. (Idaho) *Call v. Rocky Mountain Bell Tel. Co.*, 135.

Service by Publication.

3. JURISDICTION—Service by Publication.—The Use of the Initials of the Christian Name of the defendant is not sufficiently accurate to acquire jurisdiction by constructive notice in proceedings to divest him of land. But this rule is relaxed where estoppel has played. (Mo.) *Ohlmann v. Clarkson Sawmill Co.*, 506.

4. JURISDICTION—True Name of Defendant.—In notice by publication the defendant should be accurately designated by his true name. (Mo.) *Ohlmann v. Clarkson Sawmill Co.*, 506.

5. JURISDICTION—Service by Publication—Rule of Strictness.—Service by Publication, being highly technical, must be strictly pursued in order to acquire jurisdiction; constructive service must be viewed critically, to prevent, so far as can be, irreparable injury. (Mo.) *Ohlmann v. Clarkson Sawmill Co.*, 506.

See Corporations, 27, 28; Judgments, 6-9, 24, 25; Officers.

PROFITS.

See Damages, 3-5.

PROXIMATE CAUSE.

See Negligence, 4-6.

PUBLIC LANDS.

SCHOOL LANDS, Parol Evidence Showing Valid Forfeiture of.—In an action to recover possession of school land, where the defendants claimed rights as new purchasers, the plaintiff, after proving a prima facie case for himself, offered in evidence the records of the county clerk showing an attempted forfeiture of his interest. The sheriff's return was defective in failing to state that no one was in possession of the land. The plaintiff supplied the omission in the recitals of the return by offering oral proof that the land had never been occupied by anyone. Held, that the provisions of chapter 373 of the Laws of 1907 apply, and that the plaintiff thereby established a prima facie showing of a valid forfeiture, which defeated his right to recover, and a demurrer to the evidence was rightly sustained. (Kan.) *Jones v. Hickey*, 190.

See Taxation, 16, 17.

QUIETING TITLE.

1. QUIETING TITLE—Who may Maintain Action.—One having title to land, whether legal or equitable, may maintain a suit to determine adverse claims. (Or.) *Kollock v. Bennett*, 840.

2. QUIETING TITLE—Sufficiency of Evidence to Sustain Judgment.—The evidence examined in the opinion, and held to sustain the judgment. (Neb.) *Bank of Alma v. Hamilton*, 676.

RAFFLING.

See Gaming.

RAILROADS.*Mortgage of After-acquired Property.*

1. RAILWAY MORTGAGE—To What After-acquired Property Attaches.—Where a railroad company mortgages certain property and "all other property which may hereafter be acquired in connection with the construction and operation of the railroad, or as convenient or necessary for the uses or purposes thereof," the mortgage attaches (taking precedence over the lien of a subsequent judgment) to land thereafter acquired by grant from the state which lies under the water of a great bay adjacent to the company's upland, it appearing that the railroad runs only during the summer, and then mainly to reach the waters of the bay and an ocean beach, that to attract travel it has developed its terminal properties on the bay by the erection of hotels and places of amusement, that the acquired land is to be used for like purposes, and that it is necessary or convenient therefor and for the profitable maintenance of the railroad. (N. Y.) *People's Trust Co. v. Schenck*, 807.

Flooding Land by Embankment.

2. RAILWAY—Flooding Land—Intermittent Injuries.—The fact that a railway embankment and bridge which cast water upon adjacent land are permanent in character does not preclude the injuries from being temporary or intermittent, as distinguished from permanent, and bar successive actions to recover therefor. (Iowa) *Hughes v. Chicago B. & Q. Ry. Co.*, 164.

3. RAILWAY—Flooding Land—Intermittent Injuries.—Where a railway bridge obstructs the water in time of floods and sets it back across intervening land upon the premises of a proprietor not crossed

by the railroad, the invasion of his property is regarded as temporary, not permanent, and each recurring invasion is a new wrong for which a new action will lie. (Iowa) *Hughes v. Chicago B. & Q. Ry. Co.*, 164.

Unfenced Track.

4. **RAILROADS—Fencing Right of Way—Depot Grounds.**—The question whether or not a given place is depot grounds, within the meaning of the Wisconsin statute requiring railroad rights of way to be fenced, is ordinarily a question of fact. (Wis.) *Schwind v. Chicago etc. Ry. Co.*, 1055.

5. **RAILROAD—Neglect to Fence Right of Way.**—Where a Statute Commands railroads to fence their rights of way, and further declares that they "shall be liable for all damages done to domestic animals or persons thereon, occasioned in any manner, in whole or in part, by want of such fences," proximate causal relation, including reasonable anticipation, is not necessary to create liability to a person who goes upon an unfenced track and is struck by an engine, nor is contributory negligence a defense. The purpose of the statute is to cast upon railroads absolute liability for injuries to persons and animals whose entry upon tracks is made possible by absence of the prescribed fence. (Wis.) *Schwind v. Chicago etc. Ry. Co.*, 1055.

6. **RAILROAD—Injury to Boy on Track.**—The Mere Absence of a Fence prescribed by statute along a railroad right of way will support an inference that its presence would have deterred a boy of ten years from deviating from the adjacent muddy street to walk along the track, where he was struck by an engine. (Wis.) *Schwind v. Chicago etc. Ry. Co.*, 1055.

7. **RAILROAD—Injury to Boy on Track—Absence of Fence.**—It is not error, in an action for injuries to a boy struck by a train while walking on an unfenced track, to instruct the jury to consider whether a fence would have "prevented or tended to prevent" his entry on the right of way. (Wis.) *Schwind v. Chicago etc. Ry. Co.*, 1055.

Duty to Licensee in Yards.

8. **RAILROAD—Duty to Licensee in Yards Near Station.**—A railway company that maintains its station in a public highway in the center of its switchyards, and for years has permitted the public to use said yards as a footway, is bound to exercise reasonable care to avoid injuries to persons who are known or reasonably may be expected to be within those yards in the vicinity of said station. (Neb.) *Hair v. Chicago etc. Ry. Co.*, 629.

Injury to Persons on Track or Crossing.

9. **RAILROAD—Injury at Crossing—Contributory Negligence.**—Where the evidence tends to show that a traveler in an automobile, as he approached a grade crossing, found the safety gates open, stopped or nearly stopped, but on a signal from trainmen started over the crossing and was struck by coal-cars being backed on one of the tracks, of the approach of which no warning was given, it cannot be held as a matter of law that he was guilty of contributory negligence. (Pa.) *Sanders v. Pennsylvania R. R. Co.*, 857.

10. **RAILWAYS, Persons Crossing and Relying Exclusively on the Gates Being Up.**—One intending to cross the track of a railway has no right to rely exclusively on the fact that the gates are up, but is bound to use his own senses to determine whether it is safe to go on. (Mass.) *Slattery v. New York etc. R. R. Co.*, 311.

11. **RAILWAYS, Want of Due Care on the Part of a Person Injured, When Shown.**—If the evidence shows that a person who was struck and killed on the track of a railway by a passing train did

not look or must have seen the train had he looked, he is shown not to have been in the exercise of due care, though the gates were up when he passed them. (Mass.) *Slattery v. New York etc. R. R. Co.*, 311.

12. **RAILWAYS, Effect of Failure to Hear the Bell Rung at a Crossing.**—The fact that one in crossing did not hear the bell rung is some evidence that it did not ring, if his position was such that the sound would have been likely to attract his attention if the bell had been rung. Though the testimony on cross-examination is somewhat conflicting, it is still for the jury to say whether the bell rang or not. (Mass.) *Slattery v. New York etc. R. R. Co.*, 311.

13. **NEGLIGENCE, Gross, Burden of Proving.**—In an action against a railroad company to recover of defendant for the injury and death of plaintiff's intestate, where it is clear that such injury and death were due to his gross negligence, the defendant must assume the burden of proof. (Mass.) *Slattery v. New York etc. R. R. Co.*, 311.

14. **RAILWAYS, Liability of for Personal Injuries and Death Unless the Party was Guilty of Gross Negligence—Failure to Ring a Bell or Sound a Whistle.**—If the testimony on the trial of an action against a railroad company to recover for the death of plaintiff's intestate, killed at a crossing, tends to prove that when decedent entered upon and undertook to pass the crossing, the gates were up, the morning dark and foggy, and no whistle was blown, bell rung or other signal given, and the first three tracks were filled with cars, wholly concealing the approaching train until he came within twenty-five feet of it, a verdict should be directed for the defendant, for the statute permits a recovery, unless decedent was guilty of gross negligence. Whether he was guilty of such negligence should be submitted to the jury. (Mass.) *Slattery v. New York etc. R. R. Co.*, 311.

Liability of One Company for Acts of Another.

15. **RAILROAD—Liability of One Company for Negligence of Another.**—Where a traveler in the highway is negligently injured by collision with a train at a crossing, the corporation owning and controlling the railroad is primarily liable; and if it alleges that the accident was due to the negligence of another company operating a train upon the tracks under a traffic arrangement, it has the burden to establish the facts necessary to shift its responsibility. (Pa.) *Sanders v. Pennsylvania R. R. Co.*, 857.

16. **RAILROADS—Liability of One Company for Acts of Another.** Where a railroad company simply permits another company to run cars upon its tracks, it is liable for damages caused by the negligence of the company enjoying the permissive use; the arrangement for trackage rights is in the nature of a license, and the company enjoying the same is a licensee. But the application of this rule depends largely upon the nature of the contract between the companies. (Pa.) *Sanders v. Pennsylvania R. R. Co.*, 857.

17. **RAILROADS—Liability of One Company for Acts of Another.** Where a traveler in the highway is injured at a crossing by a train of a corporation not owning nor controlling the railroad, but running on it by the orders and subject to the rules and regulations of the owners of the railroad, an action for such injury is properly brought against the company owning the road. (Pa.) *Sanders v. Pennsylvania R. R. Co.*, 857.

Attempt to Stop Driverless Horse Near Track.

18. **NEGLIGENCE—Attempt to Stop a Driverless Horse Near Railroad.**—Plaintiff saw a horse and wagon without a driver approach the
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railroad tracks at a constantly used crossing of a busy city street. He took hold of the reins suspended from the top of the vehicle. Defendant's railroad train, while the engine whistle was being blown and the train was running at the rate of thirty-five miles an hour, came suddenly into view around a sharp curve some two hundred feet away. The horse became frightened, plunged forward, and jerked plaintiff on the track. The oncoming train struck him, and produced the injuries for which the jury awarded damages. Its verdict is sustained, despite objection based on the absence of proof of defendant's negligence, on plaintiff's contributory negligence, on the instructions given by the trial court, and on other grounds. (Minn.) *Campbell v. Chicago Great Western Ry. Co.*, 417.

19. NEGLIGENCE.—One Who Goes Near Enough to a Railway Track to be in danger from any cause is required by law to exercise due care to avoid harm. This rule does not, however, amount to a hard-and-fast requirement that such a person must stop, look, and listen, and continue to look under all circumstances and at all times; nor is such person bound to anticipate negligence on the part of persons operating trains on such a track. (Minn.) *Campbell v. Chicago Great Western Ry. Co.*, 417.

Frightening Horse by Escape of Steam.

20. RAILROADS—Liability for Frightening Horses by Escape of Steam.—Where a traveler, finding a locomotive standing at rest without signs of moving, attempts to drive over the crossing in front of it, whereupon the engine suddenly and without warning blows off steam with such force as to frighten the horse and cause it to run away, the railroad company may be held liable for resulting injuries. (Pa.) *Weller v. Lehigh Valley R. R. Co.*, 861.

See Carriers; Street Railways; Eminent Domain; Master and Servant, 8-10.

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Railroads, animals, frightening of, liability for injuries due to, 864, 867.

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RECEIVERS.

RECEIVER.—The Title of a Receiver and His Right to Possession vest by relation on the date of the order appointing him. (Mich.) *Saginaw County Sav. Bank v. Duffield*, 354.

See Corporations, 22–25.

RECORDS.

EVIDENCE—Negative of the Nonexistence of a Mortgage.—It is proper to permit an abstracter to testify of his examination of the records and that he did not find any mortgage recorded on the property in suit prior to a specified date. (Kan.) *Hendricks v. Brooks*, 186.

See Chattel Mortgages, 7–11; Evidence, 14, 15; Judgments, 14; Mortgages, 7.

RELATION, DOCTRINE OF.

THE DOCTRINE OF RELATION is a Fiction of Law which courts, upon broad rules of equity, apply in furtherance of justice but never employ except when necessary to give effect to an instrument the operation of which would otherwise be defeated. (Or.) *Johnson v. Crook County*, 834.

REPLEVIN.

REPLEVIN—Justification of Officer Under Execution.—Where a sheriff seizes personal property under an execution, and a stranger to the process deprives him of his possession by a writ of replevin, the execution, though produced by the officer at the trial of the suit in replevin, is not competent evidence of the officer's possessory rights without proof of the judgment on which such execution was issued. (Neb.) *Hoover v. Jones*, 647.

RES GESTAE.

See Homicide, 10.

RESIDENCE.

See Domicile.

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RESTRAINT OF TRADE.

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Restraint of Trade, trade secrets and secret processes, protection of notwithstanding, 764.

RETRAXIT.

1. **RETRAXIT**—What Constitutes.—At Common Law a Retraxit is a voluntary acknowledgment that the plaintiff has no cause of action, and therefore will not proceed further, made by him in open court in person. (S. D.) *McPherson v. Swift*, 907.

2. **RETRAXIT**—What is not.—A Verified Return to an Order to Show Cause why the defendant should not withdraw certain paragraphs from his answer, which prays the "court to discharge the order to show cause and dismiss the bill of complaint herein," does not amount to a retraxit, when from the record it does not appear to have been filed by the plaintiff in person, does not acknowledge that he has no cause of action, and is not inconsistent with the intention further to litigate his rights. (S. D.) *McPherson v. Swift*, 907.

RIPARIAN RIGHTS.

See **Waters and Watercourses**.

SAFETY GATES.

See **Railroads**, 10.

SALES.

1. **CONDITIONAL SALE**—Remedies of Seller on Breach by Buyer.—Where the buyer under a conditional sale breaches the contract, the seller may treat the contract as rescinded and retake the property; or retake the property, but still treat the contract as in force but broken by the buyer and bring an action for damages occasioned by the breach; or waive the breach and insist upon payment for the property. (Mont.) *Madison River Livestock Co. v. Osler*, 558.

2. **CONDITIONAL SALE**—Effect of Wrongful Retaking of Property.—Where the seller wrongfully retakes possession of the property sold under a conditional sale, this constitutes a violation of the terms of the contract and the buyer may treat it as rescinded. (Mont.) *Madison River Livestock Co. v. Osler*, 558.

3. **CONDITIONAL SALE**—Rescission by Seller—Quantum Meruit.—Where the seller wrongfully retakes cattle conditionally sold, the buyer may treat the contract as abrogated; and in an action by the seller on the purchase notes, the buyer may maintain counterclaims upon the quantum meruit for pasturage and labor in keeping the stock. (Mont.) *Madison River Livestock Co. v. Osler*, 558.

4. **CONDITIONAL SALE**—Election of Remedies by Seller.—Where the buyer under a conditional sale breaks the contract, the seller has an election of remedies, but having chosen the one he will pursue, the choice becomes irrevocable; he cannot retake the property, renounce the contract, and at the same time insist upon payment under the contract. (Mont.) *Madison River Livestock Co. v. Osler*, 558.

5. **CONDITIONAL SALE**—Breach by Buyer.—Where the Buyers of Cattle under a conditional sale agreed to furnish hay for the animals to the extent of four hundred tons annually, the fact that they furnished only two hundred and fifty tons between December 22d and the following spring does not necessarily constitute a breach of the contract, inasmuch as the requisite amount of hay might vary greatly with the seasons. (Mont.) *Madison River Livestock Co. v. Osler*, 558.

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SEARCHES AND SEIZURES.

SEARCH in Suspected Places, Right of Which Does not Justify Seizing Property from the Person of Another.—A statute giving commissioners of game the right to search in suspected places for, and seize and remove, lobsters which have been unlawfully taken, held or offered for sale does not justify the seizing of property upon the person or in the hands of another and taking it from him for the purpose of examining the contents of a receptacle which is seized while in his hands and taken from his person against his will. (Mass.) *Dunn v. Lowe*, 326.

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See Trade Secrets.

SELF-DEFENSE.

See Homicide, 11.

SENTENCE.

See Criminal Law, 3.

SETOFF AND COUNTERCLAIM.

1. **COUNTERCLAIM**—Cases in Which Permissible.—When a Cause of Action arises out of the transaction or is connected with the subject of the action set out in the complaint, it may be pleaded as a counterclaim without regard to its character as *ex contractu* or *ex delicto*. It is only when the cause of action sought to be counterclaimed arises upon an independent contract that it is material that it should be one on contract and existing at the time of the commencement of the action. (S. D.) *Northwestern Port Huron Co. v. Iverson*, 920.

2. **COUNTERCLAIM**—Liberal Construction of Statute.—A statute providing for counterclaims should receive a liberal construction to

avoid multiplicity of suits and to enable litigants to determine their differences in one action. (S. D.) Northwestern Port Huron Co. v. Iverson, 920.

3. **COUNTERCLAIM—Conversion.**—In an Action on Notes Secured by a chattel mortgage on machinery, the defendant may counterclaim for the wrongful conversion of the machinery by the plaintiff in attempting to foreclose the mortgage without complying with the statute. (S. D.) Northwestern Port Huron Co. v. Iverson, 920.

See Chattel Mortgages, 15.

SHERIFF.

See Officers; Replevin.

SPECIFIC PERFORMANCE.

1. **SPECIFIC PERFORMANCE, Tests of the Right to.**—The question whether a contract will or will not be specifically enforced depends on whether the thing contracted for can be purchased by the complainants and whether damages are an adequate compensation for the breach. (Mass.) Butterick Pub. Co. v. Fisher, 283.

2. **SPECIFIC PERFORMANCE of Negative Covenant.**—The specific performance of a negative covenant will not be denied in a proper case because an affirmative covenant, with which the negative covenant is allied, is in kind one which a court does not specifically enforce. (Mass.) Butterick Pub. Co. v. Fisher, 283.

3. **SPECIFIC PERFORMANCE of an Agreement not to Sell Any Goods Except Those of the Complainant.**—A contract between a manufacturer and seller of patterns for all kinds of garments worn by women and children and the owner of the largest dry-goods store in a city that the latter will purchase such patterns and keep them on hand for sale, and will not sell, or permit to be sold, during the term of the contract, any other patterns, will be specifically enforced by enjoining its violation. (Mass.) Butterick Pub. Co. v. Fisher, 283.

4. **SPECIFIC PERFORMANCE of Written Contract—Parol Evidence, When may Affect Right to.**—Where it appears that a written contract was entered into by the complainant and the defendant, and parol evidence is received which shows that it was agreed to make the latter the sole agent of the former, specific performance will not be decreed against him of such contract until the complainant carries out an agreement to make the defendant such agent. He who seeks equity must do equity. (Mass.) Butterick Pub. Co. v. Fisher, 283.

SPENDTHRIFT TRUST.

See Trusts, 4, 5.

STATUTE OF FRAUDS.

See Frauds, Statute of.

STATUTE OF LIMITATIONS.

See Limitation of Actions.

STATUTES.

Title of Act.

1. **CONSTITUTIONAL LAW—Sufficiency of Title to Act.**—The title to a statute regulating the employment of women and children is sufficient if a fuller or more distinct statement of the subject could

be made only by introducing the statute itself into the title. (Pa.) *Stehle v. Jaeger Automatic Machine Co.*, 884.

Construction and Interpretation.

2. **STATUTES—Construction.**—Where a statute has been construed, and is subsequently re-enacted, the previous construction becomes a part of the statute itself. (Ala.) *Marks v. State*, 20.

3. **STATE LAWS—Definition—Construction by Courts—Federal and State.**—The laws of a state are the enactments promulgated by its legislative body, expounded and applied by its courts, which interpret the meaning, and such interpretation guides the federal courts. In the absence of any state court interpretation of a statute, the federal courts will construe it. (Ky.) *Commonwealth v. International Harvester Co.*, 256.

4. **STATUTES—Construction—Legislative Intent.**—In construing a statute the aim is to arrive at the legislative meaning by resorting to its language alone, where the language is unambiguous, and where ambiguous to the legislative intentment. (Ky.) *Commonwealth v. International Harvester Co.*, 256.

5. **STATUTES—Inconsistent—Construction.**—Where two statutes on the same subject appear on their face inconsistent, the construing court should harmonize them if possible, so that both may stand entirely, but if not, then in part, and of the irreconcilable parts the later stands and the earlier is deemed repealed. (Ky.) *Commonwealth v. International Harvester Co.*, 256.

6. **STATUTES, INCONSISTENT—Construction of Ambiguities.**—Among the aids to which the court may resort in arriving at the legislative purpose in enacting a statute which is ambiguous is to look to the evil which it was intended to correct, and this may be done by historical references, of which judicial notice will be taken. (Ky.) *Commonwealth v. International Harvester Co.*, 256.

STREET RAILWAYS.

Elevated Railways.

1. **ELEVATED RAILWAY—Liability for Obstructing Light, Air and Access.**—When an elevated street railway, constructed and operated by permission of a town or city, interferes with and deprives the owner of property abutting on the street of his easement of light, air, and access to and from his lot and buildings, he is entitled to recover all damages resulting therefrom. (Mo.) *Rourke v. Holmes St. Ry. Co.*, 468.

2. **ELEVATED RAILWAY—Evidence of Damages to Adjacent Property.**—In an action by a property owner for damages from the construction and operation of an elevated railway in the street in front of his premises, the testimony of another property owner of increase in the rentals of his properties in the same block after the construction of the road is inadmissible; and the right to object to such testimony is not waived by the fact that previously, after the defendant on cross-examination of a witness brought out that character of evidence, the plaintiff briefly questioned the witness in regard to such matters on redirect examination. (Mo.) *Rourke v. Holmes St. Ry. Co.*, 468.

3. **ELEVATED RAILWAY—Evidence of Damages to Adjacent Property.**—In an action by a property owner for damages from the construction and operation of an elevated railway in the street in front of his premises, evidence is not admissible which shows that the railway enhances the value of properties abutting upon another street of the city; the inquiry should be limited to the specific damages and benefits which result to this property, and the joint benefits

received in common with other property in the vicinity should not be gone into. (Mo.) *Rourke v. Holmes St. Ry. Co.*, 468.

4. **ELEVATED RAILWAY—Opinion That Property was Damaged.**—An Expert upon values of real estate may give his opinion, in an action by a property owner for damages from the construction of an elevated railway in the street in front of his premises, that the property was damaged from fifteen to twenty thousand dollars. (Mo.) *Rourke v. Holmes St. Ry. Co.*, 468.

Interurban Railways.

5. **RAILWAYS—Ordinance Requiring Cars to Stop at Crossings.** A municipal ordinance requiring railroad and street-cars to stop at grade crossings to take on and discharge passengers is not a legislative exercise of the police power, and is opposed to public policy when applied to an interurban railway. Hence mandamus does not lie to compel such a railway to stop its cars at the designated places. (Minn.) *Village of Excelsior v. Minneapolis & St. Paul Sub. Ry. Co.*, 455.

Duty and Liability to Persons in Street.

6. **PLEADING—Street Railroads—Injuries to Persons on Road.**—Actual knowledge by a motorman of a traveler's peril being essential to a recovery for failure to exercise reasonable care after the peril was discovered, a complaint alleging the alternative that the position of the traveler's peril was known, or by reasonable care could have been known, to the motorman is not the equivalent of an averment of the requisite knowledge. (Ala.) *Anniston Elec. etc. Co. v. Rosen*, 32.

7. **PLEADING—Street Railroads—Negligence—Inconsistency.**—A count averring both simple negligence and wanton and willful wrong is bad for duplicity. (Ala.) *Anniston Elec. etc. Co. v. Rosen*, 32.

8. **PLEADING—Street Railroads—Simple Negligence.**—A count setting forth plaintiff's rightful presence at a much frequented street crossing, and that it was defendant's duty so to operate his car that it might be brought to a full stop before striking a person on the track, but it was so negligently operated, after the motorman discovered plaintiff's peril, that it could not be brought to a stop before it injured plaintiff, is one charging simple negligence anterior to a breach of duty raised by discovery of peril. (Ala.) *Anniston Elec. etc. Co. v. Rosen*, 32.

9. **PLEADING—Street Railroads—Contributory Negligence.**—A plea that defendant negligently drove on the track toward a street-car in lieu of other and less dangerous directions, that the car was in full view, and the plaintiff could have waited till the car passed, etc., is a good plea to a complaint charging simple anterior negligence, but is no answer to an allegation of want of due care after discovery of the peril. (Ala.) *Anniston Elec. etc. Co. v. Rosen*, 32.

10. **PLEADING—Street Railroads—Complaint—Sufficiency.**—There is no necessity to aver the name of an alleged derelict servant of a railroad company through whose negligence the plaintiff suffered injury, nor to designate the amount claimed for each element of damage. (Ala.) *Anniston Elec. etc. Co. v. Rosen*, 32.

11. **STREET RAILROADS—Travelers—Use of Street.**—The relative rights of travelers in public streets and street-cars operated therein have been defined as being equal, not exclusive, in favor of or against either. (Ala.) *Anniston Elec. etc. Co. v. Rosen*, 32.

12. **STREET RAILROADS—Duty of Car Operator.**—It is the duty of the operator of a street-car to be diligent in keeping a lookout for persons on the street, and to use such care and prudence as the

common right enjoyed by the traveler and the street-car suggest; but this duty is qualified to the extent that the car operator may assume that adults will leave the track in time to avoid injury, though that assumption must not carry him beyond the point where prudence should dictate the stopping of the car. (Ala.) *Anniston Elec. etc. Co. v. Rosen*, 32.

13. **STREET RAILROADS—Duty of Ordinary Traveler.**—On the traveler upon the street the duty rests to “always . . . look for an approaching car, and, if the street is obstructed, to listen, and in some instance to stop. (Ala.) *Anniston Elec. etc. Co. v. Rosen*, 32.

14. **STREET RAILROADS—Injuries to Persons on Road—Elements of Liability.**—Where the breach of duty consists of negligent misconduct resulting in injury after discovery of the peril of the injured party, knowledge of the peril with which the injured party is circumstanced before his injury must be proven, and cannot be inferred from a failure to look out for persons in peril whatever the place of injury, except the misconduct is wanton or willful. (Ala.) *Anniston Elec. etc. Co. v. Rosen*, 32.

15. **STREET RAILROADS—Injuries to Persons on Road—Proximate Cause.**—Where a motorman, had he kept the lookout required, could have seen the peril of a traveler and his inability to extricate himself, and thus have averted the injury, the proximate cause of such injury must be ascribed not to the traveler's stated condition of peril but to the dereliction of duty of the motorman. (Ala.) *Anniston Elec. etc. Co. v. Rosen*, 32.

16. **STREET RAILROADS—Injuries to Persons on Road—Contributory Negligence.**—Where injury is caused by the breach of the motorman's duty to keep a diligent lookout, the contributory negligence of the traveler in failing to observe the care due from him in placing himself in a position wherein injury to him might result from a breach by the motorman of his duty will defeat a recovery for such injuries, unless the motorman's default was willful or wanton. (Ala.) *Anniston Elec. etc. Co. v. Rosen*, 32.

17. **STREET RAILROADS.—The Relative Rights of Travelers and Street-cars in public streets necessarily negative any relation of either to the streets or to the other as trespassers; whether one is or is not a trespasser, the condition to the application of the principle of the negligent breach of duty after peril is discovered is the same.** (Ala.) *Anniston Elec. etc. Co. v. Rosen*, 32.

SUCCESSION.

See Descent and Distribution.

SUICIDE.

SUICIDE.—The Law Indulges the Presumption That a Person Takes Ordinary Care of his own affairs including his life. (Mont.) *Monson v. La France Copper Co.*, 549.

SUMMONS.

See Process.

SURETYSHIP.

See Principal and Surety.

TAXATION.

In General.

1. **TAX JUDGMENT**—Vacation on Tender of Taxes. The rule that one asking a court of equity to vacate a judgment must show

that he has a meritorious defense is satisfied, in case of a tax judgment, by a tender of all taxes due and a deposit of the amount in court on refusal to accept them. (Wash.) *Holly v. Munro*, 1028.

2. TAXATION—Mistake of Officer—Rights of Taxpayer.—A taxpayer is not chargeable with negligence simply because he relies upon information given him by the county treasurer with respect to his taxes. If he makes a timely and honest attempt to pay them, or to redeem from a tax sale, but is misled by the conduct or mistake of such officer, equity will grant him relief. (Iowa) *Burchardt v. Seofield*, 173.

Constitutional Questions.

3. CONSTITUTIONAL LAW—Taxation.—Classification Which is Natural and Reasonable is valid; that which is arbitrary and capricious is not. (Colo.) *Leonard v. Reed*, 77.

4. CONSTITUTIONAL LAW—Double Taxation.—The revenue act of 1903 has the effect of imposing double taxation once on the merchandise itself and again if part of it is moved into another county, and is therefore void. (Colo.) *Leonard v. Reed*, 77.

5. CONSTITUTIONAL LAW—Uniformity in Taxing Implies Equality in the burden of taxation, and all taxes must be uniform on the same class of property within the jurisdiction of the authority levying them. (Colo.) *Leonard v. Reed*, 77.

6. CONSTITUTIONAL LAW—Uniformity.—A law which imposes a tax upon goods brought into a county for temporary lodging and sale, but relieves those which are not for sale, is void for discrimination violating the Colorado state constitution, article 10, section 3. (Colo.) *Leonard v. Reed*, 77.

7. CONSTITUTIONAL LAW—Uniformity.—A law which imposes a tax upon goods sold from a storeroom but relieves those which are not, like horses and cattle, is void as violating the Colorado state constitution, article 10, section 3. (Colo.) *Leonard v. Reed*, 77.

Recovery of Taxes Illegally Exacted.

8. TAX MONEY PAID UNDER PROTEST.—When a Tax has been paid under protest, and such tax is illegal, the taxpayer may recover it by action. (Colo.) *Leonard v. Reed*, 77.

9. TAXATION—Right to Recover Taxes Illegally Exacted.—When a tax has been paid without compulsion, but with comprehension of its invalidity or with means of knowledge of its illegality, the liquidation is voluntary and prevents a recovery of the money disbursed, although the payment may have been under protest. (Or.) *Johnson v. Crook County*, 834.

10. TAXATION—Right to Recover Taxes Illegally Exacted.—When a person whose property is charged with an illegal tax has been apprehended, or his goods seized, or the collector with a warrant threatens immediately to make the arrest to coerce payment, or to levy upon and sell property to satisfy the demand, or to begin a criminal prosecution for nonpayment, thereby inducing the belief that the menace will be put into execution, in consequence of which the invalid tax is paid, the payment is involuntary and the money may be recovered. (Or.) *Johnson v. Crook County*, 834.

11. TAXATION—Recovery of Taxes Involuntarily Paid.—A Complaint is Demurrable, in an action to recover an illegal tax alleged to have been paid under compulsion, which avers that the sheriff, obeying the command of the warrant attached to the roll, notified the plaintiff that his land was taxed for a specified amount, informed him that the exaction was just and due and that unless the same

was paid he would in due time collect it by a sale of the property, but which did not allege that the sheriff was either in the act of selling the land or threatened immediately to do so, or that the plaintiff, believing the menace would be instantly executed, was by the abrupt urgency ensnared into meeting the payment, or that he had no other expedient of freeing his property. (Or.) *Johnson v. Crook County*, 834.

Tax Suits and Sales.

12. JURISDICTION—Tax Suit.—The Real Record Name of the Land Owner, the name in which he took title as distinguished from the colloquial name he is known by in the neighborhood of the land and to which he answers among those who know him, should be used in designating him in an order of publication in a tax suit. (Mo.) *Ohlmann v. Clarkson Sawmill Co.*, 506.

13. JURISDICTION—Tax Suits—Abbreviated Christian Name.—In proceedings to sell the land of a nonresident for delinquent taxes, an order of publication against "Mike Ohlman" is insufficient to confer jurisdiction where the name of the record owner is "Michael Ohlmann." (Mo.) *Ohlmann v. Clarkson Sawmill Co.*, 506.

14. TAXATION—Sale Through Mistake—Rights of Parties.—Where through mistake a receipt for taxes does not describe the land assessed, but after a sale for taxes and before the expiration of the time for redemption the treasurer, having his attention called to the matter, concedes the error and in accordance with the statute makes an entry in his record designating the sale as erroneous and presenting a case for a refund by the county to the purchaser, he cannot afterward erase the entry and issue a deed without notice to the owner and opportunity to redeem or protect his rights. (Iowa) *Burchardt v. Scofield*, 173.

15. TAXATION—Correction of Erroneous Sale in Record.—The entry of a treasurer, in accordance with the statute in such cases provided, that a tax sale is erroneous and presents a case for a refund by the county to the purchaser, is an official record on which the owner of the land may rely, and which the treasurer cannot change or erase. It must stand until a court of competent jurisdiction adjudges it erroneous. (Iowa) *Burchardt v. Scofield*, 173.

Taxation of Claims in Public Lands.

16. TAXATION—Unperfected Claim in Public Land.—An application to surrender to the United States an unperfected claim within a forest reservation, or to reconvey to the government patented land therein, and to select in lieu thereof unoccupied nonmineral land, is an offer to exchange an interest in real property for other lands, to which latter premises neither an equitable estate attaches nor a legal title vests until the proposal is accepted by the commissioner of the general land office; and while both the equitable and legal titles thus remain in the United States, the premises selected are not subject to taxation. (Or.) *Johnson v. Crook County*, 834.

17. TAXATION—Interest in Public Land—Relation of Title.—The doctrine of title by relation cannot be invoked to uphold a tax, levied upon land before the ownership had passed from the United States to an applicant therefor, by carrying the interest of the applicant back to the time when he made application. (Or.) *Johnson v. Crook County*, 834.

See **Assessments for Local Improvements; Commerce; Licenses; Municipal Corporations**, 14–18.

TELEGRAPH AND TELEPHONES.

1. TELEGRAPH—Failure to Deliver. Evidence of Effect—Where the plaintiff had decided to consign a shipment of cattle to Chicago

upon the receipt of a telegram regarding that market, which telegram the defendant negligently failed to deliver, he may, in an action against the defendant for such negligence, be permitted to testify that the effect upon his mind of the failure to receive the telegram was to cause him to divert a part of such shipment to another market. (Neb.) *Marriott v. Western Union Tel. Co.*, 633.

2. TELEGRAPH—Failure to Deliver—Notice of Probable Result. Knowledge of the probable result of a failure to deliver a telegraph message may be imparted to the telegraph company as well by circumstances as by formal or explicit notice or by the language of the message itself. (Neb.) *Marriott v. Western Union Tel. Co.*, 633.

3. TELEGRAPH—Damages for Failure to Deliver Message Relating to Shipment of Stock.—Where the failure of the defendant to deliver a message caused the plaintiff to divert a shipment of stock to an unfavorable market, the measure of damages in an action against the defendant for such failure is the difference between the net sum the plaintiff received in such unfavorable market and what he would have realized in the market to which he would have shipped the stock except for defendant's said failure. (Neb.) *Marriott v. Western Union Tel. Co.*, 633.

THREATS.

See Homicide, 9.

TIMBER.

TIMBER—Contract to Remove—Cost of Logging Road.—In the absence of positive testimony of a custom, it must be presumed that one who contracts to remove timber and deliver it in the stream will supply all means and appliances necessary to prosecute the work, and hence he cannot recover on a quantum meruit for building a logging road in aid of the enterprise. (Wash.) *Gabrielson v. Hague Box & L. Co.*, 1032.

See Deeds, 2.

TITLE OF ACT.

See Statutes, 1.

TRADE SECRETS.

1. TRADE SECRETS—Contracts of Employé not to Divulge.—A contract for personal services which forbids the employé to divulge any information known to him or acquired by him during his employment relating to the process of manufacture, and to hold inviolate the treatment, processes and secrets known to or used by him in the works of the employer, which is unlimited as to time and place, will not be enforced. (N. J. Eq.) *Taylor Iron & Steel Co. v. Nichols*, 753.

2. TRADE SECRETS—Evidence of Secret Processes.—Where the bill avers and the answer denies that the complainant has secret processes, and the secrecy of the process is an issue in the cause, it is erroneous to exclude evidence as to the details of the alleged secret processes. (N. J. Eq.) *Taylor Iron & Steel Co. v. Nichols*, 753.

3. TRADE SECRETS—Taking Evidence of Secret Processes in Camera.—In order to protect the complainant from an unnecessary disclosure of a secret process, the evidence may be taken in camera and sealed. (N. J. Eq.) *Taylor Iron & Steel Co. v. Nichols*, 753.

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 where ingredients are known, but not the mode of combination, 760, 761.
 wife or member of family, restraining disclosure by, 766.

TRIAL.

In General.

1. **TRIAL**—Submission of Case to Jury When There is No Evidence.—It is error to submit a cause of action to the jury when there is no evidence to sustain it. (Neb.) *Anderson v. Chicago etc. Ry. Co.*, 626.

2. **TRIAL BY COURT**—Statute Limiting Time for Decision.—A statute providing that upon the trial of a question of fact by the court its decision or findings must be filed within twenty days after

the case is submitted is directory merely, and the failure of the court to render a decision within the time limited does not deprive it of jurisdiction to decide at a later date. (Mont.) *Toole v. Weirick*, 576.

3. **TRIAL—Objection to Testimony.**—When upon the First Appearance of improper testimony counsel object and the objection is overruled, they are not required continuously to interpose a like objection to all similar testimony. The point once clearly made should stand for the whole trial. (Mo.) *McKee v. Rudd*, 529.

Misconduct of Counsel.

4. **TRIAL.**—Error cannot be Assigned upon Misconduct of Counsel in Argument, where the court declares it improper and it is not further pursued, and the opposing counsel, evidently satisfied with such course, makes no request for further instruction to the jury. (Mich.) *Samberg v. Knights of Modern Maccabees*, 396.

Instructions.

5. **INSTRUCTION—Emphasizing Certain Testimony.**—An Instruction is rightly refused if it improperly calls attention to and emphasizes certain testimony. (Mich.) *First Nat. Bank v. Union Trust Co.*, 362.

6. **INSTRUCTION—Singling Out and Stating Effect of Testimony.** An instruction is properly refused which singles out certain testimony and state its effect. (Mich.) *First Nat. Bank v. Union Trust Co.*, 362.

7. **JURY TRIAL—Erroneous Instructions, Curing of by Other Instructions.**—An inaccurate statement by a trial judge may be rendered harmless by other instructions clearly and correctly stating the law upon the subject. (Mass.) *Minot v. Doherty*, 281.

8. **INSTRUCTIONS—Error Invited by Appellants.**—Appellants cannot complain of error in instructions which they have invited. (Mo.) *Rourke v. Holmes St. Ry. Co.*, 468.

9. **INSTRUCTIONS—Harmless Error in Giving.**—If the court gives another instruction less favorable to plaintiffs on the same subject, it is error without prejudice to defendant, especially if it has requested practically the same instruction. (Neb.) *Clague v. Tri State Land Co.*, 637.

10. **INSTRUCTIONS—Error is not Ground for Reversal.**—If the trial court fairly instructs the jury concerning the law of a case its judgment will not be reversed because of some slight ambiguity in the instructions, nor because they might lawfully have been stated more favorably to defendant. (Neb.) *Hair v. Chicago etc. Ry. Co.*, 629.

11. **APPEAL AND ERROR—Inconsistent Instructions.**—Where one instruction is a sound exposition of the law which should guide the jury and another exaggerates a duty owed by one party to the other already referred to in the first instruction, the error is irreparable, and the judgment must be reversed. (Colo.) *Colorado etc. Ry. Co. v. McGeorge*, 43.

12. **TRIAL—Special Charges—Bulked.**—Special charges to be treated as separate instructions, should be written on separate sheets of paper; if bulked, the court may treat them as one. (Ala.) *Aniston Elec. etc. Co. v. Rosen*, 32.

13. **JURY TRIAL—Instructions, Considering as a Whole.**—The instructions given in a particular case must all be read and viewed together, and if they are not in conflict with each other, and correctly state the law as far as they go, the circumstance that an isolated sentence or paragraph is obscure, incomplete or indefinite will not of

itself constitute a ground of reversal. (Idaho) *Just v. Idaho Canal & Imp. Co.*, 140.

14. **TRIAL—Hypothetical Instruction.**—A charge to the jury cannot be said to be abstract when there is evidence to support the facts therein hypothesized. (Ala.) *Dial v. State*, 19.

Issues, Verdict and Findings.

15. **TRIAL—Submission of Unwarranted Issue.**—It is the duty of a court to exercise its judgment and see to it, although the pleadings have tendered an unwarranted issue, that an issue unsustained is not left to the jury for their consideration. (Wash.) *Gabrielson v. Hague Box & L. Co.*, 1032.

16. **TRIAL—Special Verdict—Failure to Request.**—Under the Wisconsin statute it is incumbent upon attorneys to present to the trial court, fairly and openly, their request for the submission of questions of fact in a special verdict; if by inadvertence or finesse they fail to do so, being present and having opportunity, they waive the right to have the jury pass upon that particular item of fact, and the court, rendering its judgment adversely to them, necessarily resolves that fact against them. (Wis.) *Bates v. Chicago etc. Ry. Co.*, 1069.

17. **TRIAL—Failure or Refusal to Make Findings.**—It is Error for a trial court to refuse or fail to find upon any material issue of fact, but the error may not be ground for reversal because not prejudicial to any substantial right. (S. D.) *McPherson v. Swift*, 907.

See Criminal Law; Jury.

TROVER AND CONVERSION.

See Chattel Mortgages, 15; Setoff and Counterclaim, 3.

TRUSTS.

In General.

1. **TRUST—Effect of Death of One Trustee.**—Under the Oregon statutes trustees in real estate hold as joint tenants, unless otherwise provided in the devise or deed, and therefore upon the death of one the trust survives in the other. (Or.) *Mattison v. Mattison*, 829.

2. **TRUSTEE—Validity of His Purchase of Trust Property.**—As a general rule, if a trustee becomes the purchaser of the trust property, such purchase is voidable at the instance of the cestui que trust. This rule applies notwithstanding the trustee purchase at a public sale. (N. J. Eq.) *Marr v. Marr*, 742.

3. **TRUSTS—Authority to Sell or Mortgage.**—The presumption ordinarily is that a trustee does not have authority to mortgage the trust estate, and mortgagees are bound to exercise reasonable diligence to ascertain whether that power exists. (Neb.) *Snyder v. Collier*, 682.

Spendthrift Trust.

4. **WILL—Validity of Spendthrift Trust.**—A Testator may, by appropriate language, create an equitable estate for the life of a devisee, of which he shall be entitled to the possession and profits, but which shall be inalienable by him and beyond the reach of his creditors. (Or.) *Mattison v. Mattison*, 829.

5. **WILL—Spendthrift Trust—Necessity of Express Terms.**—A provision in a will against alienation or liability to creditors of an equitable life estate created for the benefit of a devisee need not be in express terms, but may be implied from the general intention of the donor, to be gathered from the terms of the trust in the light of all the circumstances. (Or.) *Mattison v. Mattison*, 829.

Parol Agreements—Constructive Trusts.

6. **TRUSTS—Parol Agreement in Regard to Land.**—The objection that a trust in land cannot be established by parol is overcome by showing that the grantee has platted and sold parts of the land under an oral agreement to sell the property, apply the proceeds to an indebtedness thereon, and account to the grantors for any sum remaining. (Or.) *Kollock v. Bennett*, 840.

7. **TRUST—Statute of Frauds.—A Mere Verbal Promise by a Grantee to hold the legal title to land in trust for the benefit of the grantor and to reconvey it on demand, where there is no bad faith except that which arises from a mere refusal to carry out the promise, is void within the statute of frauds and uses and trusts, and the trust cannot be enforced.** (Minn.) *Henderson v. Murray*, 412.

8. **TRUST—Title to Land Inequitably Acquired.**—Where, however, a party obtains the legal title to land from another by fraud, or by taking advantage of confidential or fiduciary relations, or in any other unconscientious manner, so that he cannot justly retain the property, equity will impress a constructive trust upon it in favor of the party who is equitably entitled to it. (Minn.) *Henderson v. Murray*, 412.

9. **TRUST—Intention of Grantor to Create—Instructions.**—The trial court erred in charging the jury to the effect that if the grantor in the deed here in question, and under which the plaintiff claims, executed it simply for the purpose of investing the grantee with the legal title, intending to retain the dominion and ownership of the land, the defendant was entitled to a verdict. (Minn.) *Henderson v. Murray*, 412.

10. **TRUST—Promise of Grantee to Reconvey—Intention of Grantor.**—Where the legal title to land is conveyed upon the oral promise of the grantee to hold in trust and reconvey on demand, the intention of the grantor is immaterial, though it is otherwise when the conveyance is made under such circumstances that equity will raise a constructive trust, for if there is no bad faith, except that which arises merely from refusing to carry out the promise, the verbal trust is void and the absolute title vests in the grantee. (Minn.) *Henderson v. Murray*, 412.

VALUE OF PROPERTY.

See Evidence, 11-13.

VENDOR AND VENDEE.*In General.*

1. **VENDOR AND VENDEE—Notice of Prior Deed.**—A grantee takes subject to a prior deed of which he has full knowledge. (Or.) *Kollock v. Bennett*, 840.

2. **VENDOR AND VENDEE.—A Grantee is not Estopped to Deny His Grantor's Title,** except under special circumstances not present in this case. (N. J. Eq.) *Schmitt v. Traphagen*, 739.

3. **VENDOR AND VENDEE—Conveyance to "Trustee"—Notice to Grantee.**—The word "trustee" following the name of a grantee in a deed is notice that he may not be the owner of the real estate conveyed, and is sufficient to put those dealing with him concerning the property upon reasonable inquiry as to the existence and nature of the trust. (Neb.) *Snyder v. Collier*, 682.

4. **VENDOR AND VENDEE—Lien on Chattels of Vendee on Premises.**—The vendor in an executory contract for the sale of land acquires no lien, in the absence of agreement, upon property which

the vendee, in taking possession, moves upon the premises. (Mich.) *Midland County Sav. Bank v. T. C. Prouty Co.*, 401.

Assignment of Contract.

5. **VENDOR AND VENDEE.**—The Assignment by the Vendee of an Executory Contract for the sale of land does not relieve him from liability thereunder nor create any liability on the part of his assignee to the vendor's assignee holding the legal title. (Mich.) *Midland County Sav. Bank v. T. C. Prouty Co.*, 401.

6. **VENDOR AND VENDEE.**—Assignment by Vendor.—If an Executory Contract for the sale of land contains no provision for a forfeiture, and creates no lien for unpaid purchase money and no security therefor except insurance on the buildings, the demand of the vendor's assignee who holds the legal title is an ordinary money debt secured by the contract. (Mich.) *Midland County Sav. Bank v. T. C. Prouty Co.*, 401.

7. **VENDOR AND VENDEE.**—Remedies of Vendor's Assignee.—The assignee of the vendor in an executory contract for the sale of land, who holds the legal title, has a remedy at law against those whose promise to pay he holds, or the remedy to foreclose the vendor's lien. (Mich.) *Midland County Sav. Bank v. T. C. Prouty Co.*, 401.

Sales in Gross or by Acreage—Discrepancy.

8. **VENDOR AND PURCHASER.**—Acreage, Sold Per Acre—Absolute Right for Shortage.—In a sale of land by the acre, the purchaser is entitled to recover the amount paid under his contract for such acres as the vendor could not convey owing to discrepancies between the conveyance and the actual survey. (Ky.) *Anthony v. Hudson*, 231.

9. **VENDOR AND PURCHASER.**—Acreage—Price on Sale in Gross—Qualified Right for Shortage.—When a specific tract of land is sold for a sum certain, it is called a sale in gross, and the parties are taken to have intended that any slight overplus or deficit of acres shall not be corrected, and relief will not be granted unless the discrepancy is so large as to be beyond the range of ordinary contingency. (Ky.) *Anthony v. Hudson*, 231.

10. **VENDOR AND PURCHASER.**—Expressed Acreage—Sale in Gross.—In gross sales of land, the idea that the parties did not intend to have every slight discrepancy accounted for is not repelled by the fact that the estimated number of acres is given. (Ky.) *Anthony v. Hudson*, 231.

11. **VENDOR AND PURCHASER.**—Sale in Gross—Discrepancy in Acreage—What will Warrant Interference by Court.—In a sale in gross of five hundred and sixty acres, a shortage of nine and seventeen hundredths acres, and in a sale in gross of four hundred and eighty-one acres, a shortage of fifty-six acres, have been held not to warrant the interference of the chancellor to correct the mistake. (Ky.) *Anthony v. Hudson*, 231.

12. **VENDOR AND PURCHASER.**—Sales in Gross—Different Kinds of.—Sales in gross are of three kinds: 1. Sales strictly by the tract without reference to acreage; 2. Sales strictly by the tract where the acreage is mentioned by way of description, tending to show an intention to risk the contingency of more or less; and 3. Sales in which extraneous circumstances show the intention not to risk more than the usual rates of excess or deficiency. (Ky.) *Anthony v. Hudson*, 231.

Rescission by Vendee.

13. **VENDOR AND VENDEE.**—In an Action by a Vendee of Land to Rescind the contract, the court does not err in not finding the

value of the use of the land during the time between the transfer and the trial, if no claim is made by the vendor for the use of the land, and no evidence is introduced showing its value or that the vendee ever used or rented it. (S. D.) Wolfinger v. Thomas, 900.

14. VENDOR AND VENDEE—Rescission—Placing in Statu Quo. Where, in an action by a vendee of land to rescind the contract on the ground of mistake and recover the consideration consisting of a cash payment and a horse, the court requires the vendor to repay the money and the value of the horse which he has sold, this places the defendant in substantially the same condition as before the contract was made, as required by law. (S. D.) Wolfinger v. Thomas, 900.

15. VENDOR AND VENDEE—Rescission of Contract—Interest. In an action by a vendee of land to rescind the contract on the ground of mutual mistake, it is proper to allow interest on the cash consideration paid by him from the time of the payment to the time of the trial. (S. D.) Wolfinger v. Thomas, 900.

16. VENDOR AND VENDEE—Rescission—Value of Use of Property.—In an action by a vendee of land to rescind the contract and recover the consideration which consists in part of a horse, it is error for the court to find the value of the use of the horse from the time of its transfer to the time of the trial, if the animal was sold by the vendor soon after he received it and he received nothing for its use during that time. (S. D.) Wolfinger v. Thomas, 900.

Recovery of Payments by Vendee.

17. VENDOR AND VENDEE—Right of Vendee to Recover Payments.—One who has made a payment of purchase money on a contract which has been rescinded under circumstances entitling him to a return of the amount paid may recover the same in an action for money had and received. (Neb.) Thiele v. Carey, 679.

18. VENDOR AND VENDEE—Action by Vendee to Recover Payments.—A Petition disclosing by alleged facts that defendant received a payment of purchase money on a land contract which was terminated under circumstances showing that in justice and fairness the money ought to be returned to plaintiff states a cause of action. (Neb.) Thiele v. Carey, 679.

19. VENDOR AND VENDEE—Action by Vendee to Recover Payments.—The Statute of Limitations does not begin to run against an action for money had and received, where the suit is brought by a purchaser of land for the sole purpose of recovering a payment thereon under a contract violated by defendant, until the contract has been terminated. (Neb.) Thiele v. Carey, 679.

See Deeds; Mortgages, 3, 4.

VENUE.

VENUE.—An Action to Establish and Enforce a Trust in real and personal property is transitory, since the decree acts in personam, and the venue is properly changed to the county of the defendant's residence. (Wash.) State v. Superior Court, 1030.

See Benefit Associations, 1; Burglary; Mandamus, 15.

VERDICT.

See Criminal Law, 8, 9; Jury, 3, 4; Trial, 16.

WAIVER.

WAIVER is a Voluntary Act, and not an Act Forced upon a Party by the court. (Mo.) McKee v. Rudd, 529.

WARRANT OF ATTORNEY.

See Judgments, 4, 5.

WARRANTY.

See Assignment.

WASTE.

See Mortgages, 5.

WATER COMPANIES.

See Municipal Corporations, 1-9.

WATERS AND WATERCOURSES.*Natural Watercourse.*

1. **WATERS**—**Natural Watercourse, What is.**—Evidence in this case examined and held sufficient to sustain the finding that Watson slough, in Bingham county, is a natural watercourse. (Idaho) *Hutchinson v. Watson Slough Ditch Co.*, 125.

Appropriation—Riparian Rights.

2. **WATERS, Appropriation of, What is.**—A showing by a riparian proprietor that he has been for more than seventeen years using the water of a stream for "domestic, culinary and household purposes and for the use of his livestock," and that the water of the stream has continuously flowed through his land, "moistening the same," does not amount to an appropriation of any of the water of the stream within the meaning of the constitution and statute of this state. The waters of this state are subject to appropriation and diversion in the manner prescribed by the constitution and statute, and priority of appropriation gives the better right to the use of such waters as between the appropriator and every other person, even though he be a riparian owner. (Idaho) *Hutchinson v. Watson Slough Ditch Co.*, 125.

3. **RIPARIAN RIGHTS and Rights of Appropriation.**—The common-law doctrine of riparian rights, in so far as those rights conflict with the right of an appropriator of the waters of a stream, is repugnant to, and in conflict with, the constitution and statutes of this state, and to that extent has been abrogated thereby. (Idaho) *Hutchinson v. Watson Slough Ditch Co.*, 125.

4. **RIPARIAN RIGHTS, Extent to Which Exist in Idaho.**—Riparian rights exist in the state of Idaho only to the extent that they do not come in conflict with the superior and paramount right of one who has appropriated the waters for a beneficial use in conformity with the constitution and statute of the state. (Idaho) *Hutchinson v. Watson Slough Ditch Co.*, 125.

5. **RIPARIAN OWNERS, Rights of as Against Strangers.**—The rights of a riparian proprietor exist and may be maintained as against a stranger who does not claim or assert his right to interfere with or disturb the waters of a natural stream by or on account of an appropriation to a beneficial use. In such case the rights of a riparian proprietor are superior and paramount to the rights of a stranger or intermeddler who does not assert or establish any right to the use of the water by appropriation. (Idaho) *Hutchinson v. Watson Slough Ditch Co.*, 125.

6. **WATERS.**—Before a Riparian Owner can Acquire the superior right to the use of waters flowing by and through his lands, he must locate and appropriate the waters and divert them as any other user must do. (Idaho) *Hutchinson v. Watson Slough Ditch Co.*, 125.

7. **RIPARIAN RIGHTS, Conflict With Rights by Appropriation.** A riparian owner's right to use the water of a stream for domestic

and culinary purposes and watering his stock, and to have the water flow by or through his riparian premises, is such a right as the law recognizes as inferior to a right acquired by appropriation and superior to any right of a stranger to or intermeddler with the waters of such stream. (Idaho) *Hutchinson v. Watson Slough Ditch Co.*, 125.

8. **WATERS, Appropriators of, Rights of, When Subject to Other Appropriations.**—At such times as an appropriator is not using the water under his appropriation, and is not applying the water to a beneficial use, such water must be considered and treated as unappropriated public water of the state, and for such period of time is subject to appropriation and use by others. (Idaho) *Hutchinson v. Watson Slough Ditch Co.*, 125.

9. **WATERS, Appropriation of, When may Permit the Water to Flow in the Original Channels.**—When an appropriator is not using water under his appropriation and during the season not covered by his appropriation, he must allow the water to flow down the bed of the natural channel. (Idaho) *Hutchinson v. Watson Slough Ditch Co.*, 125.

10. **WATERS—Mining and Agricultural Uses.—An Appropriation of Water** for mining is not available for agriculture by the locator's successors, as against intervening appropriators. (Mont.) *Smith v. Duff*, 587.

11. **WATERS—Appropriation.—The Intention of a Claimant** is an important factor in determining the validity of his appropriation of water; and his intention is determined by his acts, the circumstances surrounding his possession of the water, its actual or contemplated use, and the purposes thereof. (Mont.) *Smith v. Duff*, 587.

12. **WATERS—Extent of Appropriation.—The Rule is not Universal** that an appropriator is entitled to all the water which will flow into his ditch at the time of the subsequent appropriation by another. The time when the first appropriator dug his ditch, his diligence in applying the water to a beneficial use, the extent of the use made by him, his needs, and the circumstances surrounding all these acts, are to be considered in determining the amount which he is entitled to in preference to the subsequent appropriator. (Mont.) *Smith v. Duff*, 587.

13. **WATERS—Appropriation—Beneficial Use.—One is not Permitted** to obtain the exclusive control of an entire stream by appropriation, unless his appropriation is made for some beneficial purpose, presently existing or contemplated. (Mont.) *Smith v. Duff*, 587.

14. **WATERS—Appropriation.—The Subsurface Supply of a Stream,** whether it comes from tributary swamps or runs in the sand and gravel constituting the bed of the stream, is as much a part of the stream as is the surface flow and is governed by the same rules. (Mont.) *Smith v. Duff*, 587.

15. **WATERS—Appropriation of Developed Supply.—Persons Who** by their own exertions have developed a supply of water theretofore not a part of the waters of a creek and not before available to the users of the stream, have the first right to take and use such increase. (Mont.) *Smith v. Duff*, 587.

Development of Water Supply.

16. **WATERS—Development Without Interference With Supply of Others.**—One who asserts that he is entitled to the exclusive use of water by reason of its development by him must make satisfactory proof that he is not intercepting the supply to which others are rightly entitled. (Mont.) *Smith v. Duff*, 587.

17. WATERS—Development of Supply, What is not.—The Rule That One is entitled to waters which he develops in a stream does not apply to cases of mere removal of obstructions or hastening of flow, so that the actual amount of water which passes along the stream is not increased, but only to cases in which a supply of water is added to the stream which otherwise would not have flowed there. (Mont.) *Smith v. Duff*, 587.

Irrigation—Contracts to Furnish Water.

18. IRRIGATION—Contract to Furnish Water, Validity and Enforcement.—A contract for the use of water, made for a valuable consideration with a corporation organized for the purpose of supplying water for irrigating land, that did not when made contravene the laws or policy of the state, may, as between the parties or their successors in interest, be enforced, subject to all reasonable regulations, provided that the rights of other users are not thereby unlawfully curtailed. (Neb.) *Clague v. Tri-State Land Co.*, 637.

19. IRRIGATION—Contract to Furnish Water, Liability for Breach. If a corporation engaged in the business of supplying individuals with water for the irrigation of arid or semi-arid lands unlawfully and arbitrarily prevents the holder of one of its water contracts from using water for the irrigation of a field of growing potatoes, it is liable to the individual in damages. (Neb.) *Clague v. Tri-State Land Co.*, 637.

20. IRRIGATION.—Contract to Furnish Water, Damages for Breach. In such a case the measure of damages is the value to plaintiff of the use of said right during the time he is deprived thereof, and it is not error to instruct the jury that the measure of plaintiff's recovery "is the value of the crop at the time the water was shut out of said canal, with the right to irrigate it from that time on to the end of the season, less the value of the crop without the right to irrigate it from that time until the end of the season." (Neb.) *Clague v. Tri-State Land Co.*, 637.

21. IRRIGATION—Breach of Contract to Furnish Water—Proof of Damages.—In proving damages in such a case, considerable latitude should be given in the introduction of evidence, and a judgment will not be reversed because the court refused to strike out an answer not entirely responsive to an interrogatory, and to that extent not competent, where there is an abundance of other competent evidence in the record to support the verdict, and the only reasonable ground for contention upon the entire record is the amount of the recovery. (Neb.) *Clague v. Tri-State Land Co.*, 637.

Irrigation System on Public Land.

22. WATERS—Reservoirs and Ditches on Public Lands, Vested Rights.—One who has constructed upon the vacant public lands of the United States a system of reservoirs and ditches for the distribution of water appropriated by him for irrigation purposes, and has secured the approval of his plan and appropriation by the state board of irrigation, and was using his said reservoirs and ditches for the storage and distribution of such waters before said lands are entered, has a vested and accrued right within the meaning of sections 2339, 2340, Revised Statutes of the United States. (Neb.) *Rasmussen v. Blust*, 670.

23. WATERS—Irrigation System on Public Lands—Subsequent Entries.—If such improvements have been made with the tacit or express consent of the entryman upon lands of the United States that have been entered as a homestead, and the entryman thereafter relinquishes his entry or it is canceled by the United States, and the said improvements are in actual use by the irrigator under the authority and with

the approval of the state board of irrigation, a subsequent entryman takes said lands subject to a right of way for said ditches and the use by the irrigator of the land covered by the reservoir. (Neb.) *Rasmussen v. Blust*, 650.

24. WATERS—Failure of Irrigator to File Map in Land Office.—The failure of the irrigator to file a map in the land office and to secure the approval of the Secretary of the Interior in accordance with the act of Congress approved March 3, 1891, entitled "An act to repeal timber culture laws, and for other purposes," and the acts supplementary thereto, do not destroy the privileges protected by sections 2339, 2340, Revised Statutes of the United States. (Neb.) *Rasmussen v. Blust*, 650.

25. WATERS—Irrigation System on Public Lands—Subsequent Entries.—A deed executed by an entryman before he is entitled to a receiver's final receipt and purporting to vest the grantee with a right of way over, and the privilege of constructing and maintaining a reservoir upon, the lands of the entryman, will not vest the grantee with any right against a subsequent entry of the land under the acts of Congress, unless such grantee, before the last entry, shall have constructed said improvements and was using them under such circumstances as to entitle him to protection under the laws of this state. (Neb.) *Rasmussen v. Blust*, 650.

See Adverse Possession, 3-6; Municipal Corporations, 1-9; Railways, 2, 3.

WILLS.

Alterations and Additions.

1. WILL—Presumption as to Unattested Alterations.—An unattested alteration in a will, although made by the testator, is presumed to have been made after the execution of the instrument. (Pa.) *Teed's Estate*, 896.

2. WILL—Addition of Clause Appointing Executor.—Where a will is written, signed and attested on the fourth page of a sheet of letter paper, an unsigned and unattested clause at the top of the third page appointing an executor is presumed to have been made after the signatures of the testatrix and subscribing witnesses; and if there is not sufficient evidence to overthrow this presumption, the instrument will be probated without such clause. (Pa.) *Teed's Estate*, 896.

Construction and Effect.

3. WILL.—A Will is to be Construed in Accordance With the Intention of the testator, gathered from the whole instrument rather than from the language of any particular clause. (Or.) *Mattison v. Mattison*, 829.

4. WILLS—Action to Construe—Persons Bound by Judgement.—Where a testator gives the income of a certain fund to his daughter for life, and the principal sum, on her death, "to her legal issue in equal portions after they severally reach the full age of twenty-one years"; and a few years after his death a suit is brought to construe the will, wherein it is adjudged that he intended the principal fund should become vested in the legal issue of the daughter who should be living at her death, to be paid when they each reached the age of twenty-one years, the judgment does not conclude her after-born grandchildren. (N. Y.) *Schmidt v. Jewett*, 815.

5. WILLS—Construction.—Where a Testator Makes a Number of general bequests, aggregating one hundred and twenty-seven thousand dollars, and gives all the residue of his estate, including lapsed legacies, to his executors in trust for designated life tenants and remaindermen, and then declares that the general legacies shall be paid in

full only in case the total estate amounts to three hundred thousand dollars, it is his intention to prefer the residuary legatees over the general legatees, and the "total estate" means the amount available for distribution after the payment of debts and expenses of administration. Hence, if the estate, after such deduction, amounts to less than three hundred thousand dollars, the general legacies abate proportionately. (N. Y.) *Matter of Frankenheimer*, 803.

6. **WILLS**.—The Words "Legal Issue," When Used in a Will and unexplained by the context, have the meaning of descendants. (N. Y.) *Schmidt v. Jewett*, 815.

7. **WILLS**.—Meaning of "Legal Issue."—Where a Testator Gives the Income of a certain fund to his daughter for life, and the principal sum, on her death, "to her legal issue in equal portions after they severally reach the full age of twenty-one," the words "legal issue" mean descendants, and upon the death of the daughter the fund held for her life vests absolutely in all her descendants then living in equal portions per capita. (N. Y.) *Schmidt v. Jewett*, 815.

8. **WILL**.—Restriction on Alienation of Life Estate.—If a will passes the legal title to a life estate, an attempt to limit the enjoyment or power of alienation thereof by the same instrument is void. (Or.) *Mattison v. Mattison*, 829.

Interest on Legacies.

9. **WILLS**.—Interest on Legacies.—Where a Testator Makes a Number of general bequests, aggregating one hundred and twenty-seven thousand dollars, and gives the residue of his estate to his executors in trust for designated life tenants and remaindermen, and then declares that the general legacies shall be paid in full only in case the total estate amounts to three hundred thousand dollars, and upon administration the estate proves to be worth less than that sum so that only eighty-six per cent of the amount of the general legacies can be paid, the general legatees are entitled to interest after one year provided there are funds available to pay it; but as the testator has preferred the residuary legatees over the general legatees, the residuary estate should not be diminished to pay such interest; yet if an income has accrued from the estate during administration, this should be distributed pro rata between the general and residuary legatees, and applied upon the interest and income that has accrued upon their respective legacies, and the interest remaining unpaid after such distribution must be deemed abated for want of a fund out of which to pay it. (N. Y.) *Matter of Frankenheimer*, 803.

See *Estoppel*, 2.

WITNESS.

1. **WITNESS**, Cross-examination of When a Party to the Action.—A wide latitude should be allowed in the cross-examination of parties to the suit, but the action of the trial court in sustaining objections to immaterial questions is not prejudicial error. (Idaho) *Just v. Idaho Canal & Imp. Co.*, 140.

2. **WITNESSES**.—Cross-examination.—The Court may Properly Limit the cross-examination of a plaintiff's witness to matters brought out in the direct examination; but this does not prevent the defendant from making the witness his own after the plaintiff has closed his case in chief, nor the court from then allowing, in its discretion, rigid examination if the witness is hostile. (Nev.) *Nash v. McNamara*, 694.

3. **WITNESS**.—Discrediting Accused by Showing Prior Convictions.—A person on trial for homicide who takes the stand in his own behalf may be asked on cross-examination if he has not been previously convicted of other crimes. The scope of such cross-examination

rests largely in the discretion of the court; and it is not necessary to produce the record of conviction, since the matter is merely collateral to the main issue and arises therein only as affecting the credibility of the witness. (Pa.) *Commonwealth v. Racco*, 872.

4. WITNESS—Discrediting Accused by Showing Prior Convictions.—When a person accused of crime who has taken the stand in his own behalf denies, when asked on cross-examination, that he has been previously convicted of certain offenses, his prior admissions to the contrary are admissible to impeach his credibility. (Pa.) *Commonwealth v. Racco*, 872.

5. WITNESS—Discrediting by Showing Prior Conviction.—Where a witness is asked on cross-examination if he has not been convicted of "various offenses," the character of the offenses not being stated, an objection to the question is properly sustained. (Tex. Cr.) *Ellis v. State*, 953.

6. WITNESS—Discrediting by Showing Conviction for Vagrancy. The offense of vagrancy is not one of the violations of law which justifies the introduction of a conviction as a matter of impeachment. (Tex. Cr.) *Ellis v. State*, 953.

7. WITNESS—Discrediting by Showing Want of Chastity.—The general reputation of a witness for truth and veracity cannot be impeached by showing her general reputation for chastity. (Tex. Cr.) *Ellis v. State*, 953.

8. WITNESS—Examination of Party in His Own Behalf.—A party called in his own behalf is not sworn and does not testify as a party, but as a witness, and the general rules of evidence, both as to admissibility and methods of examination and cross-examination, apply to him precisely the same as to other witnesses. (N. Y.) *People v. Morrison*, 780.

9. WITNESS—Impeachment by Showing Indictment.—A witness cannot be impeached or discredited by showing that he has been indicted; for an indictment is a mere accusation, raises no presumption of guilt, and is purely hearsay. This rule applies to criminal actions as well as civil, and to all witnesses whether parties or not. (N. Y.) *People v. Morrison*, 780.

See Evidence.

WORDS AND PHRASES.

1. WORDS AND PHRASES.—The Word "Owner" has no technical meaning, but its definition will contract or expand according to the subject matter to which it is applied. (Neb.) *Chan v. City of South Omaha*, 670.

2. WORDS AND PHRASES.—"Graft" is a Dishonest Transaction in relation to public or official acts, a word commonly used to designate an advantage which one person, by reason of his peculiar position or superior influence or trust, acquires from another. (Wash.) *Quinn v. Review Publishing Co.*, 1016.

See Intoxicating Liquors, 13-21.

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WORK AND LABOR.

WORK AND LABOR—Gratuitous Services—Degree of Relationship.—The relationship of stepson in law and stepmother in law

is too remote to create the presumption that services rendered were gratuitous, and the rule requiring stricter proof of a contract between them than in ordinary cases does not apply. (Ky.) *Hardiman v. Crick*, 248.

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